

FREEDOM OF INFORMATION COMMISSION  
OF THE STATE OF CONNECTICUT

In the Matter of a Complaint by

FINAL DECISION

Marcia Banach,

Complainant

Docket # FIC 2017-0327

against

Mayor, Town of South Windsor;  
Town Council, Town of South  
Windsor; and Town of South  
Windsor,

Respondents

February 14, 2018

The above-captioned matter was heard as a contested case on August 22, 2017, at which time the complainant and the respondents appeared, stipulated to certain facts and presented testimony, exhibits and argument on the complaint.

On September 20, 2017, the Commission received from the respondents a video recording of the Town Council's June 5, 2017 regular meeting. At the August 22<sup>nd</sup> hearing in this matter, the parties agreed that such after-filed exhibit would be marked as Complainant's Exhibit B: Video Recording of Town Council Meeting, dated June 5, 2017 (Disc 1).<sup>1</sup> Subsequently, on November 8, 2017, pursuant to an order of the hearing officer, the respondents submitted to the Commission a second copy of the video recording, which has been marked as Complainant's Exhibit B1: Video Recording of Town Council Meeting, dated June 5, 2017 (Disc 2).<sup>2</sup>

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.

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<sup>1</sup> The Commission notes that although the video recordings were provided to the Commission by the respondents, the parties agreed that such recordings would be filed as complainant's exhibits.

<sup>2</sup> The copy of the video recording submitted on September 20, 2017 (Exhibit B), was not arranged in order of time, and therefore, the hearing officer ordered the respondents to submit a second copy of the video recording in its entirety (Exhibit B1).

2. By letter dated June 12, 2017, the complainant appealed to this Commission, alleging that the respondents violated the Freedom of Information (“FOI”) Act by entering into an executive session at the respondent Town Council’s June 5, 2017 regular meeting, for an improper purpose.

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

(a) [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....

(f) A public agency may hold an executive session as defined in subdivision (6) of section 1-200, 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, as defined in section 1-200.

4. Section 1-200(6), G.S., defines “executive session” as:

...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.

5. It is found that the Town Council held a regular meeting on June 5, 2017. It is found that the following item appeared on the agenda for the June 5<sup>th</sup> meeting:

19. Executive Session

- A. To discuss a personnel [i]ssue, (Agreement Between the Town of South Windsor Job Classification and Fringe Benefit Description for Non-Bargaining Unit Members). [Emphasis omitted].

6. It is found that, at the June 5<sup>th</sup> meeting, Deputy Mayor Snyder, a Council member, moved to go into executive session, referencing §1-210(b)(10), G.S., regarding tax returns, reports and statements and attorney-client privileged communications. No further detail was provided regarding the purpose of the executive session. It is found that after inquiries from a Council member concerning the specific purpose of and the wording of the motion for entering executive session, and following the advice of the Town Attorney to amend the motion to reference both §§1-200 and 1-210(b)(10), G.S., Deputy Mayor Snyder amended the motion to go into executive session. The amended motion referenced §§1-200 and 1-210(b)(10), G.S., and a legal opinion covered under the attorney-client privilege. No further detail regarding the subject of the legal opinion was described in the motion. The Council then voted unanimously and entered into executive session.

7. At the hearing, the complainant maintained that the respondents went into executive session for an improper purpose, arguing that the intent of the executive session was to discuss the termination of a retirement health savings plan and employee benefits, which are not proper subjects for an executive session.

8. The respondents contended that they properly went into executive session to discuss an attorney-client privileged communication; specifically, a memorandum, dated June 5, 2017, titled “Re: Retiree Health Savings Plan for the Town Non-Bargaining Employees,” which was prepared by Attorney Allan Friedland, who represents the Town in pension matters.

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

10. The applicability of the exemption contained in §1-210(b)(10), G.S., is governed by established Connecticut law defining the privilege. That law is well set forth in Maxwell v. FOI Commission, 260 Conn. 143 (2002). In that case, 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.

11. 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. . . .

12. 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.

13. It is found that, prior to the June 5<sup>th</sup> meeting, the Town Manager for South Windsor provided to the Town Council his written June 2017 monthly report, stating:

I will need an Executive Session [at the June 5<sup>th</sup> meeting] before you vote on the RHS Plan. Attorney Allan Friedland from Jackson Lewis would like to come and speak to the Council during this Executive Session. I have received an opinion from him as he is the one who had worked on the Plan documents when Judy Hall was the Director of Human Resources. I would also like to discuss with you the importance of terminating this plan. I think it is important that we pay attention to what Attorney Friedland will be discussing as there were items that came to my attention for the first time during our recent conversations. He will be able to provide information on what transpired when the Plan was set up....

14. After the hearing in this matter, the respondents submitted to the Commission a six page document for an in camera inspection. Such document is identified on the in camera Index as “Atty-Client Privileged Memo re: Retiree Health Savings Plan for Town,” and has been marked as IC-2017-0327-1 through IC-2017-0327-6.

15. Based upon a careful inspection of the in camera document, it is found that the memorandum, described in paragraph 14, above, is a written communication transmitted in confidence between counsel and public official(s) or other employee(s) acting within the scope of their employment with the respondent agency. It is further found that the memorandum relates to legal advice sought by the public agency from its attorney, received by the public officials acting on behalf of the agency from its attorney.

16. It is found that, during the June 5<sup>th</sup> meeting, the respondents entered into executive session to discuss the memorandum described in paragraphs 14 and 15, above.

17. It is concluded that the respondents convened in executive session for a proper purpose under §§1-200(6)(E) and 1-210(b)(10), G.S.

18. Based upon all of the foregoing findings of fact and a careful review of the in camera document, it is concluded that the respondents did not violate the FOI Act as alleged in the complaint.

19. Although not an issue in this case, the Commission cautions the respondents to be mindful of the notice requirements in §1-225, G.S.

The following order by the Commission is hereby recommended on the basis of the record concerning the above-captioned complaint:

1. The complaint is hereby dismissed.

Approved by Order of the Freedom of Information Commission at its regular meeting of February 14, 2018.



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:

**MARCIA BANACH**, 80 Mountain Spring Road, Tolland, CT 06084

**MAYOR, TOWN OF SOUTH WINDSOR; TOWN COUNCIL, TOWN OF SOUTH WINDSOR; AND TOWN OF SOUTH WINDSOR**, c/o Attorney Robbie Gerrick and Attorney Morris R. Borea, McGivney, Kluger & Cook, P.C., 20 Church Street, Suite 780, Hartford, CT 06103



Cynthia A. Cannata  
Acting Clerk of the Commission