FREEDOM OF INFORMATION COMMISSION
OF THE STATE OF CONNECTICUT

In the Matter of a Complaint by

NOTICE OF FINAL DECISION

Jim Moore and the
Waterbury Republican American,

Complainants

against

Docket #FIC 2010-132

State of Connecticut,
Department of Education,
Contract Arbitration Panel; and
State of Connecticut,
Department of Education,

Respondents

February 25, 2011

TO: Attorney Thomas G. Parisot, for the complainants; Attorney Victor M. Muschell, for Victor Schoen, member of Contract Arbitration Panel; J. Larry Foy, pro se, as member of Contract Arbitration Panel; Martin A. Gould, pro se, as member of Contract Arbitration Panel; and Assistant Attorney General Jane D. Comerford, for State of Connecticut, Department of Education.

This will serve as notice of the Final Decision of the Freedom of Information Commission in the above matter as provided by §4-183(c), G.S. The Commission adopted the Final Decision in the above-captioned case at its regular meeting of February 23, 2011.

By Order of the Freedom of
Information Commission

Petrea A. Jones

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Acting Clerk of the Commission

FIC/2010-132/NFD/paj/2/25/2011

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The above-captioned matter was heard as a contested case on June 1, 2010, at which time the hearing was continued until the Department of Education was added as a party. The matter was then heard as a contested case on November 23, 2010, at which time the complainants 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 respondent Department of Education is a public agency within the meaning of §1-200(1), G.S.

2. The respondent Contract Arbitration Panel maintains that it is not a public agency within the meaning of §1-200(1), G.S.[1]

3. Section 1-200(1), G.S., provides;

> "Public agency" or "agency" means: (A) Any executive, administrative or legislative office of the state or any

[1] In Glastonbury Education Association v. FOIC, 234 Conn. 704 (1995), under very similar facts, the parties did not dispute that an arbitration panel convened under the Teacher Negotiation Act (§10-153a et seq., G.S.), like the one in this case, is a public agency for purposes of the FOI Act. Id., n. 6. The Glastonbury court made no explicit finding that such a panel was public agency within the meaning of §1-200(1), G.S., although such a jurisdictional fact would appear to have been a threshold issue.

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; (B) Any person to the extent such person is deemed to be the functional equivalent of a public agency pursuant to law; or (C) Any "implementing agency", as defined in section 32-222. [Emphasis added.]

4. Black's Law Dictionary (5th Ed. 1979) defines "committee" as:

> A person, or an assembly or board of persons, to whom the consideration, determination, or management of any matter is committed or referred, as by a court or legislature. An individual or body to whom others have delegated or committed a particular duty, or who have taken on themselves to perform it in the expectation of their act being confirmed by the body they profess to represent or act for.

5. Section 10-153f, G.S., provides in relevant part:

> (a) There shall be in the Department of Education an arbitration panel of not less than twenty-four or more than twenty-nine persons to serve as provided in subsection (c) of this section. The Governor shall appoint such panel, with the advice and consent of the General Assembly, as follows: (1) Seven members shall be representative of the interests of local and regional boards of education ... (2) seven members shall be representative of the interests of exclusive bargaining representatives of certified employees ... and (3) not less than ten or more than fifteen members shall be impartial representatives of the interests of the public in general .... Each member of the panel shall serve a term of two years, provided each arbitrator shall hold office until a successor is appointed .... Persons appointed to the arbitration panel shall serve without compensation but each shall receive a per diem fee for any day during which such person is engaged in the arbitration of a dispute

pursuant to this section. The parties to the dispute so arbitrated shall pay the fee in accordance with subsection (c) of this section.

...

(c) (1) [T]he commissioner shall order the parties ... if there is no [mediated] settlement [pursuant to subsection (b) of this section] ... to notify the commissioner of ... the name of the arbitrator selected by each of them. ... Within five days of providing such notice, the parties shall notify the commissioner of the ... agreement on the third arbitrator appointed to the panel pursuant to [subdivision (3) of subsection (a) of this section]. ... If ... the parties have not agreed on the third arbitrator ... the commissioner shall select a third arbitrator, who shall be an impartial representative of the interests of the public in general. ... Whenever a panel of three arbitrators is selected, the chairperson of such panel shall be the impartial representative of the interests of the public in general.

(2) At the hearing each party shall have full opportunity to submit all relevant evidence, to introduce relevant documents and written material and to argue on behalf of its positions. At the hearing a representative of the fiscal authority having budgetary responsibility or charged with making appropriations for the school district shall be heard regarding the financial capability of the school district ....

...

(4) After hearing all the issues, the arbitrators ... shall ... render a decision in writing, signed by a majority of the arbitrators ... which states in detail the nature of the decision and the disposition of the issues by the arbitrators ....The decision by the arbitrators ... shall be final and binding upon the parties to the dispute unless a rejection is filed in accordance with subdivision (7) of this subsection. ... The parties shall submit to the arbitrators ... their respective positions on each individual issue in dispute between them in the form of a last best offer. The arbitrators ... shall resolve separately each individual disputed issue by accepting the last best offer thereon of either of the parties ....

...

(7) The award of the arbitrators ... may be rejected by the legislative body of the local school district .... (A) [T]he commissioner shall select a review panel of three arbitrators ... and (B) such arbitrators ... shall review the decision on each rejected issue. ... [A]fter completion of such review, the arbitrators ... shall render a final and binding award with respect to each rejected issue. ...

(8) The decision of the arbitrators ... shall be subject to judicial review .... The superior court, after hearing, may vacate or modify the decision if substantial rights of a party have been prejudiced ....

(d) The ... arbitrators ... shall have the same powers and duties as the board [of labor relations] under section 31-108 for the purposes of mediation or arbitration pursuant to this section ... and all provisions in section 31-108 with respect to procedure, jurisdiction of the Superior Court, witnesses and penalties shall apply.

...

(f) The State Board of Education shall adopt regulations pursuant to chapter 54 concerning the method by which names of persons who are impartial representatives of the interests of the public in general are placed on lists submitted by the State Board of Education to the Governor for appointment to the arbitration panel established pursuant to subsection (a) of this section. Such regulations shall include, but not be limited to (1) a description of the composition of the group which screens persons applying to be such impartial representatives ... (2) application requirements and procedures and (3) the selection criteria and process, including an evaluation of an applicant's experience in arbitration. ...

6. Section 31-108, G.S., provides in relevant part:

For the purpose of hearings before the [State] [B]oard [of Labor Relations], the board shall have power to administer oaths and affirmations and to issue subpoenas requiring the attendance of witnesses. ... Witnesses summoned before the board ... shall be paid the same fees and mileage allowances that are paid witnesses in the courts of this state ....

7. It is found that the respondent Contract Arbitration Panel consists of three members, drawn from the pool of arbitrators maintained by the respondent Department of Education pursuant to §10-153f(a) and (c), G.S. One member was selected by the employer, a second by the employees' collective bargaining unit, and the third by the first two arbitrators.

8. It is found that the respondent panel is a board of appointed individuals to whom the consideration and determination of contractual disputes between boards of education and teachers unions have been committed by the General Assembly.

9. It is concluded that the respondent arbitration panel is a committee of the State Board of Education, and therefore a public agency within the meaning of §1-200(1), G.S.

10. Although the complainants additionally maintain that the respondent arbitration panel is the functional equivalent of a public agency, that category is typically reserved for hybrid public-private agencies. Little about the respondent arbitration panel is private, other than per diem pay being provided by collective bargaining unit. See §10-153f(a) and (c), G.S. The Commission agrees with the complainants that the panel performs a governmental function, is a creature of statute, and is highly intertwined with the respondent Department of Education, which is at the core of the program. These facts would indeed satisfy the functional equivalent analysis required by §1-200(1)(B) and Woodstock Academy v. FOIC, 181 Conn. 544 (1980). However, that analysis is unnecessary in light of the conclusion in paragraph 9, above. Moreover, the lack of any significant private, as opposed to public, component in the arbitration panel renders such an analysis pursuant to §1-200(1)(B), G.S., irrelevant, as it would be irrelevant to any public agency that already falls within the definition at §1-200(1)(A), G.S.

11. The respondent Department of Education maintains that it is not a proper party to this proceeding, citing Docket #FIC 2004-178, Williams v. Office of Labor Relations.

12. In Williams, the Commission concluded that a hearing conducted by an arbitrator to resolve a grievance was not a meeting of the Office of Labor Relations, and that the Office could not therefore be held accountable for any FOI Act violation that might have occurred at such a hearing.

13. However, Williams is clearly distinguishable. First, the issue in the instant case is not whether the Office of Labor Relations is a proper party, but whether the Department of Education is. The Office of Labor Relations is not in the same relationship to an arbitral board as is the Department of Education. Second, the issue decided in paragraphs 8 and 9, above, whether the arbitration panel is a committee of the Department of Education, was not addressed in Williams.

14. Since the respondent arbitration panel is a committee of the respondent Department of Education, it is concluded that the Department of Education is a proper

party. If the Department of Education believes it has no interest in this dispute, it will not be affected by the decision, and its designation as a party cannot prejudice or harm it.

15. By letter of complaint filed March 1, 2010, the complainants appealed to the Commission, alleging that the respondents violated the open meetings provisions of the FOI Act when, on January 30, 2010, they convened privately to hear testimony from the Torrington Board of Education and the Torrington Education Association, as required by the Teacher Negotiation Act, following rejection, by the Torrington City Council on December 21, 2009, of a negotiated agreement between the Torrington Board of Education and the Torrington Education Association. The complainants "reserve[d] the right to seek imposition of civil penalties."

16. It is found that the respondent panel, after a request by the Torrington Education Association to exclude the Republican-American reporter from the hearing in its entirety, adjourned to what arbiter Foy described as an "executive session," without taking a vote to do so. The chair of the arbitration panel noted at the time that the issue of whether the panel could convene in executive session appeared to have been left undecided by Glastonbury Education Association v. FOIC, 234 Conn. 704 (1995).

17. Section 1-225(a), G.S., provides in relevant part: "The meetings of all public agencies, except executive sessions, as defined in subdivision (6) of section 1-200, shall be open to the public."

18. Section 1-200(2) provides:

> "Meeting" means any hearing or other proceeding of a public agency, any convening or assembly of a quorum of a multimember public agency, and any communication by or to a quorum of a multimember public agency, whether in person or by means of electronic equipment, to discuss or act upon a matter over which the public agency has supervision, control, jurisdiction or advisory power. "Meeting" does not include: Any meeting of a personnel search committee for executive level employment candidates; any chance meeting, or a social meeting neither planned nor intended for the purpose of discussing matters relating to official business; strategy or negotiations with respect to collective bargaining; a caucus of members of a single political party notwithstanding that such members also constitute a quorum of a public agency; an administrative or staff meeting of a single-member public agency; and communication limited to notice of meetings of any public agency or the agendas thereof. A quorum of the members of a public agency who are present at any event which has been noticed and conducted as a meeting of another public agency under the provisions of the Freedom

> of Information Act shall not be deemed to be holding a meeting of the public agency of which they are members as a result of their presence at such event.

19. The respondent Department of Education maintains that the January 30, 2010 hearing is not a "meeting" because the arbitrators are chosen by the parties, because the fees of the arbitrators are paid for by the parties to the arbitration; and because the arbitrators are not agents of the Department of Education.

20. However, it is concluded that the January 30, 2010 hearing is a "hearing or other proceeding" of the respondent arbitration panel, and the fact that the panel has some independence from the Department of Education does not take its hearings outside of §1-200(2), G.S.

21. Both respondents maintain that the January 30, 2010 hearing of the arbitration panel constitutes "strategy and negotiation with respect to collective bargaining," and therefore is an exception to the definition of "meeting" in §1-200(2), G.S.

22. In Glastonbury Education Association, above, our Supreme Court construed the "strategy and negotiation with respect to collective bargaining" language in §1-200(2), G.S., to exclude from the term "meeting" only those parts of collective bargaining sessions that relate specifically to "strategy or negotiations," rather than to collective bargaining proceedings in their entirety. Because the Commission in that case had concluded that the *entirety* of an arbitration hearing should have been open to the public, including those parts that related specifically to "strategy and negotiations," the Court "postpone[d] to another day questions concerning the validity of a more narrowly tailored FOIC order that requires open hearings only with respect to evidentiary presentations and permits executive sessions for discussion and argument about the contents of the parties' last best offers." Id. at 718

23. The Glastonbury court did provide some guidance in distinguishing between discussion and argument about last best offers, which it concluded constituted "strategy and negotiations," and the evidentiary portions of the proceedings, which it concluded did not fall within that meeting exclusion.

24. First, the Glastonbury court concluded that the actual presentation of last best offers by the parties sufficiently resembles negotiations, despite the fact that they occur during a proceeding denominated as "arbitration," to be excluded from the "meeting" requirements of the FOI Act. Id. at 717.

25. Second, the Glastonbury court at 717-718 observed that the Teacher Negotiations Act "permits each party, in its presentations to the arbitral board, 'to submit all relevant evidence, to introduce relevant documents and written material, and argue on behalf of its last best offer.' [Citation omitted.] In aid of this *evidentiary process*, the arbitrators have the 'power to administer oaths and affirmations and to issue subpoenas

requiring the attendance of witnesses.' [Citation omitted.] Thus, the arbitration hearing also provides an opportunity for the parties *to create an evidentiary record* on which the arbitrators can rely in making their final determination of any issues left unresolved." [Emphasis added.]

26. Third, the Glastonbury court noted that the TNA "specifically contemplates the presentation of certain financial data. General Statutes §10-153fc)(2) provides in relevant part: 'At the hearing a representative of the fiscal authority having budgetary responsibility or charged with making appropriations for the school district shall be heard regarding the financial capability of the school district, unless such opportunity to be heard is waived by the fiscal authority." Id., n. 9. This financial data would be contained in the evidentiary record.

27. Finally, the Commission is guided by the Glastonbury court's analysis of the policy underlying its conclusion that only the "strategy and negotiations" portions of an arbitration hearing fall within the statutory exclusion contained in §1-200(2), G.S.:

> Inquiry into the scope of the statutory exclusion for collective bargaining contained in §1-18a(b) [now §1-200(2)] must commence with the recognition of the legislature's general commitment to open governmental proceedings. "The overarching legislative policy of the FOIA is one that favors 'the open conduct of government and free public access to government records.' " [Citations omitted.] The sponsors of the FOIA understood the legislation to express the people's sovereignty over "the agencies which serve them"; [citations omitted] and this court consistently has interpreted that expression to require diligent protection of the public's right of access to agency proceedings. "Our construction of the [FOIA] must be guided by the policy favoring disclosure and exceptions to disclosure must be narrowly construed." [Citations omitted.]
>
> In light of these principles, the statutory definition of public meetings contained in §1-18a(b) must be read to limit rather than to expand the opportunities for public agencies to hold closed hearings. Accordingly, the language providing that public meetings "shall not include ... strategy or negotiations with respect to collective bargaining" means, as the FOIC maintains, that what is excluded from the term "meeting" is not all collective bargaining, but only "strategy or negotiations" sessions that relate to collective bargaining. This interpretation accords proper respect for the manifest legislative policy expressed in the FOIA. It also comports with its legislative history, which suggests that the collective

> bargaining exception was understood to provide privacy for "the give-and-take in negotiating sessions of collective bargaining...." (Emphasis added.) 18 H.R.Proc., supra, p. 3896. Had the legislature intended a broader exclusion, it could have excluded "collective bargaining" without limitation, or it could have excluded "collective bargaining, including but not limited to strategy and negotiations relating thereto." See Bloomfield Education Assn. v. Frahm, 35 Conn.App. 384, 389, 646 A.2d 247, cert. denied, 231 Conn. 926, 648 A.2d 161 (1994). It chose neither of these options.
>
> Our interpretation of § 1-18a(b) finds further support in related provisions of the FOIA that provide limited exceptions to the public disclosure requirement for those portions of proceedings that relate to strategy or negotiations. In § 1-18a(e)(2) [now §1-200(6)], for example, the legislature authorized a public agency to adjourn a meeting into executive session for "strategy and negotiations with respect to pending claims and litigation" to which the agency itself is a party. Pointedly, the legislature did not adopt a more sweeping approach, such as closing the entire meeting, to achieve its purpose of sheltering specified components of the proceedings from public scrutiny. See *Board of Police Commissioners v. Freedom of Information Commission*, 192 Conn. 183, 190, 470 A.2d 1209 (1984) (agency's authority under § 1-18a[e] to adjourn into executive session for deliberations during proceedings about public employee's job performance does not include authority to conduct evidentiary portion of proceedings in private). Similarly, the legislature has exempted from public disclosure not all documents relating to collective bargaining, but only "records, reports and statements of strategy or negotiations with respect to collective bargaining." General Statutes § 1-19(b)(9). Although the legislature's narrowly tailored approach to the FOIA exclusions and exemptions may add a layer of complexity to agency administration, the legislature implicitly has decided that the associated costs are outweighed by the benefits derived from open government.

28. Guided by the Supreme Court's analysis, the Commission makes the following findings.

29. It is found that evidence was presented at the January 30 hearing as to all the statutory factors that the arbitrators are required to consider : the financial capability of

the town; the history of the negotiations between the parties prior to arbitration, including the offers and the range of discussion of the issues; the interests and welfare of the employee group; changes in the cost of living; the existing conditions of employment of the employee group and similar groups; and the salaries, fringe benefits and other conditions of employment prevailing in the state labor market. See §10-153f(c)(4)(A) through (E), G.S.

30. It is found that evidence in support of the statutory factors set forth in §10-153f(c)(4), G.S., included tax collections, debt, capital improvement plans, state aid or grants received by the city, what the city was providing as salary increases if any to its municipal employees, what salary increases if any the board of education was presenting to other board of education employees, what was in the interest and welfare of the Torrington teachers in terms of the ability of the board of education to recruit and retain teachers, the cost of living, and what other settlements had been reached in other school districts.

31. It is found that the evidence presented at the January 30, 2010 hearing was recorded stenographically.

32. It is found that the parties at the arbitration hearing at issue in this case also presented several "last best offers," beginning with an "initial last best offer" and concluding with "final last best offers," and possibly with "interim last best offers" between the two.

33. It is found that the evidence described in paragraphs 30 and 31, above, was in support of the parties' "last best offers," but that the evidence was not itself a "last best offer."

34. It is also found that negotiation was conducted by the parties out of the presence of the panel chair or the panel as a whole, although each party "caucused" separately with its "own" arbitrator.

35. It is found that negotiations conducted by the parties out of the presence of the panel chair or the panel as a whole were not stenographically recorded.

36. It is concluded that the negotiations portion of the January 30, 2010 hearing, conducted off the record away from the panel, and the evidentiary portion of that hearing, conducted on the record in the presence of the panel, were separate.

37. It is concluded that the evidentiary portion of the January 30, 2010 hearing that was recorded stenographically was not "strategy or negotiations with respect to collective bargaining," and therefore was a "meeting" within the meaning of §1-200(2), G.S., that was required to be open to the public.

38. It is therefore concluded that the respondents violated §1-225(a), G.S., by conducting the evidentiary portion of its hearing in private.

39. Because the issue decided in this case was specifically left open in Glastonbury, above, as noted by the arbitration panel, the Commission declines to consider the imposition of a civil penalty.

40. The Commission observes, as a practical consideration, that because the negotiation sessions conducted off the record are excluded from the definition of "meeting," they are not executive sessions, and that therefore no motion or vote to convene in executive session is required under the circumstances of this case.

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 1-200(2), G.S.

2. The respondents shall forthwith, at their own expense create a transcript of the stenographic record of the January 30, 2010 hearing, and provide it to the complainants, free of charge.

Approved by Order of the Freedom of Information Commission at its regular meeting of February 23, 2011.

Petrea A. Jones
Acting Clerk of the Commission

PURSUANT TO SECTION 4-180(e), 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.

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