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FREEDOM OF INFORMATION



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The Greenwich Time,
Complainant(s)
against

Notice of Meeting

Docket #FIC 2013-186

Board of Selectmen, Town of Greenwich; Board
of Estimate and Taxation, Town of Greenwich;
and Board of Education, Greenwich Public
Schools,

Respondent(s)

December 5, 2013

Transmittal of Proposed Final Decision

In accordance with Section 4-179 of the Connecticut General Statutes, the Freedom of Information Commission hereby transmits to you the proposed finding and decision prepared by the hearing officer in the above-captioned matter.

This will notify you that the Commission will consider this matter for disposition at its meeting which will be held in the Freedom of Information Commission Hearing Room, 18-20 Trinity Street, 1st floor, Hartford, Connecticut, at **2 p.m. on Wednesday, January 8, 2014**. At that time and place you will be allowed to offer oral argument concerning this proposed finding and order. Oral argument shall be limited to ten (10) minutes. For good cause shown, however, the Commission may increase the period of time for argument. A request for additional time must be made in writing and should be filed with the Commission **ON OR BEFORE December 13, 2013**. Such request **MUST BE (1) copied to all parties, or if the parties are represented, to such representatives, and (2) include a notation indicating such notice to all parties or their representatives.**

Although a brief or memorandum of law is not required, if you decide to submit such a document, an **original and fourteen (14) copies** must be filed **ON OR BEFORE December 13, 2013**. **PLEASE NOTE: Any correspondence, brief or memorandum directed to the Commissioners by any party or representative of any party MUST BE (1) copied to all parties, or if the parties are represented, to such representatives, (2) include a notation indicating such notice to all parties or their representatives and (3) be limited to argument. NO NEW EVIDENCE MAY BE SUBMITTED.**

If you have already filed a brief or memorandum with the hearing officer and wish to have that document distributed to each member of the Commission, it is requested that **fourteen (14) copies** be filed **ON OR BEFORE December 13, 2013**, and that **notice be given to all parties or if the parties are represented, to their representatives, that such previously filed document is being submitted to the Commissioners for review.**

By Order of the Freedom of
Information Commission

W. Paradis
Acting Clerk of the Commission

Notice to: Diego Ibarquen, Esq.
John Wayne Fox, Esq.

12/5/13/FIC# 2013-186/Trans/wrbp/VDH//GFD

FREEDOM OF INFORMATION COMMISSION
OF THE STATE OF CONNECTICUT

In The Matter of a Complaint by

Report of Hearing Officer

The Greenwich Time,

Complainant

against

Docket #FIC 2013-186

Board of Selectman, Town of Greenwich;
Board of Estimate and Taxation, Town of
Greenwich; and Board of Education,
Greenwich Public Schools,

Respondents

December 5, 2013

The above-captioned matter was heard as a contested case on September 26, 2013, at which time the complainant and the respondents appeared, stipulated to certain facts and presented testimony, exhibits and argument on the complaint.

After consideration of the entire record, the following facts are found and conclusions of law are reached:

1. The respondents are public agencies within the meaning of §1-200(1), G.S.
2. By letter dated March 28, 2013 and filed April 1, 2013, the complainant appealed to the Commission, alleging that the respondents violated the Freedom of Information Act ("FOI Act") in the following way: the Board of Estimate and Taxation, the Board of Selectmen, and the Board of Education improperly convened in executive session at a February 26, 2013 special meeting of the Board of Estimate and Taxation. While the agenda stated that the purpose of the executive session was to discuss a pending claim related to the elimination of contamination on the Greenwich High School site, the complainant contends that the actual purposes of the meeting was to discuss potential environmental remedies for the soil contamination near and around Greenwich High School and, as such, the meeting should have been conducted in public. The complainant requested that "all of the requested materials be disclosed forthwith."
3. Section 1-200(2), G.S., provides, in relevant part, as follows:

"Meeting" means any hearing or other proceeding of a public agency, [and] any convening or assembly of a quorum of a

multimember public agency . . . to discuss or act upon a matter over which the public agency has supervision, control, jurisdiction or advisory power. . . . A quorum of the members of a public agency who are present at any event which has been noticed and conducted as a meeting of another public agency under the provisions of the Freedom of Information Act shall not be deemed to be holding a meeting of the public agency of which they are members as a result of their presence at such event.

4. Section 1-225(a), G.S., provides in relevant part: “The meetings of all public agencies, except executive sessions, as defined in subdivision (6) of section 1-200, shall be open to the public. . . . Each public agency shall make, keep and maintain a record of its meetings.”

5. Section 1-200(6), G.S., provides, in relevant part, as follows:

“Executive sessions” means a meeting of a public agency at which the public is excluded for one or more of the following purposes: . . . (B) strategy and negotiations with respect to pending claims or pending litigation to which the public agency or a member thereof, because of the member’s conduct as a member of such public agency, is a party until such litigation or claim has been finally adjudicated or otherwise settled. . . . (Emphasis supplied).

6. Section 1-200(8), G.S., provides as follows:

“Pending claim” mean a written notice to an agency which sets forth a demand for legal relief or which asserts a legal right stating the intention to institute an action in an appropriate forum if such relief or right is not granted.

7. It is found that, on or about February 25, 2013, the respondent Board of Estimate and Taxation issued an agenda indicating that it planned to hold a special public meeting on February 26, 2013 at 6:00 P.M. It is further found that the agenda stated that the board planned to convene in executive session to discuss the following issue: “a Pending Claim related to elimination of contamination of the Greenwich High School site.” (Capitalization in original).

8. It is found that the Board of Estimate and Taxation convened in public on February 26, 2013, and then moved the meeting into an executive session. It is further found that this executive session was attended by more than two dozen town officials, and other individuals, including twelve members of the Board of Estimate and Taxation; seven members of the Board of Education; two or three members of the Board of Selectman; the

town attorney; one outside legal counsel; two environmental remediation consultants; and both the Commissioner and the Deputy Commissioner of Greenwich's Department of Public Works.

9. It is found that, at the time of the February 26, 2013 executive session, the Board of Estimate and Taxation was comprised of twelve members, the Board of Education was comprised of eight members, and the Board of Selectmen was comprised of three members.

10. It is found that the Board of Estimate and Taxation is the financial arm of the Town of Greenwich. It is found that the Board of Estimate and Taxation oversees and approves the spending of public money within the town.

11. It is found that, sometime in 2011, the Board of Education proposed to renovate and expand certain facilities within Greenwich High School, the town's only high school. It is found that the purpose of the project was to update existing space, as well as to expand the auditorium and related music facilities. It is found that this renovation/construction project is commonly referred to as "the Music Instructional Space and Auditorium Project", or "the MISA project."

12. It is found that, in the summer of 2011, shortly after the project commenced, the Town of Greenwich realized that the soil surrounding the high school, particularly those grounds intended for the MISA project, were contaminated and would have to be remediated before the project could proceed.

13. It is further found that, while the town was in the process of studying the problem presented by the contamination, and determining a proper course for and scope of the remediation, William Effros, a resident of Greenwich whose residential property abuts the high school's grounds, became concerned about the town's remediation plans. It is found that Steven Effros, the brother of William Effros, is a joint owner of the residential property abutting the high school grounds. It is found that Steven Effros shared the same concerns about the remediation as did his brother.

14. It is found that, in the past, William Effros has been a party to litigation filed against the Greenwich Board of Education and the Town of Greenwich.

15. Specifically, with regard to the contamination discovered on the Greenwich High School grounds, it is found that the Effros brothers had concerns about the nature of the work being performed as well as the cost of such work. It is found that the Effros brothers believed that certain remediation activities were occurring on the high school's grounds without the required approval by the planning and zoning commission and without the benefit of certain environmental studies. It is found that the Effros brothers contacted various state and federal agencies concerning the MISA project and the related remediation efforts to express their concerns. In this regard, it is found that, over the course of three years, the Effros brothers have communicated either orally and/or in writing with United States Environmental Protection Agency, the United States Securities and Exchange

Commission, the United States Army Corps of Engineers, the Connecticut Freedom of Information Commission, and the Connecticut Attorney General's Office, among others.

16. It is found, however, that, despite the various communications identified in paragraph 15, above, at the time of the Board of Estimate and Taxation's February 26, 2013 executive session, neither William Effros nor Steven Effros had a claim pending against the Board of Estimate and Taxation, nor were they demanding legal relief or asserting a legal right against the board with the intention to institute an action in an appropriate forum if such relief or right was not granted. It is further found that no evidence was presented at the contested case hearing which would suggest that, at the time of the executive session in question, any other person or entity had a claim pending against the board, or were demanding legal relief or asserting a legal right against the board with the intention to institute an action in an appropriate forum if such relief or right was not granted.

17. While the respondents submitted into evidence several emails and letters written by the Effros brothers concerning the MISA project and related work, it is found that none of these documents establishes a "pending claim," within the meaning of §§1-200(8) or 1-200(6)(B), G.S. It is found that such evidence only establishes that the Effros brothers were seeking to have an outside agency, particularly the U.S. Army Corps of Engineers, get involved with and oversee the MISA project and the related remediation. It is further found that, as they sought to secure such oversight, the Effros brothers *complained* about the process that they believed the town was following and/or not following. While it is true that the respondents submitted evidence which establishes that the Effros brothers asked the town to halt certain activities, made requests of the town, and informed the town that they believed it was in violation of certain regulations, this is evidence of their criticism and discontent, and falls short of proving that there was a pending claim against the Board of Estimate and Taxation at the time of the executive session in question.¹

18. The respondents contend that, while not noticed as such, the February 26, 2013 special meeting was meant to be a joint meeting of the Board of Estimate and Taxation, the Board of Selectman and the Board of Education. The respondents further contend that, because the Town of Greenwich (and its various agencies) cannot spend money without first obtaining approval from the Board of Estimate and Taxation, the Board of Estimate and Taxation should be permitted to convene in executive session to discuss the settlement of any claim filed or threatened against any agency within Greenwich regardless of whether the claim is directed to the Board of Estimate and Taxation.

¹ While the respondents submitted an email into evidence which was sent by the Effros brothers to the Town of Greenwich's Zoning Enforcement Officer and which was entitled, "Complaint and Request for Enforcement," the email was undated and it was never established when this correspondence was sent and received. Moreover, similar to the other correspondence submitted into evidence, this email only establishes that the Effros brothers requested that the Zoning Enforcement Officer get involved with the town's remediation efforts in order to correct mistakes which they believed the town was making. It did not establish that there was a "pending claim" against the Board of Estimate and Taxation at the time of the executive session in question.

19. With regard to the first contention, whether or not the February 26, 2013 executive session was a joint public meeting of three public agencies, or a public meeting of only the Board of Estimate and Taxation does not change the fact that there was no “pending claim,” within the meaning of §1-200(b)(B), G.S., directed at any of the respondent boards at the time of the executive session. As such, neither the Board of Estimate and Taxation alone, nor the three agencies jointly, had a permissible reason for convening in executive session.

20. With regard to the second contention, it is generally understood that, with the exception of a few narrowly defined circumstances, which are set forth in §1-200(6), G.S., the meetings of a public agency must be open to the public. Accordingly, the definition of public meetings in §1-200(2), G.S., “must be read to limit rather than to expand the opportunities for public agencies to hold closing meetings.” See Glastonbury Educ. Ass’n v. FOIC, 234 Conn. 704, 712-13 (1995). In this case, not only would the respondents’ construction of the executive session provisions obscure the general requirement in the FOI Act that the work of a public agency be conducted in public and exceptions to this requirement be narrowly construed, it would also contravene the explicit limitation in §1-200(6)(B), G.S., which requires that the “pending claim” must be asserted against the public agency (or a member thereof) desiring to convene in executive session. The fact that §1-200(6)(B), G.S., contains such a limitation has been acknowledged by the Connecticut Supreme Court. In determining the extent to which compulsory arbitration proceedings could be conducted outside of the parameters of a public meeting, the Supreme Court made the following observation with regard to the “pending claims” provision of §1-200(6)(B), G.S.:

In [§1-200(6)(B), G.S.,] for example, the legislature authorized a public agency to adjourn a meeting into executive session for ‘strategy and negotiations with respect to pending claims and litigation’ to which the agency itself is a party. . . . Although the legislature’s narrowly tailored approach to the FOIA exclusions and exemptions may add a layer of complexity to agency administration, the legislature implicitly has decided that the costs are outweighed by the benefits derived from open government.

Glastonbury Educ. Ass’n, 234 Conn. at 713-14. (Emphasis supplied).

21. It is found that the purpose of the February 26, 2013 executive session was to discuss the various approaches to resolving the ground contamination at Greenwich High School. It is further found that the discussion included a review of a remedial investigation that had been performed on the grounds as well as two risks assessments. The executive session also included the presentation a feasibility study by consulting experts retained by the town. It is found that this presentation focused on three possible remediation options for addressing the ground contamination. It is further found that each of the options presented involved a different financial commitment, with the first option or approach to the cleanup requiring a 5 to 8 million dollar financial commitment, the third option requiring a “100

million dollar plus” financial commitment, and the second option falling somewhere in between. It is further found that, before the executive session was concluded, the respondent boards reached a consensus on what option was best suited to address the town’s situation.

22. It is found that the matters discussed in executive session were public matters. It is further found that there was no basis upon which to exclude the public from this discussion.

23. Based on the foregoing, it is concluded that the respondents violated the open meeting provision of §1-225(a), G.S., by convening in executive session for an impermissible purpose.


24. In its brief, the complainant requested that the Commission impose a civil penalty against the respondents and order any action taken during the executive session null and void. The Commission declines to impose a civil penalty in this case. The Commission further declines to render the respondent boards’ consensus null and void.

The following order by the Commission is hereby recommended on the basis of the record concerning the above-captioned complaint:

1. Each respondent shall create minutes for the February 26, 2013 executive session. Such minutes shall provide an overview of the various remediation options discussed at the meeting, the price tag associated with each option, and the consensus that was reached during the meeting.

2. To the extent to which the complainant’s request that “all of the requested materials be disclosed forthwith,” (see ¶ 1 of the findings), is a request that the respondents be required to disclose all written materials which were presented or discussed during the February 26, 2013 executive session, such request is hereby granted. The respondents shall forthwith provide the complainant with a copy of such materials, free of charge.

3. Henceforth, the respondents shall strictly comply with the requirements of §1-200(6), G.S., by convening in executive sessions only for the limited purposes set forth in the statute.


Valicia Dee Harmon
as Hearing Officer