

TO: Freedom of Information Commission
FROM: Thomas A. Hennick
RE: Minutes of the Commission's regular meeting of September 12, 2018

A regular meeting of the Freedom of Information Commission was held on September 12, 2018, in the Freedom of Information Hearing Room, 18-20 Trinity Street, Hartford, Connecticut. The meeting convened at 2:20 p.m. with the following Commissioners present:

Commissioner Owen P. Eagan, presiding
Commissioner Jay Shaw (participated via speakerphone)
Commissioner Matthew Streeter
Commissioner Christopher P. Hankins
Commissioner Lenny T. Winkler

Also present were staff members, Colleen M. Murphy, Mary E. Schwind, Victor R. Perpetua, Kathleen K. Ross, Valicia D. Harmon, Lisa F. Siegel, Paula S. Pearlman, Cindy Cannata, and Thomas A. Hennick.

The Commissioners unanimously voted to approve the Commission's regular meeting minutes of August 22, 2018.

Those in attendance were informed that the Commission does not ordinarily record the remarks made at its meetings, but will do so on request.

[Docket #FIC 2018-0059](#)

Dale Kukucka v. Dora Schriro, Commissioner, State of Connecticut, Department of Emergency Services and Public Protection; and State of Connecticut, Department of Emergency Services and Public Protection

Dale Kukucka participated via speakerphone. The Commissioners unanimously voted to adopt the Hearing Officer's Report. The proceedings were recorded digitally.

[Docket #FIC 2013-479](#)

Robert Cushman v. Chief, Police Department, Town of Montville; and Police Department, Town of Montville

Attorney Matthew Willis appeared on behalf of the respondents. The Commissioners unanimously voted to adopt the Hearing Officer's Report. The proceedings were recorded digitally.

[Docket #FIC 2017-0601](#) Robert Cushman v. Chief, Police Department, City of Hartford;
Police Department, City of Hartford; and City of Hartford

The Commissioners unanimously voted to adopt the Hearing Officer's Report.

[Docket #FIC 2017-0572](#) Michael Dinan and New Canaanite v. Chairpersons, Town
Building Evaluation and Use Committee, Town of New Canaan;
Town Building Evaluation and Use Committee, Town of New
Canaan; and Town of New Canaan

Michael Dinan appeared on behalf of the complainants. Attorney Ira Bloom appeared on behalf of the respondents. The Commissioners unanimously voted to amend the Hearing Officer's Report. The Commissioners unanimously voted to adopt the Hearing Officer's Report as amended.* The proceedings were recorded digitally.

[Docket #FIC 2017-0615](#) Jay Hardison v. Chairman, Board of Education, Darien Public
Schools; and Board of Education, Darien Public Schools

Jay Hardison appeared on his own behalf. Attorney Melika Forbes appeared on behalf of the respondents. The Commissioners voted, 4-0, to amend the Hearing Officer's Report. The Commissioners voted, 4-0, to adopt the Hearing Officer's Report as amended.* The proceedings were recorded digitally. Commissioner Shaw did not participate in this matter.

[Docket #FIC 2017-0628](#) James Torlai v. Treasurer, State of Connecticut, Office of the
State Treasurer; and State of Connecticut, Office of the State
Treasurer

The Commissioners unanimously voted to adopt the Hearing Officer's Report.

[Docket #FIC 2017-0686](#) James Carey v. Superintendent of Schools, Regional School
District 4; and Regional School District 4

James Carey appeared on his own behalf. Attorney Kevin Roy appeared on behalf of the respondents. The Commissioners voted, 4-0, to remand the matter to the Hearing Officer for further review. The proceedings were recorded digitally. Commissioner Shaw did not participate in this matter.

[Docket #FIC 2017-0700](#)

Raymond Reynolds v. Chief, Police Department, City of Shelton; Police Department, City of Shelton; and City of Shelton

Raymond Reynolds appeared on his own behalf. Attorney John Bashar appeared on behalf of the respondents. The Commissioners voted, 4-0, to adopt the Hearing Officer's Report. The proceedings were recorded digitally. Commissioner Shaw did not participate in this matter.

[Docket #FIC 2017-0701](#)

Douglas Steeves v. Chief, Police Department, City of Shelton; Police Department, City of Shelton; and City of Shelton

Attorney John Bashar appeared on behalf of the respondents. The Commissioners voted, 4-0, to adopt the Hearing Officer's Report. Commissioner Shaw did not participate in this matter.

[Docket #FIC 2017-0717](#)

Kimberly Kenneson v. Executive Director, State of Connecticut, Commission on Human Rights and Opportunities; and State of Connecticut, Commission on Human Rights and Opportunities

Kimberly Kenneson appeared on her own behalf. Attorney Kimberly Jacobsen appeared on behalf of the respondents. The Commissioners voted, 4-0, to adopt the Hearing Officer's Report. The proceedings were recorded digitally. Commissioner Shaw did not participate in this matter.

[Docket #FIC 2018-0002](#)

Ed Schwing v. Elizabeth Milardo, First Selectman, Town of Haddam; Board of Selectmen, Town of Haddam; and Town of Haddam

Ed Schwing appeared on his own behalf. Attorney Richard Carella appeared on behalf of the respondents. The Commissioners voted, 4-0, to adopt the Hearing Officer's Report. The proceedings were recorded digitally. Commissioner Shaw did not participate in this matter.

[Docket #FIC 2018-0253](#)

Melissa Schlag v. First Selectman, Town of Haddam; and Town of Haddam

Melissa Schlag appeared on his own behalf. Attorney Richard Carella appeared on behalf of the respondents. The Commissioners voted, 4-0, to adopt the Hearing Officer's Report. The proceedings were recorded digitally. Commissioner Shaw did not participate in this matter.

[Docket #FIC 2018-0254](#)

Melissa Schlag v. First Selectman, Town of Haddam; and
Town of Haddam

Melissa Schlag appeared on his own behalf. Attorney Richard Carella appeared on behalf of the respondents. The Commissioners voted, 4-0, to amend the Hearing Officer's Report. The Commissioners voted, 4-0, to adopt the Hearing Officer's Report as amended.* The proceedings were recorded digitally. Commissioner Shaw did not participate in this matter.

The Commissioners voted, 4-0, to overrule the respondents' objection and grant a motion to reopen dated August 31, 2018, filed by the complainant in *Yvonne Perkins v. Chief, Police Department, City of Danbury; Police Department, City of Danbury; and City of Danbury*, Docket #FIC 2017-0702. Commissioner Shaw did not participate in this matter.

Colleen M. Murphy reported on pending appeals.

Colleen M. Murphy reported that Attorney Tracie C. Brown had left her position with the FOI Commission after 20 years of service. Director Murphy thanked Attorney Brown for her service and said she would be missed.

The meeting was adjourned at 5:34 p.m.

Thomas A. Hennick
MINREGmeeting 09122018/tah/09142018

* See attached for amendments

AMENDMENTS

[Docket #FIC 2017-0572](#)

Michael Dinan and New Canaanite v. Chairpersons, Town Building Evaluation and Use Committee, Town of New Canaan; Town Building Evaluation and Use Committee, Town of New Canaan; and Town of New Canaan

The Hearing Officer's Report is amended as follows:

18. Section 1-206(b)(2), G.S., now provides:

[a]ny 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. A notice of appeal shall be filed not later than thirty days after such denial, except in the case of an unnoticed or secret meeting, in which case the appeal shall be filed not later than thirty days after the person filing the appeal receives actual or constructive notice that such meeting was held. (*EMPHASIS SUPPLIED*)

19. Whether a statute has retroactive application depends upon whether the legislature intended a change in the law, or merely intended to clarify existing law. State of Connecticut, et al. v. State Employees' Review Bd. et al., 239 Conn. 638, 648 (1997) ("State Employees' Review Board"). "An amendment which in effect construes and clarifies a prior statute must be accepted as the legislative declaration of the meaning of the original act." Id. at 649, citing Kluttz v. Howard, 228 Conn. 401, 409 (1994). "An amendment that is intended to clarify the original intent of an earlier [statue] **STATUTE** necessarily has retroactive effect." Id., citing State v. Magnano, 204 Conn. 259 (1987).

24. The respondents contend that, because Mr. Dinan wrote an article on March 27, 2017 about the [Commission's] **COMMITTEE'S** work, including the fact that "Committee members [had] been assigned various buildings to visit in teams and gather up information and data to take back to the full group," and wrote another article on April 17, 2017 about one particular site visit that had occurred at the Waveny House,¹ he knew or should have known that all *future* site visits would be conducted as unnoticed meetings. In essence, the respondents contend that the complainants' awareness of the committee's work constituted constructive notice of future subcommittee meetings. The Commission disagrees.

¹ Waveny House was one of the 56 buildings the Committee was charged with evaluating.

30. It is found that, at the Committee’s first meeting, referred to in paragraph 10, above, before the Committee determined that the members should be divided into teams, the Committee first “discussed FOIA [obligation] **OBLIGATIONS** for publication of meeting minutes and agendas, as well as communications among the members of the Committee.” Accordingly, it is clear that the Committee wanted to comply with the FOI Act, but did not understand that the work of the subcommittees would be subject to the same requirements of the FOI Act as would the work of the full Committee. [It is concluded that a FOI training session would be beneficial to the respondents and one is so ordered.]

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(a) and 1-225(d), G.S

[2. Forthwith, the respondents, or their designee, shall arrange for a FOI Act training session to be conducted by the staff of the FOI Commission. The respondents, or their designee, shall forthwith contact the FOI Commission to schedule such training session. All seven members of the Committee shall attend the training session.]

[Docket #FIC 2018-0254](#)

Melissa Schlag v. First Selectman, Town of Haddam; and
Town of Haddam

The Hearing Officer’s Report is amended as follows:

[8. Based on the specific facts and circumstances of this case, it is found that the May 2 request was not a request for records under the FOI Act.

9. Because there was no request made under the FOI Act, there was no denial of a right conferred by the FOI Act, and therefore the Commission lacks jurisdiction to consider the merits of the allegations in the complaint.]

8. BASED UPON THE SPECIFIC FACTS AND CIRCUMSTANCES OF THIS CASE, WHEREIN THE REQUEST WAS CLEARLY INTENDED TO BE AN INFORMAL REQUEST TO A COLLEAGUE AS PART OF AN ONGOING DIALOG BETWEEN THE COMPLAINANT AND THE FIRST SELECTMAN, AND NOT A PUBLIC RECORDS REQUEST, IT IS CONCLUDED THAT THE COMMISSION LACKS JURISDICTION TO CONSIDER THE ALLEGATIONS IN THE COMPLAINT.

The remaining paragraphs are then renumbered, Paragraph 10 becomes 9, 11 becomes 10 etc.

Docket #FIC 2017-0615 Jay Hardison v. Chairman, Board of Education, Darien Public Schools; and Board of Education, Darien Public Schools

AMENDMENTS TO DOCKET #FIC 2017-0615

Paragraph 43 of the Hearing Officer’s Report is amended, as follows:

43. While it is unclear whether personally identifiable student information contained within a record that itself does not directly pertain to the student, and is therefore not an education record, is exempt from disclosure, the Commission in its discretion declines to order the production of the following personally identifiable student information within the in camera records:

- a. All instances where a student is named;
- b. All instances where a student’s parent is named;
- c. All instances where a student’s parent’s email is identified;
- d. Record 14 page 27: the phrase beginning after the colon in line 23 and through the end of the paragraph.
- e. Record 14 page 28: beginning with line 31 (subparagraph b) through clauses (i) and (ii) of that subparagraph
- f. Record 14 page 28 line 41 the fourth through the eighth words;
- g. Record 14 page 29 line 5 the ninth and tenth words [(??)]; line 6 subparagraph (i); line 9 the last three words

H. ALL INSTANCES OF THE PHRASES DESCRIBED IN PARAGRAPHS (D) THROUGH (G), ABOVE, THAT APPEAR IN IDENTICAL PARAGRAPHS IN THE IN CAMERA RECORDS.

Paragraph 46 of the Hearing Officer’s Report is amended, as follows:

46. The “certain educational programming” referred to by the respondents in the federal statute and regulations cited by them pertains specifically to special education and related services provided under the Individuals with Disabilities Education Act (“IDEA”). Assuming, only for the sake of argument, that special education or related services provided under IDEA relate to the requested records, IDEA simply incorporates the requirements of FERPA, and provides only limited additional privacy protections only with regard to confidentiality concerns not at issue in this case. [See, e.g. 34 CFR 300.573; 300.574; 300.561; 300.572.]

A new paragraph 47 of the Hearing Officer’s Report is added, as follows:

47. IT IS FOUND THAT A SINGLE PARAGRAPH APPEARING IN TWO OF THE IN CAMERA RECORDS REFERS GENERALLY TO A COMPLAINT ABOUT THE BEHAVIOR OF SCHOOL STAFF WITH REGARD TO CERTAIN EDUCATIONAL PROGRAMMING. ALTHOUGH NO SPECIFIC PROGRAMMING IS DESCRIBED, IT IS FOUND THAT PORTIONS OF THAT PARAGRAPH LINK THE GENERALLY DESCRIBED PROGRAMMING WITH A STUDENT, AND THAT LINK COULD BE

CONSIDERED PERSONALLY IDENTIFIABLE INFORMATION WITHIN THE MEANING OF 34 C.F.R. §99.3(F). AS PREVIOUSLY NOTED IN PARAGRAPH 43, ABOVE, IT IS UNCLEAR WHETHER PERSONALLY IDENTIFIABLE STUDENT INFORMATION IS EXEMPT FROM DISCLOSURE UNDER FERPA IF IT IS CONTAINED WITHIN A RECORD THAT ITSELF DOES NOT DIRECTLY PERTAIN TO A STUDENT, AND IS THEREFORE ITSELF NOT AN EDUCATION RECORD. NONETHELESS, THE COMMISSION IN ITS DISCRETION DECLINES TO ORDER THE PRODUCTION OF THE FOLLOWING PERSONALLY IDENTIFIABLE STUDENT INFORMATION WITHIN THE IN CAMERA RECORDS:

A. IN THE IN CAMERA RECORDS, ALL INSTANCES OF THE PHRASE FIRST APPEARING AS THE SECOND AND THIRD WORDS OF LINE 32 ON PAGE 30;

B. IN THE IN CAMERA RECORDS, ALL INSTANCES OF THE PHRASE FIRST APPEARING AS THE FOURTH AND FIFTH WORDS OF LINE 35 ON PAGE 30;

C. IN THE IN CAMERA RECORDS, ALL INSTANCES OF THE ENTIRE PARENTHETICAL PHRASE FIRST APPEARING ON LINES 36-37 OF PAGE 30.

Renumber paragraphs 47 through 50 as 48 through 51.

Paragraph 51 is amended as follows:

52. [51.] It is found that the single communication identified in paragraph **48** [47], above, satisfies the elements of the attorney-client privilege.

Renumber paragraph 52 as 53.

Paragraph 2 of the order is amended as follows:

2. [Additionally, i] In complying with paragraph 1 of this order, the respondents may redact the portions of the in camera records identified in paragraph **S 43 AND 47**, above.