CV10 600 35 00	:	**SUPERIOR COURT**
CHAIRPERSON, CONNECTICUT MEDICAL EXAMINING BOARD	:	**J. D. OF NEW BRITAIN**
VS	:	**AT NEW BRITAIN**
FREEDOM OF INFORMATION COMMISSION	:	**JUNE 24, 2011**

MEMORANDUM OF DECISION
RE: UAPA APPEAL

The plaintiffs, the chairperson of the Connecticut medical examining board (chairperson) and the Connecticut medical examining board (board), appeal from the final decision of one of the defendants,[1] the Connecticut freedom of information commission (commission) in contested case Docket No. FIC 2009-088. The plaintiffs argue that the commission erred in finding that: (1) General Statutes § 52-146r[2] is an evidentiary statute and

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[1] Attorney Michael Courtney and the office of the chief public defender are named as defendants in this appeal. They filed a complaint with the Connecticut freedom of information commission (commission), the final decision of which is the subject of this appeal. For the sake of clarity, the court refers to Courtney and the office of the chief public defender as the "complainants." On June 14, 2010, the clerk granted the plaintiff's motion for default for the complainants' failure to appear. On June 23, 2010, the complainants filed appearances. On June 25, 2010, the complainants filed a request to affirm the commission's final decision. They have taken no further action in the present case.

[2] General Statutes § 52-146r provides: "Disclosure of confidential communications between government attorney and public official or employee of public agency prohibited. (a) As used in this section:

"(1) 'Authorized representative' means an individual empowered by a public agency to assert the confidentiality of communications that are privileged under this section;

"(2) 'Confidential communications' means all oral and written communications transmitted in confidence between a public official or employee of a public agency acting in the performance of his

thus not applicable in the contested case and (2) an executive session of the board on February 17, 2009 was not permitted under Freedom of Information Act, General Statutes § 1-200 et seq.

The commission found the following facts. On January 8, 2009, Michael Courtney and the state of Connecticut, office of chief public defender (complainants) submitted a request for a declaratory ruling to the board asking: "'Is physician participation in the execution of condemned Connecticut inmates using lethal injection permitted?'" (Return of Record [ROR], p. 193.) The complainants "sought a determination as to whether a physician's participation constituted a departure from the ethics of the medical profession and whether such participation would subject the physician to disciplinary action." (ROR, p. 193.) At its January 20, 2009 meeting, the board convened in executive session for ten minutes to "'obtain legal advice'" regarding the request for declaratory ruling. (ROR, p. 193.)

By a letter dated February 13, 2009, the complainants informed Thomas J. Ring, Assistant Attorney General and counsel to the board, that they believed there was a "'potential

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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;

"(3) 'Government attorney' means a person admitted to the bar of this state and employed by a public agency or retained by a public agency or public official to provide legal advice to the public agency or a public official or employee of such public agency; and

"(4) 'Public agency' means 'public agency' as defined in section 1-200.

"(b) In any civil or criminal case or proceeding or in any legislative or administrative proceeding, all confidential communications shall be privileged and a government attorney shall not disclose any such communications unless an authorized representative of the public agency consents to waive the privilege and allow such disclosure."

conflict of interest'" in his representation of the board. (ROR, pp. 193-94.) The February 13, 2009 letter stated in relevant part:

"'We write to inform you of a potential conflict of interest in your continuing representation of the State Medical Examining Board in [this] matter . . .

"' . . .

"'It would seem to us that any advice your office might give the Board in determining whether to issue the ruling requested, or as to the content of such a ruling, would pose a significant risk that the representation of one of your two clients, the Board or Dr. Galvin, would be materially limited by your office's responsibilities to the other client.

"'We suggest, therefore, that the State Medical Examining Board be provided with outside counsel before making any ruling on this request. We recognize that you may not see this as any real issue, but we felt it incumbent upon us to point this possible conflict out to you . . . .'"[3] (ROR, p. 194.)

At its February 17, 2009 meeting, the board convened in executive session for five minutes to "'discuss [the] pending claim contained in [the] letter from Attorney Courtney to Assistant General Thomas Ring.'" (ROR, p. 194.)

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[3] The commission includes the ellipses in its quotation of the February 13, 2009 letter in its final decision.

By letter dated and filed on February 18, 2009, the complainants appealed to the commission alleging that the plaintiffs violated the Freedom of Information Act by convening in executive session during the January 20 and February 17, 2009 meetings for purposes not permitted under the act.[4] (ROR, p. 194.) The complainants requested that the plaintiffs be ordered to disclose the content of the discussions held during the executive sessions. (ROR, p. 194.)

At the hearing before the commission, the plaintiffs argued that pursuant to § 52-146r, a public agency may convene in an executive session to receive legal advice and that § 52-146r protects all oral comminations transmitted for purposes of obtaining confidential legal advice sought by the public agency from an attorney. (ROR, p. 194.) Additionally, the plaintiffs argued that § 1-231[5] and § 52-146r are in conflict with each other and that because § 52-146r reflects the legislature's more recent articulation of its intention, § 52-146r controls. (ROR, p. 194.)

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[4] General Statutes § 1-225 (a) 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. . . ."

[5] General Statutes § 1-231 provides: "Executive sessions. (a) 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.

"(b) An executive session may not be convened to receive or discuss oral communications that would otherwise be privileged by the attorney-client relationship if the agency were a nongovernmental entity, unless the executive session is for a purpose explicitly permitted pursuant to subdivision (6) of section 1-200."

The commission disagreed. It reasoned: "[Section] 52-146r . . . is an evidentiary statute which prohibits governmental attorneys from disclosing privileged communications in civil, criminal, legislative or administrative proceedings. On the other hand, it is found that the language in § 1-231 (b) . . . specifically covers the issue presented in this case, which is whether a multimember public agency may convene in executive session to receive or discuss oral communications what would ordinarily be privileged by the attorney-client relationship. Therefore § 1-231 (b) . . . is controlling.

"Section 1-231 (b) . . . specifically precludes a multimember agency from convening in executive session to receive oral communications that would otherwise be privileged by the attorney-client relationship unless the executive session is for one of the five explicitly permitted purposes found in subdivision (6) of section 1-200 . . . ."[6] (ROR, p. 195.)

The commission found that the plaintiffs offered no evidence that the executive session convened during the January 20, 2009 meeting was for one of the five permissible purposes

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[6] General Statutes § 1-200 (6) provides: " 'Executive 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; © 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 a political subdivision of the state when publicity regarding such site, lease, sale, purchase or construction would cause a likelihood of increased price 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."

of § 1-200 (6) and therefore failed to prove that the executive session was permitted under § 1-200 (6). (ROR, p. 196.)

The plaintiffs also argued that they convened in executive session during the February 17, 2009 meeting to discuss strategy and negotiations with respect to pending claims pursuant to § 1-200 (6) (B). (ROR, p. 196.) Specifically, they argued that the complainants' February 13, 2009 letter included a demand for legal relief and therefore, constituted a "pending claim" within the meaning of §1-200 (8).[7] (ROR, p. 196.)

The commission found that "a fair reading of the February 13, 2009 letter, . . . reveals that the complainants were merely pointing out what they considered to be a 'potential' conflict and only suggested that the board be provided with outside legal counsel before issuing a decision related to the request for a declaratory ruling." (Emphasis in original.) (ROR, p. 196.) Additionally, it found that "the complainants were deliberate in their choice of words when drafting the February 13, 2009 letter because they wanted to avoid even implying that they were demanding any relief or that they intended to institute an action regarding the alleged potential conflict of interest." (ROR, p. 196.) Therefore, the commission found that the complainants' February 13, 2009 letter did not constitute notice of a pending claim within the meaning of §1-200 (8). (ROR, pp. 196, 197.) Furthermore, the commission found that the

[7] General Statutes § 1-200 (8) provides: " 'Pending claim' 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 or right is not granted."

plaintiffs "failed to prove that their discussion of the February 13, 2009 letter constituted 'strategy' or 'negotiations' within the meaning of § 1-200 (6) (B). (ROR, p. 197.)

The commission concluded that the plaintiffs "violated the open meetings provisions of § 1-225(a) . . . by failing to hold the discussions [of the January 20 and February 17, 2009 executive sessions] in public" and ordered that in the future the plaintiffs "shall strictly comply with the provisions of § 1-225(a)." (ROR, p. 197.)

On February 4, 2010, the plaintiffs filed this appeal pursuant to General Statutes §§ 1-206 (d) and 4-183. On May 13, 2011, the court held a hearing at which it heard oral argument.

"It is well established that [j]udicial review of [an administrative agency's] action is governed by the Uniform Administrative Procedure Act [(UAPA) General Statutes § 4-166 et seq.] . . . and the scope of that review is very restricted. . . . With regard to questions of fact, it is neither the function of the trial court nor of this court to retry the case or to substitute its judgment for that of the administrative agency. . . .

"Even as to questions of law, [t]he court's ultimate duty is only to decide whether, in light of the evidence, the [agency] has acted unreasonably, arbitrarily, illegally, or in abuse of its discretion. . . . Conclusions of law reached by the administrative agency must stand if the court determines that they resulted from a correct application of the law to the facts found and could reasonably and logically follow from such facts. . . . Ordinarily, this court affords

deference to the construction of a statute applied by the administrative agency empowered by law to carry out the statute's purposes. . . . Cases that present pure questions of law, however, invoke a broader standard of review than is . . . involved in deciding whether, in light of the evidence, the agency has acted unreasonably, arbitrarily, illegally or in abuse of its discretion. . . . Furthermore, when a state agency's determination of a question of law has not previously been subject to judicial scrutiny . . . the agency is not entitled to special deference. . . . We have determined, therefore, that the traditional deference accorded to an agency's interpretation of a statutory term is unwarranted when the construction of a statute . . . has not previously been subjected to judicial scrutiny [or to] . . . a governmental agency's time-tested interpretation . . . . Consequently, an agency's interpretation of a statute is accorded deference when the agency's interpretation has been formally articulated and applied for an extended period of time, and that interpretation is reasonable." (Citations omitted; internal quotation marks omitted.) *Dept. of Public Safety* v. *Freedom of Information Commission*, 298 Conn. 703, 716-717, 6 A.3d 763 (2010).

The plaintiffs argue that the commission's statutory interpretation regarding § 52-146r and § 1-231 (b) and whether these statutes conflict should not be given deference as the commission's interpretation regarding these provisions has not been time tested. At the hearing before this court, the commission conceded that it was not seeking deference regarding its interpretation of § 52-146r. Even without affording the commission deference, the court agrees with the commission's interpretation of the interplay between § 52-146r and § 1-231 (b).

The plaintiffs argue that § 52-146r protects all oral communications transmitted for purposes of obtaining confidential legal advice sought by the public agency from its attorney. They argue that the commission has deprived the plaintiffs of the protections of the statutory attorney-client privilege of § 52-146r in ruling that § 1-231 (b) controls and therefore absent one of the five enumerated criteria under § 1-200 (6) the plaintiffs must obtain oral legal advice from its attorney in public. Additionally, the plaintiffs argue that to the extent that there is tension between § 1-231 (b) and § 52-146r, § 52-146r controls as it is the more recent articulation of the legislature's intention. Furthermore, the plaintiffs argue that the Supreme Court in *Maxwell* v. *Freedom of Information Commission*, 260 Conn. 143, 794 A.2d 535 (2002), directed that the commission must apply and respect the privilege contained in § 52-146r when asserted. They argue that the commission did not apply the privilege of § 52-146r as required by *Maxwell* in holding that § 52-146r was an evidentiary statute and not applicable to the present case.

The commission does not question the plaintiffs' right to assert the attorney-client privilege. It argues that the issue in the present case is not whether the plaintiffs can claim the evidentiary privilege created by § 52-146r, but whether they are precluded from convening in executive session to receive oral advice falling within the privilege without first complying with § 1-231 (b). Furthermore, the commission argues that § 52-146r codifies the common law attorney-client privilege and does not create an inherent right of a public agency to engage in confidential communications. It argues that § 52-146r is not applicable in the present case, but to the extent it is relevant at all, it must give way to § 1-231 (b) because § 1-231 (b)

specifically addresses a public agency's right to engage in confidential oral communications with its attorney, while § 52-146r addresses oral communications in general and in the context of evidentiary proceedings.

"When construing a statute, [o]ur fundamental objective is to ascertain and give effect to the apparent intent of the legislature. . . . In other words, we seek to determine, in a reasoned manner, the meaning of the statutory language as applied to the facts of [the] case, including the question of whether the language actually does apply. . . . In seeking to determine that meaning, General Statutes § 1-2z directs us first to consider the text of the statute itself and its relationship to other statutes. If, after examining such text and considering such relationship, the meaning of such text is plain and unambiguous and does not yield absurd or unworkable results, extratextual evidence of the meaning of the statute shall not be considered. . . . The test to determine ambiguity is whether the statute, when read in context, is susceptible to more than one reasonable interpretation. . . . When a statute is not plain and unambiguous, we also look for interpretive guidance to the legislative history and circumstances surrounding its enactment, to the legislative policy it was designed to implement, and to its relationship to existing legislation and common law principles governing the same general subject matter." (Internal quotation marks omitted.) *Dept. of Public Safety* v. *Freedom of Information Commission* , supra, 298 Conn. 720-21.

First, the court will discuss the meaning of § 52-146r. Section 52-146r (b), provides: "In any civil or criminal case or proceeding or in any legislative or administrative proceeding, all confidential communications shall be privileged and a government attorney shall not

disclose any such communications unless an authorized representative of the public agency consents to waive the privilege and allow such disclosure."

In *Maxwell* v. *Freedom of Information Commission*, supra, 260 Conn. 149, the Supreme Court, after analyzing the language and legislative history of § 52-146r, concluded that "the statute merely codifies the common-law attorney-client privilege." Additionally, the court held that "essential elements of the common-law and statutory privileges are identical." Id. The elements to determine whether communications are privileged are: "(1) the attorney must be acting in a professional capacity for the agency, (2) the communications must be made to the attorney by current employees or officials of the agency, (3) the communications must relate to the legal advice sought by the agency from the attorney, and (4) the communications must be made in confidence." (Internal quotation marks omitted.) Id., 148-49. The court held that the commission correctly applied the common-law attorney-client privilege in concluding that the town council billing invoices at issue in the case were not exempt from disclosure. Id., 149-50.

Additionally at issue in *Maxwell,* was whether "in enacting § 1-210 (b) (10), the legislature unconstitutionally delegated to [the commission], the authority to define the attorney-client privilege in violation of the separation of powers doctrine embodied in the Connecticut constitution." Id., 144-45. Section 1-210 (b) (10) provides in relevant part: "Nothing in the Freedom of the Information Act shall be construed to require disclosure of . . . communications privileged by the attorney-client relationship." The court concluded that "§ 1-210 (b) (10) does not invest the commission with the authority to formulate the attorney-

client privilege" and therefore did not need to address the issue of whether such a delegation would be constitutional. *Maxwell* v. *Freedom of Information Commission*, supra, 260 Conn. 152. The court explained that § 1-210 (b) (10) "simply reinforces the notion that the commission in rendering its decisions, must apply and respect the privilege when it is asserted. Moreover, any improper failure by the commission to apply the privilege would be subject to judicial review." Id., 151.

The plaintiffs rely too heavily on *Maxwell*. The court in *Maxwell* did not address whether § 52-146r trumps § 1-231 (b)'s requirement that "[a]n executive session may not be convened to receive or discuss oral communications that would otherwise be privileged by the attorney-client relationship . . . unless the executive session is for a purpose explicitly permitted pursuant to subdivision (6) of section 1-200." "The plain language of . . . § 1-231 (b) prohibits convening in executive session to receive or discuss attorney-client privileged oral communications unless permitted by . . . § 1-200 (6). Section 1-231 (b) establishes that the receipt or discussion of attorney-client privileged oral communications does not constitute an independent basis for an executive session." *Board of Public Safety* v. *Freedom of Information Commission*, Superior Court, judicial district of New Britain, Docket No. CV 01 0506448 (November 20, 2001, *Owens, J.*). A public agency may convene in executive session to receive attorney-client privileged oral communications, but only for one of the five permissible purposes outlined in § 1-200 (6). Once the agency has convened the executive session for a permissible purpose, it then may assert the privilege. Therefore, the court affirms the commission's conclusion that § 1-231 (b) is controlling.

The plaintiffs argue that commission erred in concluding that the February 17, 2009 executive session was not permissible under § 1-200 (6) (B). The plaintiffs argue that they convened the executive session to discuss strategy and negotiations with respect to a pending claim as defined under § 1-200 (8). Specifically, they argue that the February 13, 2009 letter was a pending claim because it specifically requested legal relief by challenging the ability of the Attorney General's Office to continue as counsel to the board as it ruled on the complainants' pending request for declaratory ruling.

The commission counters that a fair reading of the February 13, 2009 letter reveals that the complainants were pointing out what they considered to be a potential conflict of interest and only suggested that the board seek outside legal counsel before issuing a decision related to the request for declaratory ruling. Additionally, the commission argues that the complainants have no legal right to control who serves as counsel to the board and there is no legal mechanism by which the complainants could require the board to change its counsel if it refused to do so.

General Statutes § 1-200 (6) provides in relevant part: " 'Executive sessions' means a meeting of a public agency at which the public is excluded for one or more of the following purposes: . . . (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. . . ." General Statutes § 1-200 (8) provides: " 'Pending claim' 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 or right is not granted."

The court agrees with the commission that the complainants' February 13, 2009 letter did not constitute notice of a pending claim within the meaning of §1-200 (8). The February 13, 2009 letter only pointed out Attorney Ring's possible conflict of interest in representing both the board and a doctor who could be affected by the board's declaratory ruling. It is unreasonable to conclude that the suggestion that board seek outside counsel in considering the complainants' request for declaratory ruling was a demand for legal relief or an assertion of a legal right.

The plaintiffs also argue that the commission's finding that the complainants only made a suggestion to the plaintiffs is based on an underlying factual finding that has no evidence in the administrative record. The plaintiffs argue that the commission's underlying factual determination that "the complainants were deliberate in their choice of words when drafting the February 13, 2009 letter because they wanted to avoid even implying that they were demanding any relief or that they intended to institute an action regarding the alleged potential conflict of interest" (ROR, p. 196.) is not supported by any evidence, let alone substantial evidence in the administrative record. The court disagrees. The February 13, 2009 letter itself is ample evidence that the complainants were not demanding legal relief or asserting a legal right.

For the foregoing reasons, the plaintiffs' appeal is dismissed. The plaintiffs are ordered to comply with the commission's order that they shall strictly comply with the provisions of § 1-225 (a). The commission's final decision is affirmed.

OWENS, J.T.R.