

FREEDOM OF INFORMATION COMMISSION
OF THE STATE OF CONNECTICUT

In the Matter of a Complaint by

FINAL DECISION

Joan Coe,

Complainant

against

Docket #FIC 2017-0360

David Ryan, President, Board of Directors,
Simsbury Performing Arts Center, Inc.;
Board of Directors, Simsbury Performing
Arts Center, Inc.; and Simsbury Performing
Arts Center, Inc.,

Respondents

January 10, 2018

The Notice of Hearing and Order to Show Cause in the above captioned matter was issued on August 9, 2017, naming David Ryan, President of the Simsbury Performing Arts Board (“town board”), as well as the town board itself, as respondents. Mr. Ryan, by motion dated August 24, 2017, requested “summary disposition,” of the complaint, on the ground that he is not a public agency.

This matter was heard as a contested case on September 21, 2017, at which time the complainant and Mr. Ryan, in his capacity as President of the Board of Directors of Simsbury Performing Arts Center, Inc., (“SPAC, Inc.”), and the SPAC, Inc., Board of Directors (“SPAC Inc., Board”) appeared. At the hearing, counsel for Mr. Ryan and the SPAC, Inc., Board informed the hearing officer that the town board that was named in the Notice of Hearing and Order to Show Cause, no longer exists, and that SPAC, Inc., a non-profit organization, maintains the record requested by the complainant.

The hearing officer reviewed the complaint and the written request for the record at issue in this case, and determined that the complainant requested such record from SPAC, Inc., and that Mr. Ryan, in his capacity as President of the SPAC, Inc., Board, denied such request. The hearing officer then denied Mr. Ryan’s motion and offered to continue the hearing so that it could be re-noticed to Mr. Ryan, in his capacity as President of the SPAC, Inc., Board, and to the SPAC, Inc., Board. Mr. Ryan and the SPAC, Inc., Board declined the hearing officer’s offer, and waived such notice. The case caption has been amended accordingly.

Thereafter, the complainants and the respondents 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. It is found that, on or about May 31, 2017, the complainant verbally requested from the respondents a copy of an invoice for the purchase by SPAC, Inc., of a golf cart/utility vehicle. It is found that Mr. Ryan verbally denied this request, on the ground that SPAC, Inc., is not a public agency under the Freedom of Information (“FOI”) Act.

2. It is found that, by letter dated June 1, 2017, the complainant again requested a copy of the invoice, described in paragraph 1, above. The respondents did not respond to the June 1st request.

3. By letter to the Commission, filed on June 21, 2017, the complainant appealed to the Commission, alleging that the respondents violated the FOI Act by denying her request for the invoice.¹ In her complaint, she also requested the imposition of a civil penalty in the amount of \$1,000, against Mr. Ryan.

4. At the hearing in this matter, the respondents maintained their position that SPAC, Inc., is not a public agency, or the functional equivalent of a public agency. The complainant argued that SPAC, Inc., is the functional equivalent of a public agency.

5. Section 1-200(1), G.S., defines “public agency,” as:

(A) Any executive, administrative or legislative office of the state or any political subdivision of the state and any state or town agency, any department, institution, bureau, board, commission, authority or official of the state or of any city, town, borough, municipal corporation, school district, regional district or other district or other political subdivision of the state, including any committee of, or created by, any such office, subdivision, agency, department, institution, bureau, board, commission, authority or official, and also includes any judicial office, official, or body or committee thereof but only with respect to its or their administrative functions, and for purposes of this subparagraph, “judicial office” includes, but is not limited to, the Division of Public Defender Services; (B) Any person to the extent such person is deemed to be the functional equivalent of a public agency pursuant to law; or

¹ The letter of complaint to the Commission was dated May 31, 2017. When asked by the hearing officer why the complaint was dated earlier than the date of the request, the complainant explained that she had typed up the complaint on her computer on May 31, 2017, after Mr. Ryan denied her verbal request, but did not send it that day. Instead, she made a written request, dated June 1, 2017, to the respondents, for the same record, to which the respondents did not reply. She then mailed her previously drafted letter of complaint to the Commission, but inadvertently neglected to change the date of such letter.

(C) Any “implementing agency,” as defined in section 32-222.

6. It is found that the respondents are not public agencies under §1-200(1)(A), G.S., or implementing agencies, under §1-200(1)(C), G.S.

7. With respect to whether the respondents are the “functional equivalent” of a public agency, pursuant to §1-200(1)(B), G.S., four factors must be considered: (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. See Board of Trustees of Woodstock Academy v. Freedom of Information Commission, 181 Conn. 544, 554 (1980). “All relevant factors are to be considered cumulatively, with no single factor being essential or conclusive.” Connecticut Humane Society v. Freedom of Information Commission, 281 Conn. 757, 761 (1991).

8. It is found that the Town of Simsbury owns an entertainment venue known as the Simsbury Performing Arts Center at Simsbury Meadows (“facility”), consisting of a band shell, a stone patio area, and a barn that serves as an administrative office and maintenance shed. It is found that this area is adjacent to several grassy fields, also owned by the town, which are used as “lawn seating” for the concerts that take place at the facility, as well as for soccer, lacrosse and field hockey games involving public school teams and private, non-profit athletic leagues. In addition to other concert events, the facility each year hosts the Talcott Mountain Music Festival with performances throughout the summer months by the Hartford Symphony Orchestra. The facility also hosts graduations and other charity events.

9. It is found that, from approximately 2005 until 2013, the town managed and operated the facility as an entertainment venue.² Through a manager hired by the town board, the town scheduled events at the facility, marketed and oversaw the presentation of those events. During the time that the town, and later the town board, managed and operated the facility, the town lost money. According to the respondents, over time, it became clear to town officials that the town could not effectively manage and operate an entertainment venue, for several reasons. One such reason was identified by Mr. Ryan, as follows:

Negotiations with performing groups often require prompt decision-making. For example, if a group suddenly becomes available or is filling in the final performances on a tour, it might require an unanticipated and quick acceptance. It would not be acceptable to await the next meeting of the Board of Selectmen or even a Special Meeting. The Town, as manager, was not sufficiently nimble as an organization to respond to the pace of the entertainment industry.

²In 2008, the town created the town board, through which the town continued to operate and manage the events at the facility, until 2013. Mr. Ryan was president of the town board, which no longer exists. There is no dispute that the town board was a public agency under the FOI Act.

It is further found that, in transferring the management and operation of the facility to SPAC, Inc., the town sought to minimize: exposure to allegations of discrimination with respect to its selection of performers, and financial risk resulting from weather-related cancellations of events scheduled at the facility.

10. Thus, it is found that, at the direction of the first selectman, SPAC, Inc., was created as a tax exempt 501(c)(3) charitable organization for the purpose of managing and operating the facility. It is found that the town attorney served as the incorporator of SPAC, Inc., and that the initial directors of SPAC, Inc., were Mr. Ryan, Greg Piecuch and Gerry Toner. It is found that Mr. Ryan and Mr. Piecuch, who previously served as president and vice president, respectively, of the town board, are the president and vice president of the SPAC, Inc., Board.

11. It is found that SPAC, Inc., was created by government.

12. It is found that, in December 2013, SPAC, Inc., and the town, entered into a three-year agreement, effective January 1, 2014 (“agreement”), whereby the town, as the owner of the facility and adjacent grounds, granted to SPAC, Inc., the right to manage and operate the facility. The agreement was renewed at the end of 2016, for an additional three years, under substantially similar terms (“renewed agreement”).

13. Under the terms of the agreement and the renewed agreement (together “the agreements”), SPAC, Inc., is required to present live performances, including the Talcott Mountain Music Festival, and other community events, in accordance with its “mission statement.”

14. It is found that SPAC, Inc.’s mission is “to present cultural arts live performances for the enjoyment, cultural enrichment and education of today’s and future generations of citizens of all ages in the Town of Simsbury, Connecticut and other towns and cities in Connecticut,” and that the town determined that this mission “is consistent with its purposes in the ownership and operation of the [facility].” It is also found that the parties agreed that it is in their mutual interest that SPAC, Inc., manage and direct the operation of the facility. In addition, it is found that SPAC, Inc., performs the same function that the town previously performed in its operation and management of the facility.

15. With regard to whether the respondents perform a governmental function, in Domestic Violence Services of Greater New Haven, Inc., v. Freedom of Information Commission, the court concluded that “performing a government service pursuant to a contract does not make an entity a public agency subject to the [FOI] Act... The key to determining whether an entity is a government agency or merely a contractor with the government is whether the government is really involved in the core of the program.” 47 Conn. App. 466, 471-2 (1998). Courts have drawn a distinction between a function that is performed pursuant to a contract, and one that is required to be performed pursuant to statute. See Connecticut Humane Society, at 764. “[E]ntities that are the functional equivalent of a public agency have the power to govern or to regulate to make decisions affecting government.” Domestic Violence, at 475.

16. It is found that providing culturally enriching entertainment is not a traditional governmental function. Although the town itself, for many years, undertook this function, it is found that SPAC, Inc., is not required to provide entertainment to the public pursuant to any statute, but rather, provides such service only pursuant to a contract. It is found that SPAC, Inc., does not have the power to govern, regulate or make decisions affecting government. Accordingly, it is found that SPAC, Inc., does not perform a governmental function.

17. With regard to the extent of the government's involvement in, and regulation of, SPAC, Inc., it is found that SPAC, Inc., is governed by the SPAC, Inc., Board, and that the SPAC, Inc., Board hired a manager who operates and manages the facility and the events presented by SPAC, Inc., on a day-to-day basis. It is found that the majority of the members of the SPAC, Inc., Board are appointed by the town Board of Selectmen, and "if the number of board members changes, the number appointed by the Board of Selectmen shall change such that a majority of board members are appointed by the town." However, it is also found that no member of the town Board of Selectmen also is a member of the SPAC, Inc., Board. Although Mr. Ryan presently serves as the chairman of the town Zoning Commission, in addition to serving as president of the SPAC, Inc., Board, it is found that he serves as chairman of the SPAC, Inc., Board in his capacity as a private citizen, and not in his role as a public official.

18. It is found that, pursuant to the agreements, the town exercises control over SPAC, Inc.'s mission. The renewed agreement provides that:

Prior to the beginning of the 2017 season, [SPAC, Inc.] shall provide the town's Board of Selectmen with a mission statement acceptable to the Board of Selectmen. Such mission statement shall include: (1) presentation of live cultural arts performances and to host cultural and community events at the [facility] for the enjoyment, cultural enrichment and education of the residents of the town of Simsbury and beyond; and (2) raising money for operating expenses and capital improvements to the [facility].

The renewed agreement further provides that, "in the event [SPAC, Inc.,] seeks to change its mission statement, the proposed change shall be presented to the town's Board of Selectmen for review and approval."

19. Mr. Ryan testified that, despite the Board of Selectmen's right to control the membership of the SPAC, Inc., Board, in practice, the SPAC, Inc., Board itself vets potential new board members, creates a list of those individuals, and provides that list to the Board of Selectmen for approval. According to Mr. Ryan, the Board of Selectmen has always approved the individuals on the list, effectively "rubber-stamping" the respondent board's candidates. Mr. Ryan further testified, and it is found, that the SPAC Inc., Board has sole discretion and authority to determine which concerts, other than the Talcott Mountain Music Festival, and events, will be scheduled at the facility.

20. In Hallas v. Freedom of Information Commission, 18 Conn. App. 291, 296, *cert. denied*, 212 Conn. 804 (1989), the court concluded that, in order to satisfy the government regulation prong of the functional equivalent test, the entity “must operate under direct, pervasive or continuous regulatory control.” Based upon all of the facts set forth in paragraphs 17 through 19, above, it is found that, although the town has some control over the SPAC, Inc., Board, by virtue of its right to appoint a majority of the board’s members, and its right to dictate SPAC, Inc.’s mission, the town does not exercise the type of “extensive, detailed and virtually day-to-day supervision” required by the courts to satisfy the governmental involvement or regulation prong of the Woodstock test. Accordingly, it is found that the level of government involvement or regulation is not substantial.

21. With regard to the level of governmental funding, the respondents argued that SPAC, Inc., receives little or no funding from the town and that the agreements were “arms-length.” According to the respondents, the relationship between the town and SPAC, Inc., is that of an ordinary landlord and tenant, which does not make SPAC, Inc., a public agency.

22. It is found that, during the initial agreement, from January 1, 2014 through December 31, 2016, SPAC, Inc.’s total revenue from ticket sales, donations and sponsorships, was \$1,312,770.77. It is also found that, in addition to this amount, SPAC, Inc., received approximately \$13,000 from the town’s Special Revenue Fund, which was the amount left over from a grant to the town from the state, and a private donation, for the purpose of building the bandshell in 2005.³ It is also found that more recently, the town provided \$15,000 to SPAC, Inc., to purchase a golf cart/utility vehicle.

23. It is found that, pursuant to the agreement, the town received an “administrative fee,” from SPAC, Inc., in the amount of \$30,000, over the initial three year period (i.e., \$10,000 per year). It is found that, under the renewed agreement, the “administrative fee” was reduced to \$2,500 per year.

24. It is found that, under the agreements, the town provides “routine and customary maintenance,” at the facility, including upkeep and repair of the buildings, landscape maintenance, routine cleaning, trash removal, and other janitorial services.

25. In addition, it is found that the cost of all maintenance beyond the “routine and customary maintenance,” described in paragraph 24, above, is the responsibility of SPAC, Inc. However, the agreements permit and contemplate that SPAC, Inc., will utilize town public works employees to perform such additional maintenance, at rates set forth in the agreements. It is found that SPAC Inc., is responsible for obtaining, and for the cost of, all necessary permits from the town for its events, costs associated with the promotion and presentation of events,

³ The bandshell was constructed in 2005 with funds obtained through a \$500,000 grant from the state, and a \$250,000 gift from a private citizens. Approximately \$100,000 remained after construction of the bandshell was completed, and such money was deposited into a segregated account set up by the town known as the Special Revenue Fund (“fund”). At the time of SPAC, Inc.’s creation, approximately \$15,000 remained in the fund, and that amount was transferred to SPAC, Inc., at that time, minus approximately \$2,000 that was owed to the town for prior obligations.

including electricity, internet and telephone service, as well as the cost of staff, and consultants, and the development of operational plans for the season.

26. The respondents denied that they are receiving any “in kind” funding from the town; however, because the town permits SPAC, Inc., to use the facility virtually rent free, it is found that SPAC, Inc., receives in-kind funding from the town. However, no evidence was offered at the hearing in this matter as to the fair market value of the lease; therefore, no conclusion can be drawn with regard to the *level* of government funding in this case.

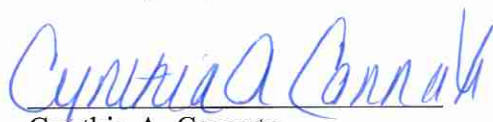
27. In summary, it is found that two of the four prongs of the Woodstock test are met in this case, i.e, that SPAC, Inc., was created by government and that it receives some government funding. It is also found that two of the four prongs are not met, i.e., that SPAC, Inc., does not perform a governmental function and is not significantly regulated by government. Considering all four factors cumulatively, it is concluded that the respondents are not the “functional equivalent,” of a public agency, under §1-200(1)(B), G.S.

28. Accordingly, it is concluded that the requested record, described in paragraph 1, above, is not a public record, within the meaning of §§1-200(5) and 1-210(a), G.S., and that therefore, the respondents did not violate the FOI Act by withholding such record from the complainant.

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.

Approved by Order of the Freedom of Information Commission at its regular meeting of January 10, 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:

JOAN COE, 26 Whitcomb Drive, Simsbury, CT 06070

**DAVID RYAN, PRESIDENT, SIMSBURY PERFORMING ARTS CENTER BOARD;
AND SIMSBURY PERFORMING ARTS CENTER BOARD**, c/o Attorney Charles D. Houlihan, Jr., PO Box 582, Simsbury, CT 06070



Cynthia A. Cannata
Acting Clerk of the Commission