

FREEDOM OF INFORMATION COMMISSION
OF THE STATE OF CONNECTICUT

In the Matter of a Complaint by

FINAL DECISION

James Maggio,

Complainant

against

Docket #FIC 2023-0251

First Selectwoman, Board of Selectmen,
Town of Weston; Board of Selectmen,
Town of Weston; and Town of Weston,

Respondents

April 10, 2024

The above-captioned matter was heard as a contested case on October 5, 2023, 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 May 19, 2023, the complainant appealed to this Commission, alleging that the respondents violated the Freedom of Information (“FOI”) Act. Specifically, the complainant alleged that during a special meeting of the respondent board of selectmen on May 17, 2023, the respondents entered executive session for an improper purpose.¹
3. It is found that the respondent board of selectmen held a special meeting on May 17, 2023 (“special meeting”). It is also found that at such special meeting the respondents entered executive session to discuss issues related to the Board of Ethics for the Town of Weston (“board of ethics”). It is further found that an item on the agenda for the special meeting was described as “Executive Session regarding Board of Ethics, CGS § 1-200”.
4. Section 1-225(a), G.S., provides, in relevant part:

[t]he meetings of all public agencies, except executive sessions, as defined in subdivision (6) of section 1-200, shall be open to the public. The votes of each member of any such public agency upon any issue before such public

¹ At the hearing on this matter, the complainant alleged additional violations of the FOI Act that were not fairly raised in his complaint, and therefore, will not be further addressed herein.

agency shall be reduced to writing and made available for public inspection within forty-eight hours and shall also be recorded in the minutes of the session at which taken. Not later than seven days after the date of the session to which such minutes refer, such minutes shall be available for public inspection and posted on such public agency's Internet web site, if available ... Each public agency shall make, keep and maintain a record of the proceedings of its meetings.

5. Section 1-200(6), G.S., provides in relevant part:

'[e]xecutive sessions' means a meeting of a public agency at which the public is excluded for one or more of the following purposes:

(A) Discussion concerning the appointment, employment, performance, evaluation, health or dismissal of a public officer or employee, provided that such individual may require that discussion be held at an open meeting;

(B) strategy and negotiations with respect to pending claims or pending litigation to which the public agency or a member thereof, because of the member's conduct as a member of such agency, is a party until such litigation or claim has been finally adjudicated or otherwise settled;

(C) matters concerning security strategy or the deployment of security personnel, or devices affecting public security;

(D) discussion of the selection of a site or the lease, sale or purchase of real estate by the state or a political subdivision of the state when publicity regarding such site, lease, sale, purchase or construction would adversely impact the price of such site, lease, sale, purchase or construction until such time as all of the property has been acquired or all proceedings or transactions concerning same have been terminated or abandoned; and

(E) discussion of any matter which would result in the disclosure of public records or the information contained therein described in subsection (b) of section 1-210.

6. At the hearing on this matter, the respondents testified, and it is found, that during the May 17, 2023 executive session they discussed a legal memorandum that was prepared for the

respondent board by their attorney, in order to provide the respondents with legal advice regarding the matters referenced in paragraphs 14, 15, and 16, below.

7. Section 1-210(b)(10), G.S., permits a public agency to withhold from disclosure records of “communications privileged by the attorney-client relationship.”

8. It is found that such memorandum, even if it were once privileged by the attorney-client relationship, had been disclosed to the public prior to the May 17, 2023 executive session.

9. Since the memorandum described in paragraph 6, above, had been disclosed to the public prior to the May 17, 2023 executive session, it was not be exempt from disclosure under §1-210(b)(10), G.S., as an attorney-client privileged communication. It is therefore concluded that the discussion of such memorandum, which was not exempt from disclosure, was not a proper basis for convening an executive session, pursuant to §1-200(6)(E), G.S.

10. The respondents also claimed that the May 17, 2023 executive session was properly held to discuss strategy or negotiations with respect to a pending claim or pending litigation against the respondent board of selectmen, and as such, it was a proper purpose for convening in executive session, pursuant to §1-200(6)(B), G.S.

11. The phrase “pending claim” as defined in §1-200(8) means:

[a] written notice to an agency which sets forth a demand for legal relief or which asserts a legal right stating the intention to institute an action in an appropriate forum if such relief is not granted.

12. The phrase “pending litigation” as defined in §1-200(9) means:

(A) a written notice to an agency which sets forth a demand for legal relief or which asserts a legal right stating the intention to institute an action before a court if such relief or right is not granted by the agency; (B) the service of a complaint against an agency returnable to a court which seeks to enforce or implement legal relief or a legal right; or (C) the agency's consideration of action to enforce or implement legal relief or a legal right.

13. Strategy is defined as “a careful plan or method and the art of devising or employing plans or stratagems toward a goal. ... Negotiations is a broad term ... but in general it means the deliberation which takes place between the parties touching a proposed agreement.” (Citations omitted; internal quotation marks omitted.) Bloomfield Education Association v. Frahm, 35 Conn. App. 384, 390, cert. denied, 231 Conn. 926 (1994).

14. It is found that, at the time of the May 17, 2023 special meeting, the respondents were considering whether to remove certain members of the town’s board of ethics, including Ruth Israely, due to allegedly improper actions having been taken by such board or its members.

15. It is found that, in response to the potential removal of certain members of the board of ethics, by email dated April 24, 2023, Ms. Israely sent an email to the respondent board of selectmen, wherein she requested:

[(a)] a written statement of the alleged violations against the members of the [b]oard of [e]thics that would give rise to the question of whether we should be removed;

[(b)] a 90 day [sic] continuance of the May 18th hearing on the [b]oard of [e]thics so that I may have the opportunity to seek counsel and gather evidence in advance of the hearing; and

[(c)] an assurance that Ms. Jenner and Mr. Mohabeer will recuse [themselves] from the May 18th hearing because I believe they are biased against at least me, and probably all three remaining members of the [b]oard of [e]thics.

16. The respondents testified at the hearing, and it is found, that, on or around April 24, 2023, Ms. Israely spoke to the Town Attorney for the Town of Weston by telephone and informed him that she was preparing to file an injunction against the town. It is also found, however, that Ms. Israely never filed an injunction against the respondents.

17. In support of their claim, described in paragraph 10, above, the respondents argued that the conversation described in paragraph 16, above, together with the email requests described in paragraph 15, above, provided a proper basis for the respondent board's belief that, at the time of the special meeting, a pending claim or pending litigation existed against them, and that they entered executive session on May 17, 2023, for a permissible purpose

18. With regard to the email, described in paragraph 14, above, it is found that Ms. Israely requested certain actions from the respondents, but that the actions sought did not constitute a request for "legal relief" within the meaning of §1-200(8) or §1-200(9), G.S., above, and even if her email did constitute a request for "legal relief", within the meaning of §1-200(8) or §1-200(9), G.S., it did not state "the intention to institute an action in an appropriate forum if such relief is not granted". See Chairperson, Connecticut Medical Examining Board v. Freedom of Information Commission, 310 Conn. 276, 286 (2013) ("Medical Examining Board") ("[t]he letter in the present case does not contain either a demand for legal relief or evidence of an intent to institute an action in an appropriate forum if the board does not grant that relief. Accordingly, it does not constitute notice of a pending claim."). See also Docket #FIC 2011-293; Salvatore Gabriele v. Daniel Young, Chairman, Board of Ethics, City of Stamford, et al. (March 28, 2011) (motion to limit scope of hearing not a "pending claim" because "it does not set forth a demand for legal relief...stating the intention to institute an action..."); Docket #FIC 2011-284; Handsome, Inc. v. Planning and Zoning Commission, Town of Monroe, et al. (March 28, 2013); Docket #FIC 2008-048; Friends of Open Space v. Conservation Commission, Town of Fairfield

(January 14, 2009); Docket #FIC 2008-286; John Spang, Jr. v. Board of Education, Norwich Public Schools, (October 22, 2008).

19. Based upon the facts and circumstances of this matter, and the cases cited in paragraph 18, above, it is concluded that the email described in paragraph 15, above, does not constitute a “pending claim” or “pending litigation” within the meaning of §§1-200(8) and 1-200(9)(A), G.S.

20. With regard to the phone conversation described in paragraph 16, above, it is found that §§1-200(8) and 1-200(9)(A) require that any “demand for legal relief” or “[assertion of] a legal right” must be written in order to constitute a “pending claim” or “pending litigation” within the meaning of §§1-200(8) and 1-200(9)(A), G.S.

21. It is therefore concluded that the phone conversation described in paragraph 16, above, does not constitute a “pending claim” or “pending litigation” within the meaning of §§1-200(8) and 1-200(9)(A), G.S.

22. Moreover, it is also found that, in order to qualify for the executive session provision in §1-200(6)(B), G.S., the claiming agency must be a “party” to such “pending claim” or “pending litigation”. See Planning & Zoning Comm’n of Town of Monroe v. Freedom of Info. Comm’n, 316 Conn. 1, 14 (2015) (“Monroe Planning & Zoning”) (“the zoning commission cannot be a party to its own regulatory proceeding). See also Medical Examining Board, 310 Conn. 276, 288 n. 12 (2013) (when an agency serves as the decision-making body in a proceeding, it is not “a party” to such proceeding). The respondents, therefore, were also not a party to any pending claim or pending litigation within the meaning of §1-200(6)(B), G.S.

23. For the reasons set forth in paragraphs 19 through 22, above, it is concluded that the email, described in paragraph 15, above, and the phone conversation, described in paragraph 16, above, did not form a proper basis for the respondents to convene an executive session under §§1-200(6)(B), 1-200(8), and 1-200(9)(A), G.S.

24. In their post-hearing brief, the respondents also argue, for the first time, that the executive session on May 17, 2023, was proper because the underlying facts and circumstances, as described in paragraphs 14 through 16, above constitute “pending litigation” pursuant to §1-200(9)(C), G.S., which includes “the agency’s consideration of action to enforce or implement legal relief or a legal right.”

25. It is found that, unlike § 1-200(9)(A), G.S., there is no requirement in §1-200(9)(C), G.S., that the contemplation of “pending litigation” be reduced to writing in order to form a proper basis for discussion in executive session.

26. The respondents testified, and it is found, that the executive session discussion centered on the facts described in paragraph 14, above, and more specifically on consideration of whether the respondent board of selectmen should remove Ms. Israely and other members of the board of ethics. The respondents argued that consideration of such removal constituted

discussion of “pending litigation” pursuant to §1-200(9)(C), G.S., that was permissible for executive session.

27. In their post-hearing brief, the respondents cite Furhman v. Freedom of Info. Comm’n, 243 Conn. 427 (1997) (“Furhman”), as support for their arguments described in paragraphs 24 and 26, above, and that §1-200(9)(C), G.S. Specifically, the respondents quote:

Subdivision [A] and [B] refer to litigation in terms of legal action. Subdivision [C], however, refers to ‘consideration of action to enforce or implement legal relief or a legal right.’ Absent from that subdivision are the terms ‘legal action’ and ‘an action.’ Words of a statute ‘shall be construed according to the commonly approved usage of the language....’ General Statutes § 1-1(a). Such a reading of the statute yields the interpretation that any action, not restricted to legal action, to implement legal relief or enforce a legal right concerns ‘pending litigation’ under the exception. Furhman 243 Conn. 427, 433-34 (1997).

28. It is found, however, that, in a subsequent case, Monroe Planning & Zoning, the Supreme Court expressly rejected a similarly broad interpretation of §1-200(9)(C), G.S., when it reversed the lower court’s holding, which relied on the same language in Furhman, quoted in paragraph 26, above. The Court stated:

In Furhman, this court indeed held that a public agency may convene an executive session to consider nonjudicial actions to enforce or implement legal relief or a legal right. We did not hold, however, that a public agency may convene an executive session to consider taking such nonjudicial actions in the absence of a pending or prospective proceeding in a court or forum other than the agency itself. ... Thus, in Furhman, the public agency in question was not only considering taking nonjudicial action in connection with a legal matter that *already was pending* before a different administrative agency ... but also was considering filing a lawsuit. Thus, there was no question in Furhman that the New Milford town council convened its executive session to discuss a pending claim or pending litigation. (Citations omitted; emphasis in original).

Monroe Planning & Zoning, 316 Conn. 1, 15 (2015).

29. It is found that any potential removal of Ms. Israely and other members of the Board of Ethics would occur by a vote of the respondent board of selectmen at a meeting. It is also found that, although the respondents testified that they discussed Ms. Israely’s alleged threat to file an injunction against the town, the respondents did not provide testimony or evidence that

they were considering bringing action against Ms. Israely, or any members of the board of ethics, before a court or another administrative agency.

30. It is found that the complainant submitted, unopposed, two affidavits from two of the three members of the respondent board, which have been marked as Complainant's Exhibit B: Affidavits of Amy Jenner and Martin Mohabeer, signed October 4, 2023. It is also found that in such affidavits, both members attested that, to the best of their individual recollections, there was no discussion of an "injunction" during the executive session on May 17, 2023.

31. It is therefore found that, at the time of the special meeting, no legal matter was pending before a court or other administrative agency in connection with the matters discussed during the respondents' executive session on May 17, 2023.

32. For the reasons set forth in paragraphs 28 through 31, above, it is concluded that neither the phone conversation, nor the threatened injunction, nor the respondents' discussion of whether to remove Ms. Israely and other members of the board of ethics, formed a proper basis for executive session under §1-200(6)(B) as "pending litigation", pursuant to §1-200(9)(C), G.S.²

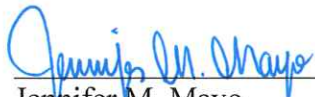
33. It is therefore concluded, based upon all of the foregoing, that the respondents violated §§1-200(6) and 1-225(a), by convening in executive session for an impermissible purpose, at their May 17, 2023 special meeting.

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 executive session and open meeting provisions of §§1-200(6) and 1-225(a), G.S.

2. Within two weeks of the date of the Notice of Final Decision in this matter, the respondent board shall create minutes indicating what transpired during the May 17, 2023 executive session, and make such minutes available for public inspection, in conformance with §1-225(a), G.S.

Approved by Order of the Freedom of Information Commission at its regular meeting of April 10, 2024.



Jennifer M. Mayo
Acting Clerk of the Commission

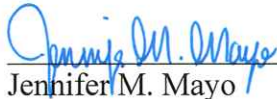
² The Commission notes that, while the respondents' post-hearing brief relies heavily on final decisions of this Commission as support for their interpretation of §1-200(9)(C), G.S., all such final decisions predate the final decision in Monroe Planning & Zoning.

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:

JAMES MAGGIO, 48 High Noon Road, Weston, CT 06883

FIRST SELECTWOMAN, BOARD OF SELECTMEN, TOWN OF WESTON; BOARD OF SELECTMEN, TOWN OF WESTON; AND TOWN OF WESTON, c/o Attorney Nicholas R. Bamonte, Berchem Moses PC, 1221 Post Road East, Westport, CT 06880



Jennifer M. Mayo
Acting Clerk of the Commission