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# FREEDOM OF INFORMATION



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

Notice of Meeting

Docket #FIC 2014-142

Philip Kurtz, Chairman, Board of Finance, Town of Brookfield; Ernie Nepomuceno, Member, Board of Finance, Town of Brookfield; Robert Gianazza, Member, Board of Finance, Town of Brookfield; Robin Appleby, Member, Board of Finance, Town of Brookfield; Steve O'Reilly, Member, Board of Finance, Town of Brookfield; Jeffrey Rossi, Member, Board of Finance, Town of Brookfield; Board of Finance, Town of Brookfield; and Town of Brookfield,  
Respondent(s)

December 15, 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, January 14, 2015**. 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 January 2, 2015**. 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 January 2, 2015**. **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 January 2, 2015**, 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: Peter S. Olson, Esq.; Thomas W. Beecher, Esq.

FREEDOM OF INFORMATION COMMISSION  
OF THE STATE OF CONNECTICUT

In The Matter of a Complaint by

Report of Hearing Officer

Bill Davidson,

Complainant

against

Docket #FIC 2014-142

Philip Kurtz, Chairman, Board of Finance,  
Town of Brookfield; Ernic Nepomuceno,  
Member, Board of Finance, Town of  
Brookfield; Robert Gianazza, Member,  
Board of Finance, Town of Brookfield;  
Robin Appleby, Member, Board of Finance,  
Town of Brookfield; Steve O'Reilly, Member,  
Board of Finance, Town of Brookfield;  
Jeffrey Rossi, Member, Board of Finance,  
Town of Brookfield; Board of Finance,  
Town of Brookfield; and Town of Brookfield,

Respondents

December 3, 2014

The above-captioned matter was heard as a contested case on September 9, 2014, 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 and filed March 11, 2014, the complainant appealed to the Commission, alleging that the respondents violated the Freedom of Information Act ("FOI Act") in the following ways:
  - a. Failing to describe sufficiently a matter on the agenda, which matter was scheduled for discussion during an executive session;

- b. Entering into an executive session without a proper motion;  
and
- c. Entering into an executive session for an improper purpose.

3. In his complaint, the complainant requested that the Commission consider the imposition of a civil penalty, as well as other various remedies, including formally reprimanding the chairman and the members of the respondent board, and ordering that the respondents pay the complainant's attorney's fees.

4. 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: (A) Discussion concerning the appointment, employment, performance, evaluation, health or dismissal of a public officer or employee, provided that such individual may require that discussion be held at an open meeting; (B) strategy and negotiations with respect to a pending claim or pending litigation to which the public agency or a member thereof, because of the member's conduct as a member of such agency, is a party until such litigation or claim has been finally adjudicated or otherwise settled . . . .

5. Section 1-200(9), G.S., defines “pending litigation,” as follows:

“Pending Litigation” means (a) 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 before a court if such relief or right is not granted by the agency; (B) the service of a complaint against an agency returnable to a court which seeks to enforce or implement legal relief or a legal right; or (C) the agency's consideration of action to enforce or implement legal relief or a legal right.

6. Section 1-225(c), G.S., provides, in relevant part, as follows:

The agenda of the regular meeting of every public agency. . shall be available to the public and shall be filed, not less than twenty-four hours before the meeting to which they refer, (1) in such agency's regular office or place of business, and (2) . . . in the office of the clerk of such subdivision for any public agency of a political subdivision of the state or in the office of the clerk of each municipal member of any multitown district or agency. . . . Upon the

affirmative vote of two-thirds of the members of a public agency present and voting, any subsequent business not included in such filed agendas may be considered and acted upon at such meetings.

7. Section 1-225(f), G.S., provides as follows:

A public agency may hold an executive session as defined in subdivision (6) of section 1-200, upon an affirmative vote of two-thirds of the members of such body present and voting, taken at a public meeting and stating the reasons for such executive session, as defined in section 1-200.

8. It is found that the complainant is currently a selectman for the Town of Brookfield.

9. It is found that the Brookfield Board of Finance (“Board of Finance” or the “board”) held a regular meeting on February 12, 2014. It is found that the complainant did not attend the February 12, 2014 meeting. It is further found that, subsequent to the February 12, 2014 meeting, the complainant was informed by the town clerk that the Board of Finance convened in executive session at the February 12<sup>th</sup> meeting, and that, subsequent to the executive session, the board decided to file a complaint against the complainant with the Town of Brookfield’s Board of Ethics (the “Board of Ethics”). It is found the respondents in fact filed such a complaint with the Board of Ethics on February 13, 2014.

10. With regard to the February 12<sup>th</sup> meeting agenda, it is found that the description of the agenda pertaining to the executive session discussion stated the following: “Board to go into executive session over matters requiring full confidentiality per town charter and state statute.”

11. It is the complainant’s position that, not only does the description of the matter to be discussed in executive session, as set forth in paragraph 10, above, not meet the sufficiency requirements of the FOI Act, but also that consideration of whether or not to file an ethics complaint does not constitute “litigation,” pursuant to the definition set forth in §1-200(9)(C). In addition, the complainant contends that, because the Board of Finance wanted to discuss what amounts to an aspect of the complainant’s employment, the respondents were required to give the complainant notice that such discussion was going to occur. See ¶4, above (citing §1-200(6)(A)).

12. With regard to the complainant’s contention that he should have received notice prior to the respondents’ executive session discussion, the Commission first notes that convening an executive session for the purpose of appointing, evaluating, or dismissing an employee, and the notice requirement that goes along with such a session, (see ¶ 4, above), is different in nature from an executive session convened for the purpose of discussing whether to file a complaint against a public employee or official for misconduct. The first type of executive session focuses on a current or future employment relationship, while the latter focuses solely on the alleged misconduct. In addition, while misconduct could be the focus of an employment-focused executive session with an eye toward dismissal, only a public agency

with supervisory authority over the alleged transgressor could convene such a session. In this instance, certain of the general statutes are instructive in that they distinguish between “records of performance” and “records of misconduct.” See, e.g. §10-151, G.S., providing that records of teacher performance and evaluation are deemed not to be public records, while records of teacher misconduct are public records; §10a-154a, G.S., providing that records of performance and evaluation of a faculty member are deemed not to be a public records; but see Lieberman, M.D. v. FOIC, et al., HHB-CV-13-6022-70-S, 2014 Conn. Super. LEXIS 1558, at \*15 (Conn. Super Ct. June 14, 2014) (records involved in a grievance process concerning faculty member’s alleged workplace misconduct must be disclosed), *appeal docketed*, A.C. 36982 (July 10, 2014).

13. In this case, it is found that the respondents did not convene in executive session to evaluate the complainant’s employment or performance, or for the purpose of considering whether to dismiss the complainant (all of which, it is found, the respondents could not do with respect to a selectman). Rather, it is found that the respondents convened in executive session for the sole purpose of discussing whether or not to file an ethics complaint against the complainant. It is therefore found that the notice necessary prior to convening in executive session to engage in an employment based-discussion, was not required in this case.

14. With regard to the complainant’s contention that the filing of an ethics complaint is not similar enough to actual litigation to be properly discussed in executive session, see ¶ 2.c, and ¶ 5, above, the Commission disagrees. It is found that a public agency’s consideration of whether to file a complaint with the town’s Board of Ethics is “litigation” for the purposes of §1-200(9)(C), G.S. It is found that the filing of an ethics complaint is a legal action which, in this case, renders the respondent board a complainant, and the first selectman a respondent. In sum, it is found that the respondents convened an executive session to discuss their “strategy” with respect to whether or not to enforce their “legal right” to file an ethics complaint against the complainant. See Furchman, et al. v. FOIC, et al., 243 Conn. 427, 430-31 (Dec. 23, 1997) (holding that the town properly met in executive session to discuss litigation strategy when it convened such session to discuss how it might oppose a waste permit application). Accordingly, it is concluded the respondents did not violate the FOI Act in this regard.

15. With regard to the complainant’s sufficiency allegation in paragraph 2, a, and b, above, the Commission first notes Zoning Board of Appeals of the Town of Plainfield, et al. v. FOIC, et al., Superior Court, Docket No. 99-0497917-S, Judicial District of New Britain, Memorandum of Decision dated May 3, 2000 (Satter, J.), reversed on other grounds, 66 Conn. App. 279 (2001), in which the court observed that one purpose of a meeting agenda “is that the public and interested parties be apprised of matters to be taken up at the meeting in order to properly prepare and be present to express their views,” and that “[a] notice is proper only if it fairly and sufficiently apprises the public of the action proposed, making possible intelligent preparation for participation in the hearing.”

16. The respondents contend that, because the town adopted a code of ethics, and pursuant to §7-148h, G.S., established a board of ethics to investigate complaints alleging violations of the code, the *respondents* are prohibited, pursuant to §1-82a, G.S., from discussing any aspect of an ethics complaint, including their consideration of whether to file one. It is for this reason the respondents contend that they had to camouflage the nature of their executive

session discussion, including the agenda item pertaining to such session and the motion to enter into such session, in the manner in which they did.

17. Section 7-148h (a), G.S., provides, in relevant part, that:

Any town, city, district, . . . or borough may, by charter provision or ordinance, establish a board, commission, council, committee or other agency to investigate allegations of unethical conduct, corrupting influence or illegal activities levied against any official, officer or employee of such town, city, district or borough. The provisions of subsections (a) to (e), inclusive, of section 1-82a shall apply to allegations before any such agency of such conduct, influence or activities, to an investigation of such allegations conducted prior to a probable cause finding, and to a finding of probable cause or no probable cause. . . . (Emphasis supplied).

18. Section 1-82a (a), G.S., provides, in relevant part, that:

Unless a judge trial referee makes a finding of probable cause, a complaint alleging a violation of this part . . . shall be confidential except upon the request of the respondent. An evaluation of a possible violation of this part. . . by the Office of State Ethics prior to the filing of a complaint shall be confidential except upon the request of the subject of the evaluation. If the evaluation is confidential, any information supplied to or received from the Office of State Ethics shall not be disclosed to any third party by a subject of the evaluation, a person contacted for the purpose of obtaining information or by the ethics enforcement officer or staff of the Office of State Ethics. . . .

19. It is found that the Town of Brookfield adopted a code of ethics in October, 2009, and, pursuant to §7-148h (a), G.S., established a Board of Ethics to investigate complaints alleging violations of the code. It is found that, pursuant to §1-82a (a), G.S., the Board of Ethics is responsible to keep all ethics complaints confidential until it determines that the allegations are supported by probable cause. It is further found that, while the provisions of §1-82a (a), G.S., do apply to the town's Board of Ethics, such confidentiality provisions do not apply to any of the respondents, as none of the respondents comprise the town's Board of Ethics.

20. The respondents point to the following provision in the town's Code of Ethics to support their argument that they were prohibited from even mentioning the fact that they were considering filing an ethics complaint against the complainant:

§21-5. Board of Ethic's responsibilities and procedures.

...

C. To provide for a fair and respectful hearing, protecting the rights and interests of all parties, the [Brookfield Board of Ethics] shall:

...

(4) Conduct hearings as needed to hear and decide specific cases in which a violation of this chapter is alleged in a complaint. Pursuant to C.G.S. §7-148h, the processing of complainants shall comply with the requirements of C.G.S. §1-82a.

21. It is found that this section of the town's Code of Ethics simply adopts the provisions of §1-82a, G.S., thereby preventing the town's Board of Ethics from disclosing the allegations of a complaint once a complaint has been filed with it, unless and until a determination of probable cause is made. However, it is found that, just like provisions of §1-82a, G.S., this section does not prevent the *respondents* from disclosing the fact that they are considering whether or not to file an ethics complaint against a public official or public employee. See Ethics Comm'n of the Town of Glastonbury v. FOIC, et al., 302 Conn. 1, \*25 (Aug. 9, 2011) ("Pursuant to General Statutes §82a (a), the [Ethics Commission for the Town] is required to keep all ethics complaints confidential until it determines that the allegations are supported by probable cause) (Palmer, J., concurring).

22. It is found that the respondents moved the February 12<sup>th</sup> motion into an executive session by way of the following motion: "I [Chairman Kurtz] move to go into executive session to discuss pending litigation the subject of which requires full confidentiality per town charter and state statute." It is found that this motion was seconded and thereafter passed unanimously.

23. It is found that the description of the scheduled executive session on the agenda, see ¶ 10, above, much like the motion to move the meeting into an executive session, referred to in paragraphs 22, above, did not "fairly and sufficiently apprise the public" of the purpose for the executive session. It is found that, upon reading the description of the executive session on the agenda, the public would not even be able to discern under which provision of §1-200(6), G.S., the respondents planned to convene in executive session. It is also found that the motion raised to move the public meeting into an executive session failed to inform the public whether the respondents intended to discuss litigation to which they were already a party, or litigation that they themselves were considering filing. In order for the public to meaningfully attend the February 12<sup>th</sup> meeting, it is found that more detail was required for both the agenda item and the motion.

24. Based on the foregoing, it is therefore concluded that the respondents violated the provisions of §§1-225(c) and 1-225(f), G.S, by failing to describe sufficiently on their agenda

the reason for the executive session, and by failing to disclose with sufficient specificity the reason they were moving into an executive session.

25. Based on the facts and circumstances of this case, the Commission declines to consider the imposition of civil penalties.

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

1. Henceforth, the respondents shall strictly comply with the requirements of §§ 1-225(c) and 1-225(f), G.S.



Valicia Dee Harmon  
Valicia Dee Harmon  
as Hearing Officer