Government Administrations and Elections Committee
Public Hearing

CONNECTICUT COUNCIL ON FREEDOM OF INFORMATION STATEMENT ON RAISED BILL 5501, AN ACT CONCERNING EXECUTIVE SESSIONS OF PUBLIC AGENCIES

March 7, 2016

The Connecticut Council on Freedom of Information ("CCFOI") **opposes** Raised Bill No. 5501. The bill seeks to restore a loophole in the Freedom of Information Act ("FOIA") that the Generally Assembly closed in 1986 when it passed Public Act 86-266, now codified as Conn. Gen. Stat. § 1-231(b). The General Assembly passed that amendment in response to clear and convincing evidence that public agencies were abusing the "executive session" provision of the FOIA.

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Since its inception in 1975, the FOIA has allowed public agencies to go into executive session for a number of very sound reasons, including to obtain legal advice from attorneys concerning "strategy and negotiations with respect to *pending* claims or *pending* litigation [to which the agency is a party]." When a public agency, including a municipal board, is a party to *active* litigation, the legal advice of its attorneys must be rendered in confidence, lest the opposing party use knowledge of that advice to its unfair advantage.

These concerns are not present when an attorney is providing general legal advice to a public agency on matters unrelated to pending claims or litigation. Moreover, when attorneys provide general legal advice on non-litigation matters to a public agency, that advice itself is frequently a matter of legitimate public interest. When public agencies take, or decline to take, certain actions outside of litigation based in part on legal advice, the public has a strong interest in knowing what that advice is.

Unfortunately, the evidence presented to the General Assembly in 1986 showed that government agencies around the state had begun to pay their attorneys to attend *all* of their meetings just so that they could exclude the public from meetings where potentially unpopular issues (such as tax hikes or salary increases for public officials) would be discussed, but which were neither privileged nor statutorily permitted as a proper purpose for an executive session. Put bluntly, public agencies used taxpayer money to pay for attorneys so that they (the agencies) could hide matters of civic importance from the taxpayers until after the fact.

Accordingly, Conn. Gen. Stat. § 1-231(b) states 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 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."

Notably, this important amendment does not preclude public agencies from receiving confidential legal advice on matters other than pending claims and litigation. Nor does it preclude public agencies from discussing such advice with their counsel in executive session. It simply requires that such advice must first be memorialized *in writing*. The FOIA authorizes public agencies to go into executive session to "discuss[] any matter which would result in the disclosure of public records . . . described in subsection (b) of section 1-210," which includes privileged attorney-client communications. *See* Conn. Gen. Stat. § 1-210(b)(10) (exemption written attorney-client communications). This writing requirement ensures that public agencies are able to receive confidential legal advice on matters that do not involve pending claims or litigation, while reducing the likelihood of abuse of executive sessions.

For these reasons, CCFOI strongly opposes Raised Bill No. 5501.

Respectfully submitted,

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CCFOI Legislative Chair