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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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Chris Ehlert,
Complainant(s)
against

Notice of Meeting

Docket #FIC 2016-0547

Board of Selectmen, Town of Westbrook;
and Town of Westbrook,
Respondent(s)

February 23, 2017

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, March 22, 2017**. 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 March 10, 2017**. 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 March 10, 2017**. **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 **fifteen (15) copies** be filed **ON OR BEFORE March 10, 2017**, 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: Chris Ehlert
Attorney Henry J. Zaccardi

FIC# 2016-0547/Trans/wrbp/KKR//TAH/2017-02-23

FREEDOM OF INFORMATION COMMISSION
OF THE STATE OF CONNECTICUT

In the Matter of a Complaint by

Report of Hearing Officer

Chris Ehlert,

Complainant

against

Docket #FIC 2016-0547

Board of Selectman, Town of Westbrook;
and Town of Westbrook,

Respondents

January 31, 2017

The above-captioned matter was heard as a contested case on November 28, 2016, at which time the complainant and the respondents appeared 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 email, dated and filed July 27, 2016, the complainant appealed to this Commission, alleging that the respondents violated the Freedom of Information (“FOI”) Act by:
 - (a) inaccurately describing the subject of an executive session on the agenda for the respondent board’s July 14, 2016 regular meeting (the “meeting”); and
 - (b) allowing certain individuals to be present during two executive sessions that took place during the meeting.
3. With regard to the allegation described in paragraph 2(a), above, §1-225(c), G.S., provides in relevant part that:

[t]he agenda of the regular meetings of every public agency... shall be available to the public and shall be filed, not less than twenty-four hours before the meetings to which they refer....
4. It is well established that a meeting agenda must “fairly apprise the public of the action proposed,” and of the “matters to be taken up at the meeting in order to [permit the public] to properly prepare and be present to express their views.” See Zoning Board of Appeals of the

Town of Plainfield v. Freedom of Information Commission, Docket No. CV 99-047917-S, 2000 WL 765186 (superior court, judicial district of New Britain, May 3, 2000), reversed on other grounds, Zoning Board of Appeals of the Town of Plainfield v. Freedom of Information Commission, 66 Conn. App. 279 (2001).

5. This Commission repeatedly has held that in order for the public to be fairly apprised of the reason for an executive session, the public agency must give some indication of the specific topic to be addressed. Descriptions such as “personnel,” “personnel matters,” “legal,” or even “the appointment, employment, performance, evaluation, health, dismissal of a public officer or employee,” are inadequate. See, e.g., Bradshaw Smith v. Craig Cook, Superintendent of Schools, Windsor Public Schools, et al., Docket #FIC 2014-833 (September 24, 2015) (agenda item “Potential Executive Session to Review Attorney/Client Privileged Communication Regarding Personnel Matter,” did not fairly apprise the public of matter to be discussed); Richard L. Stone v. Board of Selectmen, Town of Cromwell, Docket #FIC 2010-738 (August 24, 2011) (agenda item “[e]xecutive session: [p]ersonnel,” did not fairly apprise the public of proposed matter to be discussed); Preston D. Schultz and the Citizens for Prudent Spending v. Board of Education, Woodstock Public Schools, Docket #FIC 2008-236 (February 25, 2009) (agenda item “discussion of attorney/client privilege [sic] documents and pending litigation,” did not fairly apprise the public); Bradshaw Smith v. Milo W. Peck, Jr., Member, Board of Education, Windsor Public Schools, Docket #FIC 2007-003 (August 8, 2007) (agenda item “employee personnel matters,” did not fairly apprise the public of the matter to be discussed in executive session); John Voket and the Newtown Bee v. Board of Education, Newtown Public Schools, Docket #FIC 2006-013 (October 11, 2006) (agenda item “executive session – personnel,” did not fairly apprise the public); Trenton Wright, Jr. v. First Selectman, Town of Windham, Docket #FIC 1990-048 (agenda item “executive session – personnel matters,” did not sufficiently state the reason for the executive session); and Robert Cox v. Ridgefield Board of Education, Docket #FIC 88-165 (January 25, 1989) (the agenda item listing executive session to “receive advice from legal counsel on a legal matter,” was insufficient).

6. In the present case, it is found that item 2 on the agenda for the meeting, stated: “Executive Session – personnel matter – to discuss voluntary retirement of Fire Marshal.” At the hearing in this matter, the complainant argued that this description of the executive session was misleading, because the fire marshal did not retire voluntarily. According to the complainant, the agenda item more accurately should have stated that the discussion in executive session pertained to a settlement agreement between the town and the fire marshal.

7. It is found that a dispute existed between the town and the fire marshal. It is found that, at some point prior to the meeting, the fire marshal and the town agreed to resolve their dispute by way of a Release and Settlement Agreement, dated July 14, 2016 (the “agreement”), which agreement provided for the fire marshal’s retirement as of June 30, 2016. It is found that both parties to the agreement entered into such agreement voluntarily, as a means to resolve their differences.

8. It is found that, during the executive session, the members of the respondent board of selectmen discussed a personnel matter, i.e., the terms of the agreement by which the fire marshal would retire. It is found that the agenda item, described in paragraph 6, above, informed

the public that the discussion pertained to a personnel matter, and further identified the specific employee and employment action to be discussed. It is therefore found that the agenda item 2 fairly apprised the public of the business to be discussed in the executive session. Despite the complainant's belief that the fire marshal's retirement was not "voluntary," it is further found, based upon a careful review of the agreement, and the testimony in this case, that the fire marshal voluntarily retired rather than engage in potential litigation with the town. Thus, it is found the respondents' use of the term "voluntary" on the agenda was not "misleading."

9. With regard to the allegation, described in paragraph 2(b), above, §1-231(a), G.S., provides:

[a]t an executive session of a public agency, attendance shall be limited to members of said body and persons invited by said body to present testimony or opinion pertinent to matters before said body provided that such persons' attendance shall be limited to the period for which their presence is necessary to present such testimony or opinion and, provided further, that the minutes of such executive session shall disclose all persons who are in attendance except job applicants who attend for the purpose of being interviewed by such agency.

10. It is found that the respondent board of selectmen invited members of the board of fire commissioners, the finance director, the chairman of the board of finance ("chairman") and the respondent board's clerk ("clerk"), into the executive session, described in paragraph 8, above.

11. At the hearing in this matter, the complainant stated that he did not take issue with the presence of the members of the board of fire commissioners, but argued that the finance director, chairman and clerk should not have been present, or that they should not have been present for the entire executive session.

12. It is found that the executive session, described in paragraph 8, above, lasted approximately 19 minutes. It is found that the finance director and the chairman were present during the entire executive session. According to the respondents, the presence of both the finance director and the chairman was necessary so that they could offer their opinions regarding the potential financial impacts of the agreement to the town, at any time during the discussion, where appropriate.

13. Based upon the credible testimony of the respondents' witness, it is concluded that the respondents did not violate §1-231(a), G.S., by permitting the finance director and the chairman to be present during the entire executive session.

14. The respondents' witness testified, and it is found, that the clerk was invited by the respondent board of selectmen into the executive session, described in paragraph 8, above, because she handles all of the confidential correspondence for the board and her presence was

necessary during the executive session to assist the board with locating and providing members with copies of certain documents during the discussion.

15. It is found that the clerk, who was not a member of the respondent board of selectmen, was not present during the executive session to provide "testimony or opinion," and that her presence therefore was not permitted pursuant to §1-231(a), G.S.

16. It is therefore concluded that the respondents violated §1-231(a), G.S., by permitting the clerk to be present during the executive session.

17. It is found that the members of the respondent board of selectmen also discussed, in a separate executive session, during the meeting, "collective bargaining strategy" regarding "town hall contract and tentative agreement." It is found that the respondent board of selectmen invited their labor attorney, the finance director and the chairman into the executive session.¹

18. The complainant argued that the presence of the finance director and the chairman was not permitted by §1-231, G.S., because, at the time of the meeting, the salaries "were already set."

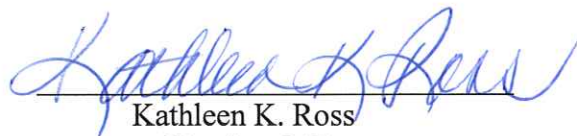
19. It is found that the executive session, described in paragraph 17, above, lasted approximately 25 minutes and that the finance director and chairman were present during the entire session. According to the respondents, the presence of both the finance director and the chairman was necessary so that they could offer their opinions regarding certain insurance issues, and the financial impact to the town of certain decisions, at any time during the discussion, where appropriate.

20. Based upon the credible testimony of the respondents' witness, it is concluded that the respondents did not violate §1-231(a), G.S., by permitting the finance director and the chairman to be present during the entire executive session, described in paragraph 17, above.

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 §§1-231(a), G.S.

¹Although the complainant did not allege that the respondents violated the FOI Act by meeting in executive session for an improper purpose, the Commission notes that "collective bargaining strategy" is not a topic that is permitted to be discussed in executive session under §1-200(6), G.S., of the FOI Act. However, the Commission further notes that, under §1-200(2), G.S., discussion of "strategy or negotiations with respect to collective bargaining," is not a "meeting" that must be open to the public. In this case, the respondents did not argue that the discussion was not a "meeting," under §1-200(2), G.S., and there is insufficient evidence in the record from which the Commission could conclude that the discussion in executive session qualified as a non-meeting under that provision.



Kathleen K. Ross
as Hearing Officer

FIC 2016-0547/hor/kkr/12122016