



FREEDOM OF INFORMATION



Connecticut Freedom of Information Commission • 18-20 Trinity Street, Suite 100 • Hartford, CT 06106
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Town of Rocky Hill,
Complainant(s)
against

Notice of Meeting

SecureCare Options, LLC,
Respondent(s)

Docket #FIC 2013-303

April 2, 2014

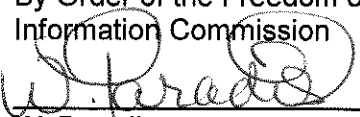
Transmittal of Proposed Final Decision

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, April 23, 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 April 11, 2014**. 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 April 11, 2014**. **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 April 11, 2014**, 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: Town of Rocky Hill
Jonathan M. Starble, Esq.

2014-04-02/FIC# 2013-303/Trans/wrbp/VRP//TAH

FREEDOM OF INFORMATION COMMISSION
OF THE STATE OF CONNECTICUT

In the Matter of a Complaint by

Report of Hearing Officer

Town of Rocky Hill,

Complainant

against

Docket #FIC 2013-303

SecureCare Options, LLC,

Respondent

April 2, 2014

The above-captioned matter was heard as a contested case on January 6, 2014, at which times the complainant and the respondent 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 complainant alleges that the respondent is subject to the Freedom of Information ("FOI") Act.

2. By letter of complaint filed May 15, 2013, the complainant appealed to the Commission, alleging that the respondent violated the FOI Act by denying its request to inspect documents concerning the business operations of the respondent, which plans to operate a nursing home in the town of Rocky Hill for individuals transitioning from a correctional facility or receiving services from the Department of Mental Health and Addiction Services (the "DMHAS"). The complainant requested compliance with its request for records, and further requested that the Commission invalidate any actions taken by the respondent without compliance with the FOI Act, and that the Commission declare null and void a certain Personal Service Agreement dated January 30, 2013 between the respondent and DMHAS.

3. It is found that the complainant made a request dated May 2, 2013 to the respondent to be permitted to inspect records relating to purchase, financing, operation and management of real property in Rocky Hill, Connecticut by the respondent.

4. It is found that the complainant received no reply to its request by May 15, 2013.

5. It is found that the respondent sought to establish a nursing home pursuant to § 17b-372a, G.S., which provides:

Notwithstanding any provision of the general statutes, the Commissioners of Social Services, Correction and Mental Health and Addiction Services *may establish or contract for the establishment* of a chronic or convalescent nursing home on state-owned or private property to care for individuals who (1) require the level of care provided in a nursing home, and (2) are transitioning from a correctional facility in the state, or (3) receive services from the Department of Mental Health and Addiction Services. A nursing home developed under this section is not required to comply with the provisions of sections 17b-352 to 17b-354, inclusive, of the general statutes. [Emphasis added.]

6. The respondent maintains that the complainant lacks standing to bring this complaint because it is not a “person” within the meaning of §1-200(4), G.S.

7. Section 1-206(b)(1), G.S., provides in relevant part:

Any person denied the right to inspect or copy records under section 1-210 or wrongfully denied the right to attend any meeting of a public agency or denied any other right conferred by the Freedom of Information Act may appeal therefrom to the Freedom of Information Commission, by filing a notice of appeal with said commission.

8. Section 1-200(4), G.S., provides that “person” means “natural person, partnership, corporation, limited liability company, association or society.”

9. The Commission takes administrative notice of the fact that the Town of Rocky Hill is a municipal corporation. See Garland v. Barber, 11 Conn. L. Rptr. 28 (1994).

10. It is concluded that the complainant Town is a person within the meaning of §1-200(4), G.S. The Commission additionally notes that, in any event, the request described in paragraph 3, above, was made, and the complaint was filed, by attorney Morris Borea on behalf of the town, and attorney Borea is certainly a person within the meaning of §1-200(4), G.S.

11. It is therefore concluded that the complainant has standing to bring this complaint.

12. The sole basis asserted in the complaint to support the Commission’s jurisdiction over the respondent is a Memorandum of Decision by Superior Court Judge

Antonio Robaina finding that the respondent was an arm of the state entitled to sovereign immunity. See Docket No. HHD CV-13-6037949-S, Town of Rocky Hill v. SecureCare Realty LLC et al., Superior Court, J.D. of Hartford at Hartford, Memorandum of Decision dated April 23, 2013. The Commission takes administrative notice of the fact that this decision was appealed to the Appellate Court (AC 35598) and was transferred to the Supreme Court (SC 19275) where it is pending and ready for argument.

13. The complainant argues that, because the respondent has been found by the Superior Court to be immune from suit under the judicial “an arm of the state” test, it is therefore necessarily subject to the FOI Act under the “functional equivalence test.”

14. However, the tests for sovereign immunity and for functional equivalence under the FOI Act, while they share some criteria, are not identical. The sovereign immunity test is set forth in Gordon v. H.N.S. Management Co., Inc., 272 Conn. 81 (2004). In Gordon, our Supreme Court specifically addressed the fact that the statutory analysis under the FOI Act is not the same as the analysis regarding sovereign immunity:

[T]he considerations underlying a determination as to whether an entity is a public agency for purposes of the FOIA are not necessarily the same as those underlying a determination as to whether an entity is entitled to assert a sovereign immunity defense. The purpose of the FOIA is to provide public access to governmental information while the purpose of the doctrine of sovereign immunity is to protect the state from liability for private litigation that may interfere with the functioning of state government and may impose fiscal burdens on the state. See Pamela B. v. Ment, 244 Conn. 296, 328, 709 A.2d 1089 (1998). We note, for example, that the Appellate Court has suggested that an entity that engages in a governmental function but “has no power to govern, to regulate or to make decisions affecting government”; Domestic Violence Services of Greater New Haven, Inc. v. Freedom of Information Commission, 47 Conn. App. 466, 475, 704 A.2d 827 (1998); cannot be the functional equivalent of a public agency for FOIA purposes. Id. ... [F]or purposes of determining whether an entity is entitled to a sovereign immunity defense, the relevant criterion is the degree of the state’s control over the entity, not the degree of the entity’s control over state functions.

Gordon, 272 Conn. at 96 n. 15.

15. Therefore the test for whether the respondent is subject to the FOI Act is not whether it may assert a sovereign immunity defense to suit (because the state would ultimately bear the cost of any liability) but whether the respondent is a public agency

pursuant to §1-200(1)(B), G.S., because it is the functional equivalent of a public agency, or whether the respondent's records are subject to the FOI Act under §1-218, G.S., because the respondent performs a governmental function under a contract with a public agency in excess of \$2.5 million.

16. With respect to whether the respondent's records are subject to the FOI Act under §1-218, G.S., because it performs a governmental function, §1-200(11), G.S., provides:

“Governmental function” means the administration or management of a program of a public agency, which program has been authorized by law to be administered or managed by a person, where (A) the person receives funding from the public agency for administering or managing the program, (B) the public agency is involved in or regulates to a significant extent such person's administration or management of the program, whether or not such involvement or regulation is direct, pervasive, continuous or day-to-day, and (C) the person participates in the formulation of governmental policies or decisions in connection with the administration or management of the program and such policies or decisions bind the public agency. “Governmental function” shall not include the mere provision of goods or services to a public agency without the delegated responsibility to administer or manage a program of a public agency.

17. Section 1-218, G.S., then provides:

Each contract in excess of two million five hundred thousand dollars between a public agency and a person for the performance of a governmental function shall (1) provide that the public agency is entitled to receive a copy of records and files related to the performance of the governmental function, and (2) indicate that such records and files are subject to the Freedom of Information Act and may be disclosed by the public agency pursuant to the Freedom of Information Act. No request to inspect or copy such records or files shall be valid unless the request is made to the public agency in accordance with the Freedom of Information Act. Any complaint by a person who is denied the right to inspect or copy such records or files shall be brought to the Freedom of Information Commission in accordance with the provisions of sections 1-205 and 1-206.

18. It is found that the contract between the respondent and the Department of Mental Health and Addiction Services [the "DMHAS"] may not, by its express terms, exceed \$800,000.00 "inclusive of all expenses."

19. Even if the respondent's records were subject to §1-218, G.S., that section requires that the complainant's request be made to the DMHAS, which the complainant has not done.

20. It is therefore concluded that the respondent's records are not subject to §1-218, G.S.

21. With respect to the complainant's alternative argument that the respondent is a public agency pursuant to §1-200(1)(B), that section provides that "public agency" means "[a]ny person to the extent such person is deemed to be the functional equivalent of a public agency pursuant to law"

22. In determining whether an entity is the functional equivalent of a public agency "pursuant to law", four criteria are relevant: (1) whether the entity performs a governmental function; (2) the level of government funding; (3) the extent of government involvement or regulation; and (4) whether the entity was created by government. Connecticut Humane Society v. FOIC, 218 Conn. 757, 760 (1991).

23. It is found that SecureCare would provide nursing home care for individuals transitioning from a correctional facility or receiving services from DMHAS.

24. While §17b-372a, G.S., provides that the Commissioners of Social Services, Correction and Mental Health and Addiction Services may establish a nursing home for such individuals, it also provides that those Commissioners may contract for such a service with a private vendor, which would be the arrangement with the respondent. It is concluded that, even if the provision of such services is a government function, performing such a service pursuant to contract does not satisfy the first prong of the functional equivalence test. See Domestic Violence Services v. FOIC, 47 Conn.App. 466, 474 ("Performing a government service pursuant to contract does not make an entity a public agency subject to the [FOI] Act."); See also Envirotest v. FOIC, 59 Conn. App. 753, 759 (2000).

25. It is also concluded that the provision of services pursuant to contract also does not satisfy the test for governmental funding under functional equivalence. See Domestic Violence Services v. FOIC, 47 Conn.App. 466 (1998) ("Although the plaintiff receives a significant amount of funding from various government sources, the funds are consideration for providing certain services to victims of family violence, as set forth in grants and contracts. Therefore, the second prong is not met.") See also Envirotest v. FOIC, 59 Connl. App. 753 (2000), cert denied, 254 Conn. 751 (2000),

26. It is found that the plaintiff offered no evidence to prove that the extent of government regulation or involvement in the respondent's affairs rose to the level of

“direct, pervasive or continuous regulatory control,” Domestic Violence Services, above, at 477), or control of the day-to-day operations of the respondent’s business (Envirotest, above, at 761).


27. Therefore, it is concluded that the third prong of the functional equivalence test is not satisfied.

28. Finally, it is found that the respondent was not created by government, and therefore it is concluded that the fourth prong of the functional equivalence test is not satisfied.

29. It is therefore concluded that the respondent is not the functional equivalent of a public agency within the meaning of §1-200(1)(B).

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

1. The complaint is dismissed.



Victor R. Perpetua
As Hearing Officer