FREEDOM OF INFORMATION COMMISSION
OF THE STATE OF CONNECTICUT

In the Matter of a Complaint by

Marissa Lowthert,

Complainant

against

Bruce Likly, Chairman, Board of Education, Wilton Public Schools; and Board of Education, Wilton Public Schools,

Respondents

FINAL DECISION UPON REMAND

Docket #FIC 2014-171

September 14, 2016

The above-captioned matter was heard as a contested case on January 22, 2015, at which time the complainant and the respondents appeared, stipulated to certain facts and presented testimony, exhibits and argument on the complaint. The matter was consolidated for hearing with Docket #FIC 2014-246; Marissa Lowthert v. Chairman, Board of Education, Wilton Public Schools; and Board of Education, Wilton Public Schools; and Docket #FIC 2014-416; Marissa Lowthert v. Bruce Likly, Chairman, Board of Education, Wilton Public Schools; and Board of Education, Wilton Public Schools.

On March 11, 2015, the Commission adopted a final decision in this matter. Notice of such final decision was mailed to the parties on March 13, 2015. The complainant filed a timely appeal of the final decision with the Superior Court. By Memorandum of Decision dated January 15, 2016, the Superior Court reversed the Commission's decision and remanded the case to the Commission "to examine the memoranda in question in camera and, unless inappropriate in view of [the Court's] opinion, order the board of education to disclose the general subject matter of the memoranda." Marissa Lowthert v. Freedom of Information Commission, Docket #CV15-6028902, Judicial District of New Britain (Schuman, J.), January 15, 2016.

On April 29, 2016, the respondents submitted an unredacted copy of the privileged memorandum at issue in this matter for an in camera inspection. Such memorandum shall be referenced as IC-2014-171-1 through IC-2014-171-3.

After consideration of the entire record, the following facts are found and conclusions of law are reached:

1. It is found that the respondents are public agencies within the meaning of §1-200(1), G.S.

2. By letter filed March 26, 2014, the complainant appealed to this Commission, alleging that the respondents violated the Freedom of Information ("FOI") Act by failing to "state the purpose of the executive session with sufficient specificity" at their February 27, 2014 special meeting ("meeting"), and by failing to identify in the minutes of such meeting all persons who attended such executive session. The complainant requested the imposition of a civil penalty.

3. Section 1-225, G.S., provides, in relevant part:

> (a) The meetings of all public agencies, except executive sessions, as defined in subdivision (6) of section 1-200, shall be open to the public.

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

> (6) "Executive sessions" means a meeting of a public agency at which the public is excluded for one or more of the following purposes: ...(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."

5. It is found that the respondents convened a special meeting on February 27, 2014. It is further found that the notice for such meeting stated: "Discussion of confidential Attorney-Client privileged memorandum. Proposed to be held in Executive Session."

6. It is found that the respondents voted to go into executive session at the February 27, 2014 meeting, in order to discuss a memorandum prepared by their attorneys.

7. The respondents claim that the memorandum is exempt from disclosure pursuant to §1-210(b)(10), G.S. In relevant part, §1-210(b)(10), G.S., permits an agency to withhold from disclosure "communications privileged by the attorney-client relationship."

8. The applicability of the exemption contained in §1-210(b)(10), G.S., is governed by established Connecticut law defining the privilege. Maxwell v. FOI Commission, 260 Conn. 143 (2002). In Maxwell, the Supreme Court stated that §52-146r, G.S., which established a statutory privilege for communications between public agencies and their attorneys, merely codifies "the common-law attorney-client privilege as this court previously had defined it." Id. at 149.

9. Section 52-146r(2), G.S., defines "confidential communications" as:

> all oral and written communications transmitted in confidence between a public official or employee of a public agency acting in the performance of his or her duties or within the scope of his or her employment and a government attorney relating to legal advice sought by the public agency or a public official or employee of such public agency from that attorney, and all records prepared by

> the government attorney in furtherance of the rendition of such legal advice. . . .

10. The Supreme Court has also stated that "both the common-law and statutory privileges protect those communications between a public official or employee and an attorney that are confidential, made in the course of the professional relationship that exists between the attorney and his or her public agency client, and relate to legal advice sought by the agency from the attorney." Maxwell, supra at 149.

11. It is found that the memorandum referenced as IC-2014-171-1 through IC-2014-171-3, contained legal advice that the respondents sought from their counsel.

12. It is also found that the memorandum referenced as IC-2014-171-1 through IC-2014-171-3 is a written communication transmitted in confidence between the respondents and their counsel.

13. It is found that the respondents have not waived their claim of privilege with respect to the memorandum.

14. It is found, therefore, that §1-210(b)(10), G.S., exempts IC-2014-171-1 through IC-2014-171-3 from mandatory disclosure, and it is concluded that §1-200(6) permitted the respondents to discuss the memorandum in executive session.

15. With respect to the complainant's claim that the respondents failed to state the purpose of the executive session with sufficient specificity, §1-225(d) and (f), G.S., provide in relevant part:

> (d) Notice of each special meeting of every public agency ... shall specify the time and place of the special meeting and the business to be transacted.
>
> ...
>
> (f) A public agency may hold an executive session ... upon an affirmative vote of two-thirds of the members of such body present and voting, taken at a public meeting and stating the reasons for such executive session[.]

16. It is well established that a meeting notice 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).

17. This Commission has repeatedly 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., 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).

18. The respondents claimed that disclosure of the general subject matter of the privileged memorandum referenced as IC-2014-171-1 through IC-2014-171-3 would destroy the confidentiality of the advice contained in the body of the memorandum.

19. Upon careful review of the in camera records, it is found that the respondents could have provided the necessary specificity as to the general subject matter of the memorandum referenced as IC-2014-171-1 through IC-2014-171-3, without destroying the confidentiality of the advice contained in the body of the memorandum.

20. It is concluded, therefore, that the respondents violated the notice provisions of §1-225(d) and (f), G.S.

21. With respect to the complainant's claim that the respondents failed to identify all persons who attended the executive session, §1-231(a), G.S., provides:

> At 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.

22. It is found that no one attended the executive session other than the respondents present at the meeting, and the meeting minutes identified each such respondent individually by name. It is also found that the minutes stated the respondents' vote to convene in executive session and then to adjourn to open session.

23. It is found that the respondents did not take any votes in executive session.

24. It is concluded, therefore, that the respondents did not violate the provisions of §1-231, G.S.

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 notice requirements of §1-225(d) and (f), G.S.

2. The respondents shall forthwith amend the notice and minutes of their February 27, 2014 meeting to disclose the general subject matter of the memorandum referenced as IC-2014-171-1 through IC-2014-171-3, and the respondents shall send a copy of such amended notice and minutes to the complainant.

Approved by Order of the Freedom of Information Commission at its regular meeting of September 14, 2016.

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:

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Bruce Likly, Chairman, Board of Education, Wilton Public Schools; and Board of Education,
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Cynthia A. Cannata
Acting Clerk of the Commission

FIC/2014-171/FD/cac/9/14/2016