

LISA KELLY MORGAN

Statement before Judiciary Committee – Public Hearing – April 9, 2007

Raised Bill Nos. 7430 and 1481

Good afternoon Chairmen McDonald and Lawlor, Ranking Members Kissel and O'Neill, and other members of the Judiciary Committee. My name is Lisa Kelly Morgan. I am chair of the Judicial Selection Commission and I will address Raised Bill Nos. 7430 and 1481.

With regard to Bill No. 7430, there are some positive changes proposed to the existing statute which will greatly facilitate access to the Judicial Selection Commission and streamline the process for obtaining and filing applications. One proposed change, however, raises a concern. As drafted, new subsection (h) of the proposed Bill can be interpreted to require the Judicial Selection Commission to give notice of the time and place of all meetings held, regardless of the purpose of the meeting. In contrast, the Freedom of Information Commission has issued Advisory Opinion #77 holding that the Judicial Selection Commission is not required to publish notice of the time and date of meetings held for the purpose of interviewing candidates. The FOIC reasoned that public notice of such meetings could violate the confidentiality provisions of Conn. Gen. Stat. §51-44a by “inviting surveillance of individuals who enter or leave the [Judicial Selection Commission’s] noticed meeting place.” If new (h) of the proposed amendment is interpreted to supersede, rather than implement the FOIC’s Advisory Opinion, such an interpretation would run afoul of the Judicial Selection Commission’s statutory mandate to protect and maintain the confidentiality of its investigations, deliberations, files and records. For your reference, I have attached a copy of Advisory Opinion #77 to this statement.

It is important to note that when the Judicial Selection Commission meets to interview prospective candidates, it is in fact conducting a job interview. Many candidates have not disclosed to their current employers that they have applied for a judgeship and many candidates who come before the Commission are not approved. Even those who are approved are hardly guaranteed the job. Rather, the approved applicants’ names are placed on a list of qualified

candidates from which the Governor may nominate judges. The list doesn't expire and a candidate can remain on the list indefinitely. Under these circumstances, it would be unfair to the applicants to have their identity and intent to seek other employment made public. The FOIC recognized the sensitive and confidential nature of the application process and properly implemented safeguards to protect the applicant's right of privacy and the Commission's mandate of confidentiality. Consequently, to the extent that Bill No. 7430 seeks to implement the FOIC's Advisory Opinion, it is a positive change. However, if the proposed amendment seeks to supersede the FOIC opinion, the amendment should be reconsidered for the reasons stated.

Turning to Bill No. 1481, the proposed amendment provides that state referees seeking reappointment shall be evaluated and recommended by the Judicial Selection Commission. The concern with this amendment is one of volume. At present, the Commission, which as you know is comprised of volunteers, meets once a month to interview new candidates for judgeships, incumbent judges seeking reappointment and incumbent judges seeking appointment to a different court. On average, the Commission conducts approximately 80 interviews a year. Incumbent judges are required to be evaluated every eight years. This year, the Commission will evaluate 19 incumbent judges; next year it will evaluate 35. As of January 31, 2007, there were 97 state referees. If the evaluation of state referees is to be added to the duties of the Judicial Selection Commission, there will be fewer opportunities for the Commission to interview new candidates for judgeships or incumbent judges seeking elevation to a different court. Accordingly, consideration should be given to the frequency with which the state referees are to be evaluated by the Commission and the impact these additional evaluations will have on the ability of the Commission to timely conduct other interviews. Thank you.

FREEDOM OF INFORMATION COMMISSION
OF THE STATE OF CONNECTICUTIn the Matter of a Request
for Declaratory RulingCorrected Notice of Final
DecisionMajority Leader, Connecticut
House of Representatives,

Applicant

Advisory Opinion #77

March 7, 1990

This will serve as notice of final decision of the Freedom of Information Commission in the above matter, as provided by §4-183(b), G.S. At its meeting of February 14, 1990, the Commission adopted the attached proposed declaratory ruling as the declaratory ruling of the Freedom of Information Commission requested under §4-176 G.S.

By Order of the Freedom of
Information Commission
Karen J. Haggett
Clerk of the Commission

Forrest Palmer
William A. O'Neill, Governor
Senator John B. Larson, Senate President Pro-Tempore
Rep. Richard Balducci, Speaker of the House
Senator Reginald J. Smith, Senate Minority Leader
Rep. Robert G. Jaekle, House Minority Leader
Senator Cornelius O'Leary, Senate Majority Leader
Senator Anthony Avallone, Co-Chairman, Judiciary Cmte.
Rep. Richard Tulisano, Co-Chairman, Judiciary Cmte.
Judge Aaron Ment, Chief Court Administrator
Paul J. McQuillan, Chairman, Judicial Selection Comm.
Howard Rifkin, Legal Counsel to the Governor
Daniel Schaffer, Asst. Atty. Gen.



STATE OF CONNECTICUT
FREEDOM OF INFORMATION COMMISSION

In the Matter of a Request for
Advisory Opinion

Draft #3
Advisory Opinion #77

Majority Leader, Connecticut
House of Representatives, Applicant

On November 30, 1988, the Commission considered and agreed to respond to the request for an advisory opinion filed by the Majority Leader of the Connecticut House of Representatives.

In his request, the applicant notes that the State Judicial Selection Commission ("JSC") was established and empowered pursuant to constitutional amendment and state statute. The chief mandate of the JSC is to provide a list of qualified candidates from which the Governor shall select nominees for judgeships.

The applicant seeks the Commission's opinion as to the applicability of the Freedom of Information ("FOI") Act with respect to the JSC. Specifically, the applicant would like the Commission's opinion as to whether the JSC must comply with the FOI Act's requirements governing notice of meetings, minutes (including those portions about executive sessions) and votes.

The basic concept behind the FOI Act is that the records and meetings of public agencies are to be open to the public except where federal law or state statute provides to the contrary. See Conn. Gen. Stat. §§1-19(a) and 1-21(a). Without doubt, the JSC is a public agency within the meaning of Conn. Gen. Stat. §1-18a(a). The question remains then as to the extent federal law or state statute exempts the JSC from the requirements of the FOI Act.

The Commission is unaware of any federal law controlling the JSC's records or meetings. The primary state statute governing the JSC is Conn. Gen. Stat. §51-44a, as amended by P.A. 89-238. That statute contains a number of provisions affecting the applicability of the FOI Act to the JSC. They are:

1. The JSC shall hold a hearing before recommending a judge's reappointment if a preliminary examination indicates further inquiry is necessary. The JSC shall make a record of each such hearing. The hearing may be open to the public at the request of the judge. The notice of the JSC's decision not to reappoint a judge shall include a record of the numerical vote on the issue. Conn. Gen. Stat. §51-44a(e).

Advisory Opinion #77

Page 2

2. Although the vote of the JSC on an incumbent judge may be by secret ballot, the vote on a new nominee must not be by secret ballot. Conn. Gen. Stat. §51-44a(i).

3. Except as provided in Conn. Gen. Stat. §§51-44a(e) and (m), "the investigations, deliberations, files and records" of the JSC shall be confidential. The criteria by which new and incumbent judges are evaluated and the JSC's procedural rules, however, shall be public. Conn. Gen. Stat. §51-44a(j).

4. The JSC's chairperson shall annually report certain non-personally identifiable information to the General Assembly's Judiciary Committee. Conn. Gen. Stat. §51-44a(m). Since this information constitutes an exception to the matters to be kept confidential under §51-44a(j), presumably it is also available to the public.

In addition, Conn. Gen. Stat. §2-40a, as amended by P.A. 89-238, provides that any performance evaluation of a judge made by the Judicial Department and made available to the JSC shall be used only for the purpose for which it was given and shall not be disclosed to anyone else.

The Commission believes that the statutory scheme described above can be fairly characterized as embodying the legislature's will in two, somewhat differing, respects as to the applicability of the FOI Act to the JSC. First, the legislature clearly manifested its intent to confer a broad grant of confidentiality over personally identifiable information in those matters falling within the JSC's mandate to evaluate and recommend judge candidates. Second, the legislature did not categorically exempt the JSC from all of the requirements of the FOI Act. Consequently, to respond to the applicant's specific inquiry, the Commission believes it must balance the FOI Act's "overarching policy favoring disclosure," Hartford v. FOI Commission, 201 Conn. 421, 431 (1986), with the legislature's broad grant of confidentiality to the JSC.

It is the Commission's opinion that the JSC must comply with the notice of meetings requirements of the FOI Act except to the extent that such compliance would disclose, or reasonably lead to the disclosure of, matters which are confidential under §51-44a(j). The Commission foresees three categories of meetings, distinguished by subject matter and attendance, to which this general requirement applies:

Advisory Opinion #77

Page 3

1. Meetings concerning confidential investigations, deliberations, files or records, which meetings are to be attended only by JSC members, staff or counsel. It is the Commission's opinion that the JSC will not violate the prohibitions against disclosure in §51-44a(j) merely by filing a schedule of regular meetings at which attendance is to be limited to JSC members, staff or counsel. Nor will the JSC violate those prohibitions by filing notices of special meetings at which attendance is to be so limited, denoting the time, date, place and a general, non-personally identifiable statement of the business to be transacted.

2. Meetings concerning confidential investigations, deliberations, files or records, which meetings are to be attended by individuals (other than JSC members, staff or counsel) whose presence might disclose, or reasonably lead to the disclosure of, matters which are confidential under §51-44a(i). It is the Commission's opinion that because filing a schedule of a regular meeting at which such individuals are to be present, or filing a notice of a special meeting at which such individuals are to be present may violate the prohibition against disclosure in §51-44a(j), the JSC need not file such a schedule or notice. Such a schedule or notice might disclose or reasonably lead to the disclosure of, for example, a judicial candidate attending such a meeting, by inviting surveillance of individuals who enter or leave the JSC's noticed meeting place.

3. Meetings concerning matters other than confidential investigations, deliberations, files or records. It is reasonable to assume that some, or a portion of some, JSC meetings may concern administrative or other matters which do not fall within the legislative grant of confidentiality; for example, procedural rules or evaluation criteria. It is the Commission's opinion that public notice is required for such meetings.

It is also the Commission's opinion that the JSC must comply with the minutes-keeping requirements of the FOI Act. Without approved minutes, there would be no official permanent record that the JSC in fact held meetings for the transaction of its business as required by public agency law. 2 Am. Jur. 2d, Administrative Law §227. See also Zionek v. Bartimole, 156 Conn. 604, 612 (1968). Nor would there be such a record to support the reimbursement of expenses. Conn. Gen. Stat. §51-44a(d)(3). Furthermore, as in the case of meeting notices, it is reasonable to assume that some, or a portion of some, JSC minutes may concern matters which are not confidential under §51-44a.

Advisory Opinion #77

Furthermore, for reasons similar to those set forth above with respect to the JSC's minutes, it is the Commission's opinion that the JSC must comply with the requirements of the FOI Act for keeping a record of its members' votes, with one notable exception.

Conn. Gen. Stat. §1-21(a), in pertinent part, provides:

The votes of each member of any such public agency upon any issue before such public agency shall be reduced to writing . . . and shall also be recorded in the minutes of the session at which taken. . . .

Conn. Gen. Stat. §51-44a(i), however, states that although the vote of the JSC on an incumbent judge may be by secret ballot, the vote on a new nominee must not be by secret ballot.

Thus, while the JSC need not record the votes of each of its members on issues relating to incumbent judges, it must at least keep a numerical record of its members' votes for purposes of §51-44a(e). It must also record the votes of each of its members on issues relating to new judge candidates.

The Commission stresses that this opinion should not be construed to limit the JSC's obligation under §51-44a to exclude the public from those meetings or those portions of its meetings constituting investigations or deliberations or at which the contents of its files or records will be disclosed. Nor should this opinion be construed to limit the JSC's obligation under §51-44a not to disclose those portions of its minutes (including those describing what transpired at executive sessions), or its record of votes, concerning JSC investigations or deliberations or the contents of its files or records. The Commission believes that these matters are exceptions to the FOI Act by virtue of Conn. Gen. Stat. §51-44a.

By Order of the Freedom of Information Commission

Curtis M. Coffield

Curtis Coffield, Chairman

Dated:

March 17, 1990

Ordered:

Karen Haggett
Karen Haggett, Clerk