FREEDOM OF INFORMATION COMMISSION
OF THE STATE OF CONNECTICUT

In the Matter of a Complaint by FINAL DECISION

Thomas Potter,

Complainant

against Docket #FIC 2017-0237

Commissioner, State of Connecticut, Department of Mental Health and Addiction Services; and State of Connecticut, Department of Mental Health and Addiction Services,

Respondents April 11, 2018

The above-captioned matter was heard as a contested case on August 28, 2017, 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 of complaint filed May 2, 2017, the complainant appealed to the Commission, alleging that the respondents violated the Freedom of Information ("FOI") Act by denying his request for electronic copies of certain public records.

3. It is found that the complainant made an April 6, 2017 request to the respondents for copies of records pertaining to a contract between the respondent Department of Mental Health and Addiction Services ("DMHAS") and Advanced Behavioral Health, Inc. ("ABH"), the administrator of one of DMHAS's programs.

4. It is found that the contract, in the amount of approximately $7 million, provides that ABH, as the designated "Administrative Services Organization," administers Connecticut's Access to Recovery ("ATR") IV program.

5. It is found that the complainant specifically requested the following documentation:

a. A fully executed and signed copy of the Provider's Agreement for Supported Recovery Housing Service awarded to Community of Hope[1], Inc. with an effective date of July 1, 2014, and all attachments, exhibits and addenda;

b. A fully executed and signed copy of the Reimbursement Rate Schedule for Supported Recovery Housing awarded to Community of Hope with an effective date of July 1, 2015;

c. A copy of the Request for Qualified Contractors for Supported Recovery Housing with a "Due Date" of May 8, 2015;

d. A copy of the Staffing and Training Plan submitted by Community of Hope in response to Section C.III.i.a-f of the Request for Qualified Contractors for Supported Recovery Housing Service with a "Due Date" of May 8, 2015; and

e. A copy of Appendices 1, 5, 7 and 8 as submitted by Community of Hope in response to the Request for Qualified Contractors for Supported Recovery Housing Service with a "Due Date" of May 8, 2015.

6. It is found that the requested records specifically pertain to subcontracts between ABH and Community of Hope, made pursuant to ABH's contract with DMHAS.

7. It is found, based upon the representation of respondents' counsel and by inference from the facts on the record, that the requested records are held and maintained by ABH.

8. It is found that the respondents denied the complainant's request on April 12, 2017, asserting that the FOI Act pertains only to records maintained or kept on file by a public agency, and that the requested contract information was not maintained or kept on file by DMHAS.

9. The issue presented is whether ABS, which holds and maintains the records, performs a governmental function pursuant to §§1-200(11) and 1-218, G.S. If so, the records are subject to the FOI Act, DMHAS is entitled to a copy of the records from ABH, and a citizen's request for the records is properly directed to DMHAS pursuant to §§1-200(11) and 1-218, G.S.

10. Section 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

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[1] Community of Hope, as a service provider sub-contracting with Advanced Behavioral Health, provides "faith-based" recovery support services. "Community of Hope supports a gentle biblical method of uncovering the pain that caused dependency and destructive behavior." http://www.abhct.com/Customer-Content/WWW/CMS/files/ATRIII/ATR%20III%20Provider%20Directory.pdf accessed March 24, 2018.

> 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.

11. Section 1-218, G.S., 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.

12. The Commission takes administrative notice of the fact that ATR IV is a three-year grant program funded by the federal Substance Abuse and Mental Health Services Administration, Center for Substance Abuse Treatment. ATR is a presidential initiative that provides vouchers to adults with substance abuse disorders to help pay for a range of community-based clinical treatment and recovery support services.[2]

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[2] The Access to Recovery Program was launched in August 2004 when three-year Access to Recovery I grants were awarded to 14 states and one tribal organization. During this period, over 17,000 people with substance abuse disorders receive treatment and/or recovery support services in Connecticut. The program was re-funded in September 2007 when three-year ATR II grants were awarded, and again in 2010 when four-year ATR III grants were awarded. http://www.abhct.com/Customer-Content/WWW/CMS/files/ATRIII/ATR%20III%20Provider%20Directory.pdf accessed March 24, 2018.

> The goals of the program are (1) Facilitate genuine individual choice and promote multiple pathways to recovery through the development and implementation of a substance use treatment and recovery support service voucher system; (2) Expand access to a comprehensive array of clinical substance use treatment and recovery support services, including those provided through faith-based organizations; and (3) Ensure each client receives an assessment for the appropriate level of services. All services are designed to assist recipients remain engaged in their recovery while promoting independence, employment, self-sufficiency, and stability.[3]

13. The Commission also takes administrative notice of the fact that a central mission of DMHAS, in this case accomplished by ABH's administration of the ATR IV program, is to provide substance abuse treatment and recovery support services to individuals in the state who could not otherwise afford them:

> The mission of the Department of Mental Health and Addiction Services is to improve the quality of life of the people of Connecticut by providing an integrated network of comprehensive, effective and efficient mental health and addiction services that foster self-sufficiency, dignity and respect. … [DEMHAS] promotes and administers comprehensive, recovery-oriented services in the areas of mental health treatment and substance abuse prevention and treatment throughout Connecticut. While the Department's prevention services serve all Connecticut citizens, its mandate is to serve adults (over 18 years of age) with psychiatric or substance use disorders, or both, who lack the financial means to obtain such services on their own.[4]

14. It is found that ATR IV is a program of a public agency within the meaning of §1-200(11), G.S.

15. It is found that the ATR-IV program has been authorized by law to be administered or managed, or both, by ABH, within the meaning of §1-200(11), G.S.

16. It is found that DMHAS is involved in or regulates to a significant extent ABH's administration or management, or both, of the ATR IV program, within the meaning of §1-200(11), G.S.

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[3] Department of Mental Health & Addiction Services Access to Recovery (ATR) IV, http://www.ct.gov/dmhas/cwp/view.asp?a=2900&q=566480, accessed March 24, 2018.

[4] State of Connecticut Department of Mental Health and Addiction Services Triennial State Substance Abuse Plan 2016, http://www.ct.gov/dmhas/lib/dmhas/publications/triennialreport2016.pdf, accessed March 25, 2018.

17. However, the respondents contest whether, pursuant to §1-200(11)(C), G.S., ABH participates in the formulation of governmental policies or decisions in connection with the administration or management of the ATR IV program, and whether such policies or decisions bind DMHAS.

18. Specifically, the respondents contended that, pursuant to DMHAS's contract with ABH, ABH lacks the authority to participate in the formulation of governmental policies or decisions in connection with the administration or management of the program "to the extent that such policies or decision would bind DMHAS." The governmental policies and decisions related to the program are, according to the respondents, either made by DMHAS or subject to approval by DMHAS. The respondents pointed out that the contract explicitly provides that ABH works under the direction of the DMHAS project manager.

19. First, the Commission notes that the plain language of §1-200(11)(C), G.S., does not require that ABH have the ultimate authority to formulate governmental policies or decisions, only that it *participate* in those formulations of policies or decisions.

20. With respect to ABH's duties under the contract generally, it is found that ABH is responsible to oversee providers' performance.

21. With respect to the procurement and credentialing of providers, it is found that, pursuant to the contract between ABH and DMHAS, ABH participates in the development of a procurement process and credentialing application; does a first level review of the credentialing applications; organizes a review committee to score the credentialing applications based on criteria predetermined by DMHAS *and* ABH; provides DMHAS with a list of recommended providers based upon the review committee's scoring and other factors; and initiates subcontracts with providers after receiving DMHAS approval.

22. With respect to provider agreements and services specifically, it is found that, pursuant to the contract, ABH develops a provider agreement and enters into provider agreements with providers; develops and submits to DMHAS for pre-approval the provider agreements, including an appeals process; and enters into and maintains provider agreements with DMHAS-approved providers.

23. It is found that, pursuant to the contract, ABH participates similarly in the decisions and policies made in the ATR program by:

- screening potential service recipients to determine eligibility for the ATR program;
- developing ATR program manuals and marketing materials for providers and service recipients;
- providing training and education to providers;
- developing and providing to DMHAS for approval a utilization management process;

- making client eligibility determinations, and developing and maintaining a methodology to verify individuals' eligibility;
- providing care coordination for all service recipients;
- developing and maintaining an electronic voucher management system;
- establishing a customized and secure data base to track information related to services requested and received by service recipients;
- accepting, adjudicating and submitting for payment invoices received from providers;
- attending all meetings requested by DMHAS regarding the ATR IV program administration;
- coordinating and performing periodic performance reviews and internal audits of the entire ATR IV program, and generating performance assessment reports;
- maintaining an appeals process for providers and conducting the first level of appeal review; and
- developing and implementing a grievance procedure for all service recipients who are dissatisfied with any action of ABH or a provider.

24. It is found that the decisions and policies described in paragraphs 20 through 23, above, formulated by ABH (in coordination with DMHAS) in order to oversee, develop, provide, pay for, supervise, coordinate, and review services under DMHAS's ATR IV program, are governmental decisions. If DMHAS did not contract out the administration of the ATR IV program, and instead administered the program itself, making the same decisions delegated to ABH, there would be little doubt the DMHAS's services would be deemed "governmental." The Commission takes administrative notice of the fact that many governmental decisions, when performed by public agencies, might be deemed merely "administrative," or "managerial." For example, in the conduct of an administrative agency, decisions as to how and when to conduct hearings, the forms of notices and decisions, the assignment of staff to perform different functions, the review of proposed agency decisions, the determination whether to expedite certain cases, the monitoring of cases--all of these may reasonably be described as managerial or administrative, yet all are governmental decisions or policies made or formulated by a public agency in connection with the administration and management of the agency's program or programs.

25. It is therefore found that ABH participates in the formulation of governmental policies and decisions.

26. The respondents contended, however, that ABH's decisions are not binding on DMHAS within the meaning of §1-200(11), G.S., because ABH works under the direction of the DMHAS Project Manager; because DMHAS is involved in setting criteria used by ABH in connection with its responsibilities under the contract; and because the majority of responsibilities under the contract require DMHAS approval.

27. First, it is concluded that the governmental policies and decisions described in paragraphs 20 through 23 of the findings, above, are, to the extent that they may not be overridden by DMHAS, binding on DMHAS within the meaning of §1-200(11), G.S.

28. DMHAS and ABH nonetheless contended that many of the policies implemented and decisions made by ABH, even if governmental, are not binding on DMHAS because DMHAS has the power to override them.

29. It is found that DMHAS has the power to override some, but not all, of the decisions made by ABH. For example, in the operation of the customer service call center, ABH screens potential service recipients for eligibility and, once eligibility is determined, provides intake appointments to potential service recipients at community access centers. Nothing in the contract specifically gives DMHAS the power to override ABH's screening or appointment decisions (except to the extent that DMHAS must have approved the community access centers).

30. It is also found that, with respect to provider relations under the contract, ABH provides training and education to providers and potential providers; establishes procedures that are responsive to the issues voiced by providers; facilitates provider and service recipient forums; reaches out to and partners with state agencies, federally qualified health centers, women's residential treatment programs, and grass-roots community and faith-based organizations. Nothing in the contract specifically gives DMHAS the power to override ABH's decisions in these matters of provider relations.

31. It is also found that, with respect to client eligibility determinations under the contract, ABH deems individuals eligible for services on initial requests; develops and maintains a methodology to verify individuals' eligibility; and verifies that the individuals have no other entitlements at the time of the initial request, and that the ATR IV program will be the "payer of last resort." Nothing in the contract specifically gives DMHAS the power to override ABH's decisions in these client eligibility determinations.

32. Similarly, nothing in the contract specifically gives DMHAS the power to override ABH's decisions with respect to:

- recovery assessment and care coordination;
- voucher management;
- service authorization;
- the processing of invoices and payments; or
- accountability measures and program review,

33. Nonetheless, the respondents correctly point out that many of the other decisions made and policies formulated by ABH may be overridden by DMHAS, or are subject to pre- or post-approval by DMHAS, or are made in accordance with criteria predetermined by DMHAS.

34. The respondents therefore contended that, since DMHAS is the ultimate authority in matters pertaining to decisions made and policies formulated in the

administration of the ATR IV program, the decisions made and policies formulated by ABH are not binding on DMHAS.

35. For a variety of reasons, the Commission does not find this argument persuasive, particularly as applied to the totality of ABH's decisions and policies.

36. First, it is found that, in general, the ability to reverse a decision does not necessarily, or even customarily, mean that the decision is not binding. For example, in employment law, a superior's directive to an employee may be binding, even though the employee may appeal that directive through a grievance process, and the directive may ultimately be reversed. Nonetheless, such a directive is binding unless and until it is reversed.

37. Similarly, in the judicial decision-making and appeals process, a decision of the Superior Court is binding on the parties, even though a party may appeal that decision to the Appellate or Supreme Courts, and the Superior Court's decision may ultimately be reversed. Nonetheless, the Superior Court's decision is binding unless and until it is reversed.

38. In any event, the fact that DMHAS can reject or override decisions made by ABH is simply a reflection of the relationship between a public agency, such as DMHAS, and the private entity it contracts with to perform a governmental function. Necessarily, as part of its ultimate responsibility for governmental addiction services in Connecticut, DMHAS retains rights to disapprove or even reject certain of ABH's decisions or policies. If the ability to reject ABH's actions were evidence that the ABH's decisions were not binding on DMHAS, then no decisions made by any contractor performing a governmental function would ever be binding on a public agency, because every agency could reserve the right to reject decisions of the contractor. The power to approve or disapprove is not evidence that the contractor's decisions are not binding, but simply a reflection of the fact that the state retains a position of higher authority and higher policy-making ability. It cannot be that a public agency must relinquish complete managerial and decision-making authority over an entire program to a private entity in order to satisfy §1-200(11). To do so would be to abrogate totally an agency's responsibility to the citizens of the state. Ultimately, it is the obligation of DMHAS to provide adequate substance abuse services. If ABH fails to do so under its contracts, that failure is "binding" on DMHAS.

39. It is therefore concluded that the governmental policies and decisions implemented by ABH in the administration or management, or both, of the ATR IV program "bind the public agency" within the meaning of §1-200(11), G.S.

40. Nonetheless, the respondents further contended that §1-200(11), G.S., only applies when a major state function, such as Medicaid, is being contracted. See, Hartwig v. Department of Social Services, Docket #FIC 2005-024 (concluding that the administration of the Department of Social Services' Medicaid program by contract with private managed care organizations was a governmental function within the meaning of §1-210(11), G.S.) The respondents argue that the $7 million contract between DMHAS and ABH is not a substantial program such as Medicaid and would not, "in the scheme of state services," be considered a large program or major state function. The respondents additionally contend that, based on legislative intent, only contracts that

have been the subject of "enormous public interest" in which "a great deal of money is involved" satisfy the requirements of §1-200(11), G.S.

41. However, the plain language of §1-210(11), G.S., contains none of the restrictions proposed by the respondents, and the statute clearly applies to any contract in excess of $2.5 million, whether or not the contract is otherwise considered to be "large" or "of enormous public interest."

42. Even if the statute were ambiguous, its legislative history demonstrates that the General Assembly did not intend to distinguish between $5 million and $50 million contracts. The size of the contract—in excess of $2.5 million—is only a threshold. The remarks of Senator Jepsen demonstrate, in the senator's words, that the formulation of governmental policies and decisions was rather to be distinguished from "a road contractor who might have a $5 million bridge repair job." 44 H.R. Proc., Pt. 11, p. 95. The Commission believes that ABH's administration of a program at the core of DHMAS's central purpose is clearly of a different nature than a road contractor's repair decisions—no matter how large the road contract is.

43. It is therefore concluded that ABH performs a governmental function within the meaning of §1-200(11), G.S.

44. Having concluded that ABH performs a governmental function within the meaning of §1-200(11), G.S., the question remains as to the respondents' compliance with §§1-210(a), 1-218, and 1-200(5), G.S.

45. Section 1-200(5), G.S., provides:

> "Public records or files" means any recorded data or information relating to the conduct of the public's business prepared, owned, used, received or retained by a public agency, or to which a public agency is entitled to receive a copy by law or contract under section 1-218, whether such data or information be handwritten, typed, tape-recorded, printed, photostated, photographed or recorded by any other method.

46. Section 1-210(a), G.S., provides in relevant part:

> Except as otherwise provided by any federal law or state statute, all records maintained or kept on file by any public agency, whether or not such records are required by any law or by any rule or regulation, shall be public records and every person shall have the right to (1) inspect such records promptly during regular office or business hours, (2) copy such records in accordance with subsection (g) of section 1-212, or (3) receive a copy of such records in accordance with section 1-212.

47. Section 1-212(a), G.S., provides in relevant part, "Any person applying in writing shall receive, promptly upon request, a plain, facsimile, electronic or certified copy of any public record."

48. It is concluded that the requested records are public records within the meaning of §§1-200(5), 1-210(a) and 1-212(a), G.S.

49. It is concluded that the respondents violated §§1-200(5), 1-210(a), 1-212(a), and 1-218, G.S., by failing to obtain a copy of the requested records from ABH, and by failing to provide a copy of such records to the complainant.

50. As to the question of remedies, §1-206(b)(2), G.S., provides in relevant part:

> In any appeal to the Freedom of Information Commission under subdivision (1) of this subsection or subsection (c) of this section, the commission may confirm the action of the agency or order the agency to provide relief that the commission, in its discretion, believes appropriate to rectify the denial of any right conferred by the Freedom of Information Act.

51. The Commission in its discretion believes that the relief appropriate to rectify the denial of the complainant's rights in this case consists of three parts: (1) requiring the respondents to obtain from ABH, and provide to the complainant, any records responsive to her request; (2) requiring the respondents to provide the records to the complainant at no cost; and (3) requiring the respondents to provide the records in electronic form, as requested by the complainant.

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

1. The respondents shall forthwith obtain from ABH and provide to the complainant, at no cost to the complainant, copies in electronic form of all records responsive to the complainant's request.

2. Henceforth the respondents shall strictly comply with the requirements contained in §§1-200(5), 1-200(11), 1-210(a), and 1-218, G.S.

Approved by Order of the Freedom of Information Commission at its regular meeting of April 11, 2018.

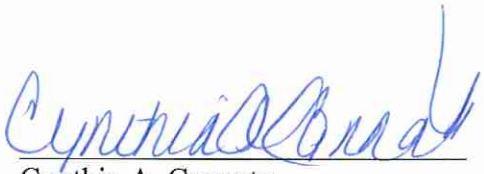
Cynthia A. Cannata
Acting Clerk of the Commission

PURSUANT TO SECTION 4-180(c), G.S., THE FOLLOWING ARE THE NAMES OF EACH PARTY AND THE MOST RECENT MAILING ADDRESS, PROVIDED TO THE FREEDOM OF INFORMATION COMMISSION, OF THE PARTIES OR THEIR AUTHORIZED REPRESENTATIVE.

THE PARTIES TO THIS CONTESTED CASE ARE:

THOMAS POTTER, 154 Walker Hill Road, Groton, CT 06340

COMMISSIONER, STATE OF CONNECTICUT, DEPARTMENT OF MENTAL HEALTH AND ADDICTION SERVICES; AND STATE OF CONNECTICUT, DEPARTMENT OF MENTAL HEALTH AND ADDICTION SERVICES, c/o Assistant Attorney General Jacqueline S. Hoell, Office of the Attorney General, 55 Elm Street, PO Box 120, Hartford, CT 06141-0120



Cynthia A. Cannata
Acting Clerk of the Commission

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