

FREEDOM OF INFORMATION COMMISSION
OF THE STATE OF CONNECTICUT

In the Matter of a Complaint by

FINAL DECISION

J.R. McMullen,

Complainant

against

Docket # FIC 2017-0334

Committee of the Whole,
Board of Representatives, City of Stamford;
Public Safety and Health Committee,
Board of Representatives, City of
Stamford; Board of Representatives,
City of Stamford; and City of Stamford,

Respondents

May 23, 2018

The above-captioned matter was heard as a contested case on August 30, 2017, at which time the complainant and the respondents appeared, stipulated to certain facts and presented testimony, exhibits and argument on the complaint. On March 7, 2018, the hearing officer issued a proposed final decision. Subsequently, at the Commission's regular meeting of April 11, 2018, the Commissioners unanimously voted to table the matter. Upon review of the respondents subsequently filed brief, the hearing officer issued the Second Report of Hearing Officer on May 18, 2018.

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 received and filed on June 14, 2017, the complainant alleged that the respondents violated certain meetings provisions under the Freedom of Information ("FOI") Act at a "joint meeting" of the Board of Representatives' Public Safety and Health Committee ("Public Safety Committee") and the Board's "Committee of the Whole."¹ Specifically, the complainant alleged in his complaint the following:

[a] The Committee of the Whole "entered into executive session without taking the required vote";

¹ Based upon the hearing officer's careful review of the allegations in the complainant's complaint and consideration of the testimony provided by the complainant and respondents at the hearing in this matter, the case caption has been changed to accurately reflect all respondents.

[b] The Public Safety Committee “entered Executive Session without an affirmative vote of two thirds of the members present and voting in violation of Sec. 1-225(f)”;

[c] The “purpose of the Executive Session does not conform to any purpose listed in Sec. 1-200(6).”²

3. Section 1-225(a), G.S., 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....

4. Section 1-200(6), G.S., defines “Executive sessions” to mean 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. Section 1-225(f), G.S., also provides, in relevant part:

² In his complaint, the complainant also inquired “if it is the Commission’s opinion that I can enter future Executive Sessions based on the BOR decision to make me an ex-officio member of the committees I am not specifically assigned to.” At the hearing in this matter, the complainant withdrew this portion of his complaint. Accordingly, such issue will not be further addressed herein.

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.

6. In addition, §1-231(a), G.S, provides, in relevant part that:

[a]t 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....

7. It is found that the City of Stamford’s Board of Representatives (“BOR”), which consists of 40 members, has created several committees. One of the committees, the Public Safety Committee, consists of nine members. The BOR has also created a committee to which it refers as the “Committee of the Whole,” consisting of all 40 members of the BOR. At the hearing, Attorney Valerie Rosenson, Legislative Officer of the BOR, testified that it has been a “past practice” of the BOR to list the Committee of the Whole as a secondary committee on a meeting agenda if there may be “an item of interest” to the full BOR, and allow members of the Committee of the Whole, as a secondary committee, to participate at the meetings, including inviting the Committee of the Whole into an executive session, if any.

8. It is found that on May 25, 2017, five members of the Public Safety Committee and seventeen members of the Committee of the Whole held a meeting (“May 25th meeting”).

9. It is found that the following item appeared as Item No. 2 on the agenda for the May 25th meeting:

Item No.	Description	Invitee(s) or Designee(s)...
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Possibly in Executive Session:

2. PS29.077	REVIEW; Shippan Fire Settlement 05/03/17 – Submitted by Pres. Skigen and Rep. Fedeli	K. Emmett
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Secondary Committee: Committee of the Whole

[Emphasis in original].

10. It is found that the May 25th meeting of the Public Safety Committee was called to order by its Chair at 7:00 p.m. It is found that at or about 7:58 p.m., the Public Safety Committee called Item No. 2 on the agenda, described in paragraph 9, above. It is also found that, immediately thereafter, the BOR President, who was present as a member of the Committee

of the Whole, but not a member of the Public Safety Committee, called to order a meeting of the Committee of the Whole.

11. It is found that following the call to order of the Committee of the Whole, as described in paragraph 10, above, Kathryn Emmett, corporation counsel for the City of Stamford, requested that the discussion of Item No. 2 be held in executive session due to pending litigation and ongoing negotiations. Attorney Emmett testified that she was invited to the May 25th meeting to present on the status of such pending litigation and ongoing negotiations, and to obtain feedback from the members of the Public Safety Committee and Committee of the Whole on such matters.

12. It is found that a motion was made by a member of the Public Safety Committee to enter into executive session. The purpose of the executive session was not explicitly articulated in such motion. The motion was approved by a vote of 3-0-2 (i.e., 3 in favor, 0 against and 2 abstaining) by the members of the Public Safety Committee. The members of the Committee of the Whole did not vote to go into executive session. However, at the hearing in this matter, Attorney Emmett testified that the members of the Committee of the Whole entered the executive session, and that, in executive session, they participated, as members of the BOR, in discussing and expressing opinions about the topic of the executive session.

13. Attorney Emmett testified that upon entering the May 25th executive session, she “began to talk about where we were and what the process had been to get there.” An objection was then raised by the complainant, who is a member of the BOR and was present in executive session, to maintaining confidentiality. Attorney Emmett testified that, after some discussion with the complainant regarding confidentiality, she was not comfortable discussing the pending litigation any further, and no substantive discussion concerning pending claims and litigation occurred in executive session.

14. It is found that no votes were taken upon returning to the public session, except for two votes taken by the Public Safety Committee to come out of executive session and adjourn the meeting, respectively.

15. With respect to the allegation described in paragraph 2[b], above, Black’s Law Dictionary (8th Ed. 2004), defines the term “abstain,” in relevant part, as “[t]o voluntarily refrain from doing something, such as voting in a deliberative assembly....” In addition, although not binding on the Commission, under Robert’s Rules of Order Newly Revised (11th Ed. 2011), “[t]o ‘abstain’ means not to vote at all....”

16. It is found that three members of the Public Safety Committee who were present at the May 25th meeting voted to enter into executive session. It is found that two members abstained, and therefore did not vote at all on such motion. Accordingly, it is found that all members of the Public Safety Committee who were present and voting at the May 25th meeting, voted to go into executive session in accordance with §1-225(f), G.S. It is concluded that the respondent Public Safety Committee did not violate §1-225(f), G.S., as alleged in paragraph 2[b], above.

17. With respect to the allegation described in paragraph 2[a], above, the respondents

argued that the Committee of the Whole did not vote to enter into executive session because they did not have a quorum, and that they were simply invited to attend the executive session of the Public Safety Committee. As found in paragraph 12, above, the executive session was convened by the Public Safety Committee, not the Committee of the Whole. Based upon the unusual facts and circumstances of this case, it is concluded that the respondent Committee of the Whole did not violate §1-225(f), G.S., as specifically alleged in paragraph 2[a], above.

18. With respect to the allegation described in paragraph 2[c], above, regarding the purpose of the executive session, the respondents argued that they properly went into executive session for discussion of strategy and negotiations with respect to pending claims or pending litigation, within the meaning of §1-200(6)(B), G.S. The complainant contends, however, that the respondents cannot justify the executive session under §1-200(6)(B), G.S., because the BOR is not “a party” to a pending claim or litigation, nor was the purpose to discuss strategy and negotiations, but rather to have corporation counsel “present” on litigation strategy.

19. Section 1-200(6)(B), G.S., allows an executive session for discussion of “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....”

20. “Pending claim” is defined in §1-200(8), G.S., as “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.”

21. “Pending litigation” is defined in §1-200(9), G.S., as “(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.”

22. It is found that on Christmas Day 2011, a fatal fire in the Shippan neighborhood of the City of Stamford resulted in the deaths of three children and two grandparents. It is found that the estates of the deceased individuals, and parents of the children, brought wrongful death lawsuits against the City of Stamford and two city officials. The “City of Stamford” and the two city officials were explicitly named as defendants. The “Board of Representatives” and “Public Safety and Health Committee” were not explicitly named.

23. It is found that, at the time of the May 25th meeting, the City of Stamford had reached settlement agreements in certain lawsuits, described in paragraph 22, above, which were subject to certain delineated conditions (*e.g.*, required final approval by the Stamford Probate Court, required the passage of certain ordinances by the City’s legislative body), and a settlement agreement which had not yet been signed and executed.

24. At the hearing and on brief, the respondents argued that the BOR is a “party” to the pending litigation, described in paragraphs 22 and 23, above.

25. However, the issue of whether the BOR, the Committee of the Whole, or the Public Safety Committee, is or was a “party” to the litigation described in paragraphs 22 and 23, above, is not determinative under the complex facts and circumstances of this case. Even if any of the respondents were found to be parties to the litigation described in paragraphs 22 and 23, above, the respondents failed to prove the other elements of §1-200(6)(B), G.S., as discussed below.

26. It is found that the respondents failed to prove that the purpose for entering executive session was for discussion of strategy and negotiations with respect to pending litigation. Rather, based on the evidence in this matter, it appears that the purpose of the executive session was to have corporation counsel provide the members of the Public Safety Committee and the Committee of the Whole with a status update on the pending litigation. Furthermore, as testified to by Attorney Emmett, no substantive discussion actually occurred in executive session relating to any pending claims or litigation.

27. At the hearing in this matter, the respondents also argued that they properly went into executive session pursuant to §1-200(6)(E), G.S., which allows an executive session for “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.” The respondents claimed that the record to be discussed constituted a preliminary draft, within the meaning of §1-210(b)(1), G.S.; a record pertaining to strategy and negotiations with respect to pending claims or pending litigation, within the meaning of §1-210(b)(4), G.S., and an attorney-client privileged communication, within the meaning of §1-210(b)(10), G.S., respectively.

28. On January 18, 2018, the hearing officer ordered the respondents to submit such records for in camera inspection. By email received on February 1, 2018, the respondents provided the hearing officer with a document titled “Confidential Settlement Agreement and Release” (“Settlement Agreement”), and a privilege log, which have been marked as Respondents’ Exhibit 12 (after-filed). In their February 1st email, the respondents informed the hearing officer that: “As the conditions upon which this Agreement was predicated have recently been satisfied, the Respondent no longer claims exemption of this record. However, at the time of the hearing before you, the conditions were not yet met, and the document was claimed under §1-210(b)(4). Consequently, I have enclosed a privilege log to confirm our claim of exemption that existed at the time of the hearing.”³

29. Section 1-210(b)(4), G.S., provides that disclosure is not required of “[r]ecords pertaining to strategy and negotiations with respect to pending claims or pending litigation to which the public agency is a party until such litigation or claim has been finally adjudicated or otherwise settled...”

30. At the hearing, Attorney Emmett testified that the purpose of the executive session

³ The Commission notes that in their February 1st email, including the privilege log, and post-hearing brief, the respondents did not cite to their previous claims of exemption pursuant to §§ 1-210(b)(1) and 1-210(b)(10), G.S. It is found that the respondents failed to prove that they went into executive session to discuss a record constituting a preliminary draft, within the meaning of §1-210(b)(1), G.S., or an attorney-client privileged communication, within the meaning of §1-210(b)(10), G.S.

was also to discuss “documents” pertaining to “strategy and negotiations” with respect to pending claims or pending litigation. She testified that such documents were in “draft form” and “had not been finally signed off on.” Attorney Emmett did not specifically identify the documents.

31. It is found, based upon a review of the Settlement Agreement, described in paragraph 28, above, that such document pertained to the settlement of the pending lawsuit in Madonna Badger v. City of Stamford, Robert D. DeMarco and Ernest Orgera, District of Connecticut, Civil Action No. 3:13-cv-00011-SRU, and contained certain delineated conditions. It is also found that the Settlement Agreement was signed by the plaintiff and by Attorney Emmett, on behalf of the City of Stamford, prior to the May 25th meeting at issue in this matter.

32. It is found that the respondents failed to prove that the signed Settlement Agreement, which was provided to the hearing officer, pertained to “strategy and negotiations” with respect to pending litigation, within the meaning of §1-210(b)(4), G.S. Accordingly, it is found that the respondents failed to prove that they went into executive session to discuss a record constituting a record pertaining to strategy and negotiations with respect to pending claims or pending litigation, within the meaning of §1-210(b)(4), G.S.

33. It is therefore concluded that the respondent Public Safety Committee violated §1-225(a), G.S., by entering into the executive session for an impermissible purpose.

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

1. Henceforth, the respondent Public Safety Committee shall strictly comply with §1-225(a), G.S.
2. The complaint is dismissed against the respondents BOR and Committee of the Whole.
3. The Public Safety Committee shall contact Commission staff to schedule a training session. The Commission also strongly encourages all of the respondents to attend such session to address several concerns raised in this matter that were not addressed in the report because they were not raised in the complaint.

Approved by Order of the Freedom of Information Commission at its regular meeting of May 23, 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:

J.R. MCMULLEN, 165 Slice Drive, Stamford, CT 06907

COMMITTEE OF THE WHOLE, BOARD OF REPRESENTATIVES, CITY OF STAMFORD; BOARD OF REPRESENTATIVES, CITY OF STAMFORD; PUBLIC SAFETY AND HEALTH COMMITTEE, BOARD OF REPRESENTATIVES, CITY OF STAMFORD; BOARD OF REPRESENTATIVES, CITY OF STAMFORD; AND CITY OF STAMFORD, c/o Attorney Amy J. LiVolsi, City of Stamford, 888 Washington Boulevard, Stamford, CT 06905



Cynthia A. Cannata
Acting Clerk of the Commission