

**FREEDOM OF INFORMATION COMMISSION STATEMENT REGARDING
RAISED BILL 5501, AN ACT CONCERNING
EXECUTIVE SESSIONS OF PUBLIC AGENCIES**

March 7, 2016

The Freedom of Information (FOI) Commission strongly **opposes** Raised Bill 5501 which would expand the ability of public agencies to meet in executive session.

Under current law, of course, a public agency may discuss any matter with its attorney, in public. Also, a public agency may invite its attorney into an executive session to receive the attorney's oral testimony or opinion, if such executive session is convened for discussion of one of the following purposes: (1) certain personnel matters; (2) certain real estate matters; (3) matters concerning security or deployment of security personnel; (4) strategy and negotiations with respect to pending claims or pending litigation; and (5) any record that is exempt from disclosure, including records of attorney-client privileged communications.

This bill would amend §§1-200(6) and 1-231 of the FOI Act to eliminate the requirement that the public agency must convene in executive session for one of the five explicitly permitted purposes, only, before it receives oral testimony or opinion from its attorney. Under this bill, a public agency would be permitted to consult with its attorney in executive session about any "legal matter[]." Such provision is very broad, and could encompass, for example, a discussion of a variance by a zoning commission, or discussion of the budget by a board of finance, which discussions are required to be held in public. The possibilities are endless.

Significantly, in 1986, the General Assembly considered and rejected this very "loophole" in the open meetings requirements of the FOI Act, and the Commission therefore asks this Committee to consider the following history before it votes on the bill:

- ***The General Assembly has grappled with this issue before.*** In a 1984 Superior Court decision, Zoning Board of Appeals of the Town of North Haven v. Freedom of Information Commission, No. 21 28 11 (Freedman, J.) (May 3, 1984), the Court read the FOI Act language at that time to mean that a multi-member public agency may meet at any time to discuss attorney-client privileged matters with their attorney, and need not identify those matters to the public. The case was appealed, with the anticipation that the Supreme Court would finally decide the issue.
- In February 1986, the Supreme Court decided the case on other grounds and did not address the issue of the appropriateness of the executive session. Zoning Board of Appeals of the Town of North Haven v. Freedom of Information Commission, 198 Conn. 498 (1986). Because it was then clear that the Superior Court decision had opened up a ***huge loophole*** in the open meetings provisions of the FOI Act, the Legislature acted quickly - and decisively - to close it up.
- In the ***spirited debate on the floor***, the members of the House recognized that, if the North Haven case went unaddressed, it would result in a gutting of the open meetings provisions.

- The proponent, **Representative Mae Schmidle**, referring to the bill stated: "...it closes a loophole created by the North Haven court decision that states that any agency can exclude the public at any time it chooses and go into an executive session with an attorney for... any reason or maybe a reason that only God knows..." Connecticut General Assembly House Proceedings 1986, H-435, page 4055.
- Citing the North Haven case, **Representative Schmidle** stated "[the court] ruled that a government agency can close its meetings to the public for any reason whatsoever merely by stating that it intends to discuss a matter with its attorney. The court said that the agency need not even disclose the subject of the discussion, because that, too, would reveal a communication privileged by the attorney-client relationship.... I cannot believe that this is what the people in our state want and I know that this is not what the Connecticut General Assembly intended." Id. at 4055-4056.
- **Representative Richard Blumenthal** stated: "What we are saying here is that there may also be issues of public policy that ought to be a matter of public debate. We ought not to treat a town or the state the same as we would treat a private litigant, because the town or the state or a public agency owes a special duty to the public and that ought to subject it to a greater amount of scrutiny...." Id. at page 4068.
- **Representative Christopher Shays** stated: "When I was here a number of years ago...I remember Ella Grasso saying we are going to have open government and I remember that I thought, you know, it wasn't all that significant. I mean, what is all the big fuss. And she got it through and the vast majority of democrats supported it and so did the republicans. And it was a good law. I now realize what a monumental thing she accomplished. And for a number of years it worked just fine until we had a judge that decided in a case in New Haven, when they illegally had a meeting closed to the public, and then looked for an excuse and the excuse was we have an attorney and there is this thing called an attorney-client privilege that we will go and appeal it. And for some strange reason, they won." Id. at 4078.
- The House passed the rectifying bill by a vote of 119 -24 and the Senate passed it on consent. It was Public Act 86-266, now codified as Conn. Gen. Stat. §1-231(b), which states: "An 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."
Raised Bill 5501 proposes to eliminate this very provision.

If this bill is enacted, the loophole that the Legislature wisely closed up in 1986 will be re-opened. It will allow multi-member public agencies to discuss with their attorneys any legal matter behind closed doors. The law has been working well for thirty years so why is this change needed?

The passage of this bill would be a major blow to transparency of government operations, as well as an unnecessary step backwards.

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