NO. HHB CV15-6028902S		STATE OF CONNECTICUT
MARISSA LOWTHERT		SUPERIOR COURT
v.	:	JUDICIAL DISTRICT OF NEW BRITAIN
FREEDOM OF INFORMATION COMMISSION, ET AL.	:	JANUARY 15, 2016

Memorandum of Decision

Plaintiff Melissa Lowthert appeals from three final decisions of defendant freedom of information commission (commission) dismissing her complaints against defendant Wilton Board of Education and its Chairman (collectively board of education) in which the plaintiff claimed that the board of education did not adequately describe the reasons for convening in executive session at three meetings. For the reasons that follow, the court sustains the appeal, reverses the commission's decision, and remands the case for further proceedings.

I

The commission found the following historical facts. The board of education convened a special meeting on February 27, 2014 and regular meetings on April 10, 2014 and June 26, 2014. The agenda for the February and April meetings stated: "Discussion of Confidential Attorney-Client privileged material. Proposed to be held in Executive Session." The agenda for the June 26 meeting stated: "Executive Session anticipated: Administrator Compensation; Administrative Appointment; Discussion of Confidential Attorney-Client Memorandum." At each meeting, the board of education voted to go into executive session in order to discuss a memorandum prepared by its attorneys. (Return of Record (ROR), pp. 34, 63, 93.)

The plaintiff filed complaints with the commission alleging that the board of education

violated the Freedom of Information Act (act) by 1) failing to adequately describe, on the agenda for each meeting, the reason for convening in executive session and 2) by failing to identify in the minutes of the meetings all persons who attended the executive sessions.[1] The commission held a consolidated hearing on all three complaints. Towards the end of the hearing, the plaintiff requested that the hearing officer examine the attorney-client memorandum in camera. The hearing officer declined to do so. (ROR, pp. 191-92, 217.)

Based on the hearing, the commission found that the memorandum that the board of education discussed in its executive session contained legal advice previously sought from its counsel and that the board of education did not disclose the subject matter of the memorandum because to do so would reveal the substance of its confidential communications with its attorney. The commission concluded that, in light of these facts and circumstances, the agenda adequately described the business to be transacted to the extent required by the act. Accordingly, the commission dismissed all three complaints. (Return of Record, pp. 33-36, 62-65, 92-95.)[2]

The plaintiff has filed a consolidated appeal to this court of all three decisions.

II

Under the Uniform Administrative Procedure Act (UAPA), General Statutes § 4-166 et seq., judicial review of an agency decision is "very restricted." (Internal quotation marks omitted.) *MacDermid, Inc. v. Dept. of Environmental Protection*, 257 Conn. 128, 136-37, 778

---

[1]On appeal, the plaintiff pursues only the first claim.

[2]The commission did advise the board of education that it was "encouraged to cite the attorney client privilege exception only when there is a good faith basis that disclosure of the subject matter of the communication would itself violate the attorney client privilege." (ROR, pp. 36, 65, 95.)

A.2d 7 (2001). Section 4-183 (j) of the General Statutes provides as follows: "The court shall not substitute its judgment for that of the agency as to the weight of the evidence on questions of fact. The court shall affirm the decision of the agency unless the court finds that substantial rights of the person appealing have been prejudiced because the administrative findings, inferences, conclusions, or decisions are: (1) In violation of constitutional or statutory provisions; (2) in excess of the statutory authority of the agency; (3) made upon unlawful procedure; (4) affected by other error of law; (5) clearly erroneous in view of the reliable, probative, and substantial evidence on the whole record; or (6) arbitrary or capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion."

Stated differently, "[r]eview of an administrative agency decision requires a court to determine whether there is substantial evidence in the administrative record to support the agency's findings of basic fact and whether the conclusions drawn from those facts are reasonable. . . . Neither [the appellate] court nor the trial court may retry the case or substitute its own judgment for that of the administrative agency on the weight of the evidence or questions of fact. . . . Our ultimate duty is to determine, in view of all of the evidence, whether the agency, in issuing its order, acted unreasonably, arbitrarily, illegally or in abuse of its discretion." (Internal quotation marks omitted.) *Okeke v. Commissioner of Public Health*, 304 Conn. 317, 324, 39 A.3d 1095 (2012). "It is fundamental that a plaintiff has the burden of proving that the [agency], on the facts before [it], acted contrary to law and in abuse of [its] discretion." (Internal quotation marks omitted.) *Murphy v. Commissioner of Motor Vehicles*, 254 Conn. 333, 343, 757 A.2d 561 (2000).

Our Supreme Court has stated that "[a]n agency's factual and discretionary determinations

are to be accorded considerable weight by the courts. . . ." (Internal quotation marks omitted.) *Longley v. State Employees Retirement Commission*, 284 Conn. 149, 163, 938 A.2d 890 (2007). "Even for conclusions 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 if its discretion. . . . [Thus] [c]onclusions 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. . . . [Similarly], 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. . . . [When the agency's] interpretation has not been subjected to judicial scrutiny or consistently applied by the agency over a long period of time, our review is de novo." (Citation omitted; internal quotation marks omitted.) *Chairperson, Connecticut Medical Examining Board v. Freedom of Information Commission,* 310 Conn. 276, 281-83, 77 A.3d 121 (2013).

III

A

As our Supreme Court has recently stated, "[t]he act requires that '[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.' General Statutes § 1-225 (a). Section 1-200 (6) defines an executive session as 'a meeting of a public agency at which the public is excluded' for one of five specified purposes.[fn6][3] This court has narrowly construed these purposes because 'the general rule under the . . . [a]ct is disclosure. . . .' *New Haven v. Freedom of Information Commission*, 205 Conn. 767, 775, 535 A.2d 1297 (1988); see also *Stamford v. Freedom of Information Commission*, 241 Conn. 310, 314, 696 A.2d 321 (1997) ('[t]he overarching legislative policy of the [act] is one that favors the open conduct of government and free public access to government records' [internal quotation marks omitted])." *Chairperson, Connecticut Medical Examining Board v. Freedom of Information Commission,* supra, 310 Conn. 283-84.

The executive sessions in this case took place under section 1-225 (6) (E), which

---

[3]Footnote 6 quotes § 1-200 (6), which 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; (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 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."

authorizes exclusion of the public from any public agency meeting that involves "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." Section 1-210 (b), in turn, provides in relevant part that "[n]othing in the Freedom of Information Act shall be construed to require disclosure of . . . (10) Records, tax returns, reports and statements exempted by federal law or the general statutes or communications privileged by the attorney-client relationship . . . ." General Statutes § 1-210 (b) (10).

The act contains brief requirements for the agenda for both a regular meeting, such as the April 10 and June 26, 2014 meetings of the board of education, and the notice for a special meeting, such as the February 27 meeting. With respect to a regular meeting, § 1-225 (c) provides that "[t]he agenda of the regular meetings of every public agency . . . shall be available to the public and shall be filed, not less than twenty-four hours before the meetings to which they refer . . . ."[4] For a special meeting, § 1-225 (d) states that the notice "shall be posted not less than twenty-four hours before the meeting . . . [and] shall specify the time and place of the special meeting and the business to be transacted. No other business shall be considered at such meetings

---

[4]In full, § 1-225 (c) states: "The agenda of the regular meetings of every public agency, except for the General Assembly, shall be available to the public and shall be filed, not less than twenty-four hours before the meetings to which they refer, (1) in such agency's regular office or place of business, and (2) in the office of the Secretary of the State for any such public agency of the state, in the office of the clerk of such subdivision for any public agency of a political subdivision of the state or in the office of the clerk of each municipal member of any multitown district or agency. For any such public agency of the state, such agenda shall be posted on the public agency's and the Secretary of the State's web sites. Upon the affirmative vote of two-thirds of the members of a public agency present and voting, any subsequent business not included in such filed agendas may be considered and acted upon at such meetings."

by such public agency."[5]

Our appellate courts have not had occasion to interpret these provisions. Although the parties marshal an array of decisions of the commission and the Superior Court that they claim are persuasive, none of them is binding on the court. Further, there is no court case or pattern of commission cases on the precise issue here of the adequacy of the agenda in describing a meeting concerning attorney-client communications that would require deferential review based on the issue having been "subjected to judicial scrutiny [or to] . . . a governmental agency's time-tested interpretation. . . ." *Chairperson, Connecticut Medical Examining Board v. Freedom of*

---

[5]In full, § 1-225 (d) provides: "Notice of each special meeting of every public agency, except for the General Assembly, either house thereof or any committee thereof, shall be posted not less than twenty-four hours before the meeting to which such notice refers on the public agency's Internet web site, if available, and given not less than twenty-four hours prior to the time of such meeting by filing a notice of the time and place thereof in the office of the Secretary of the State for any such public agency of the state, in the office of the clerk of such subdivision for any public agency of a political subdivision of the state and in the office of the clerk of each municipal member for any multitown district or agency. The secretary or clerk shall cause any notice received under this section to be posted in his office. Such notice shall be given not less than twenty-four hours prior to the time of the special meeting; provided, in case of emergency, except for the General Assembly, either house thereof or any committee thereof, any such special meeting may be held without complying with the foregoing requirement for the filing of notice but a copy of the minutes of every such emergency special meeting adequately setting forth the nature of the emergency and the proceedings occurring at such meeting shall be filed with the Secretary of the State, the clerk of such political subdivision, or the clerk of each municipal member of such multitown district or agency, as the case may be, not later than seventy-two hours following the holding of such meeting. The notice shall specify the time and place of the special meeting and the business to be transacted. No other business shall be considered at such meetings by such public agency. In addition, such written notice shall be delivered to the usual place of abode of each member of the public agency so that the same is received prior to such special meeting. The requirement of delivery of such written notice may be dispensed with as to any member who at or prior to the time the meeting convenes files with the clerk or secretary of the public agency a written waiver of delivery of such notice. Such waiver may be given by telegram. The requirement of delivery of such written notice may also be dispensed with as to any member who is actually present at the meeting at the time it convenes. Nothing in this section shall be construed to prohibit any agency from adopting more stringent notice requirements."

Information Commission, supra, 310 Conn. 282. On the other hand, the issue here is not a pure question of law but rather one of whether the commission correctly applied the relevant statutory provisions to the specific facts here. Therefore, the court must look to see "whether, in light of the evidence, the [agency] has acted unreasonably, arbitrarily, illegally, or in abuse if its discretion. . . ." (Internal quotation marks omitted.) Id., *Chairperson, Connecticut Medical Examining Board v. Freedom of Information Commission,* supra, 310 Conn. 281-82.

B

The commission's brief claims that there was "credible testimony provided by the Wilton Defendants that any additional details regarding those legal memoranda, including the subject matter of such memoranda, would have revealed 'the substance of the [Wilton Defendants'] confidential communications with their attorney.'" (Commission brief, pp. 16-17, 19.) However, the brief fails to cite to any such testimony or even the identify the witness or witnesses in question. Similarly, the board of education's brief asserts that "[b]ased on extensive testimony from Board representatives, the FOIC correctly found that the Board's agendas for all three meetings adequately described the business to be transacted . . . and that the Board appropriately did not disclose the subject matter of the attorney-client privileged memoranda that were the subject of discussion in the executive sessions convened during each meeting because to do so would have been to disclose confidential communications between the Board and its attorneys within the meaning of [General Statutes] § 52-146r (2)." (Board of Education brief, pp. 1-2.)[6]

[6]Section 52-146r (a) (2) defines "confidential communications" for purposes of subsection (b), which makes such communications privileged in any proceeding, as follows: "'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 or her duties or within the scope of his or her employment and a government attorney relating

The board of education brief also fails to identify the "Board representatives" who provided "extensive testimony" or to provide any citations to any of their testimony.

These briefs do a disservice to the court. A thorough search of the record reveals that only one witness testified for the board of education. That witness, Christine Finkelstein, stated only that the memorandum in question pertained to legal advice on a pending matter, that its nature and contents were confidential, and that its contents were not to be discussed outside of the boardroom. (ROR, pp. 171-72, 177-78, 182.) At no point did the witness state that identifying the subject matter of the memorandum would disclose confidential attorney-client communications.[7] Although the commission claimed at oral argument that it was a "reasonable inference" from this testimony that disclosure of the subject matter would also reveal the communications, it is entirely possible to describe the subject matter of a communication – e.g., "legal claim of John Smith" – without disclosing the communication itself. In any event, because the commission refused to examine the memoranda in camera, the commission could not have known for a fact whether disclosure of its subject matter would have revealed confidential communications. Hence, the commission's finding that disclosure of the subject matter of the memorandum would reveal its contents lacked evidentiary support and was thus unreasonable.

---

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. . . ."

[7]Ironically, at the conclusion of the testimony, the hearing officer did ask Finkelstein the following critical questions: "[C]an you address why on the agenda it's limited to attorney-client memorandum and did it discuss any further the subject matter? Did it get into the detail of the subject matter? Did you feel that would betray the privilege if you identified exactly the topic that you were talking about?" Unfortunately, after further colloquy, the hearing officer withdrew her questions. (ROR, pp. 214-16.)

The finding was also unreasonable because it misconstrued the law. "Courts have consistently held that the general subject matters of clients' representations are not privileged. See, e.g., *In re Grand Jury Subpoena*, 204 F.3d 516, 520 (4th Cir.2000). Nor does the general purpose of a client's representation necessarily divulge a confidential professional communication, and therefore that data is not generally privileged. To be sure, there are exceptions, but as always the burden of demonstrating the applicability of the privilege lies with those asserting it. See *In re Lindsey*, 158 F.3d 1263, 1270 (D.C. Cir.1998) (per curiam); cf. *In re Sealed Case*, 877 F.2d 976, 979–80 (D.C. Cir.1989)." *United States v. Legal Services for New York City*, 249 F.3d 1077, 1081-82 (D.C. Cir. 2001).

In the present case, the statute governing regular meetings merely states that the "agenda of the regular meetings of every public agency . . . shall be available to the public . . ." General Statutes § 1- 225 (c). For special meetings, the statute provides with only slightly more elaboration that "[t]he notice shall specify the time and place of the special meeting and the business to be transacted." General Statutes § 1-225 (d). Although the statutes do not further define the terms "agenda" and "notice . . . of business to be transacted," there are at least two rules of construction that should guide the analysis. First, "[e]very word and phrase [of a statute] is presumed to have meaning . . . [and a statute] must be construed, if possible, such that no clause, sentence or word shall be superfluous, void or insignificant." (Internal quotation marks omitted.) *Lopa v. Brinker International, Inc.*, 296 Conn. 426, 433, 994 A.2d 1265 (2010). Second, "the general rule under the . . . [a]ct is disclosure. . . ." (Internal quotation marks omitted.) *Chairperson, Connecticut Medical Examining Board v. Freedom of Information Commission,* supra, 310 Conn. 284. Applying these rules, an agency should provide an agenda

and notice that, absent some overriding concern, has at least some significance to the public and that provides at least some level of meaningful disclosure about the subject matter of a public agency meeting.

Merely stating that an executive session will involve "Discussion of Confidential Attorney-Client Memorandum," as did the board of education here, does not meet this standard. As discussed, there is neither an evidentiary foundation nor a legal basis for concluding in this case that disclosure of the general subject matter of the attorney-client memorandum would reveal its contents. Thus, there is no reason on this record why the board of education could not have described the business to be transacted as something such as "discussion of confidential attorney-client memorandum re legal claim of John Smith" or "attorney-client memorandum re settlement with Mary Jones." Such a description would have fairly and more adequately appraised the public of the business to be transacted without in any way disclosing any confidential attorney-client communications.

IV

The remaining question is whether there was substantial prejudice to the plaintiff from the lack of notice concerning the subject matter of the meetings in question. General Statutes § 4-183 (j). Neither defendant argued to the contrary in its brief. It seems self-evident that some harm occurs whenever the public is denied information to which it has a right. See *Chairperson, Connecticut Medical Examining Board v. Freedom of Information Commission,* supra, 310 Conn. 284. ("[T]he overarching legislative policy of the [act] is one that favors the open conduct of government and free public access to government records.") [Internal quotation marks omitted.] In this case, the plaintiff could have used more specific information about the subject

matter of the executive session to decide whether to attempt to attend any public portion of the meetings, to object to the executive session, or to follow up in some way. Therefore, the court finds substantial prejudice.

IV

The court sustains the plaintiff's appeal, reverses the commission's dismissal of the complaints, and, pursuant to General Statutes § 4- 183 (j), remands the case to the commission with directions to examine the memoranda in question in camera and, unless inappropriate in view of this opinion, order the board of education to disclose the general subject matter of the memoranda.

It is so ordered.

Schuman, J.

Carl J. Schuman
Judge, Superior Court