

## **Attorneys Are Not So Special After All: The FOIA and the Need for Specific Agenda Items**

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### Education Law Notes

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By Mark Sommaruga

Generally, Connecticut's Freedom of Information Act ["FOIA"] requires that a public agency preparing an agenda/posting for a meeting ensure that each agenda item is specific enough to apprise the public of the action contemplated by the agency, so that the public and interested parties may be properly prepared and be present to express their views. This is especially so when a public agency is planning on entering into executive session, as the FOIA additionally requires an agency to give the reason for moving into executive session. *Connecticut General Statutes §1-225(f)*.

For years, I have repeatedly advised public agencies that agenda items such as "personnel matter" or "pending litigation" are insufficient under the FOIA due to lack of sufficient specificity, and that an agency at least needs to describe the general type of personnel matter or litigation involved before excluding the public and proceeding into "executive session." *Understanding the Connecticut Freedom of Information Act and Access to Public Meetings and Records*, by Mark J. Sommaruga (4<sup>th</sup> Edition, 2013), p. 17. Despite the general rule, Connecticut's Freedom of Information Commission ["FOIC"] had previously appeared to be more lenient with regard to a public agency proceeding to consider an attorney-client privileged document. The FOIC appeared to hold that simply listing as an agenda item "discussion of confidential attorney client memorandum" was sufficient, and the agency need not list the subject matter of the confidential communication. See, e.g., *Lowthert v. Chairman, Board of Education, Wilton Public Schools*, #FIC 2014-171 (March 11, 2015).

However, in *Smith v. Superintendent of Schools, Windsor Public Schools*, #FIC 2014-833 (September 24, 2015), and #FIC 2015-037 (October 28, 2015), the FOIC clarified (and pulled back) on this "lenient" treatment of attorney-client communications in the context of agenda items. In the first case, a FOIC complainant asserted that a board of education violated the FOIA when it conducted an executive session for the stated agenda item of "**attorney/client privileged communication regarding personnel matter.**" In the second case, the same complainant asserted that the board of education violated the FOIA when it conducted an executive session for "**discussion concerning confidential attorney-client communication.**" The FOIC agreed with the complainant in both cases that these agenda items were not specific enough, and thus were in violation of the FOIA. The FOIC asserted that its prior rulings **only** permitted such a broad/non-specific agenda item where disclosure of the subject matter of the privileged communication would by itself reveal the substance of the privileged communication. The FOIC borrowed the logic that it has long applied in

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cases concerning discussions of “pending litigation” and “personnel” matters.

### **Lessons Learned?**

As an attorney who represents public agencies such as school districts, this case hits close to home. Nonetheless, it is understandable that the FOIC could find that simply providing some general description of the subject matter of the written legal opinion – for example, that the opinion concerned the superintendent’s contract, or regional school district budget process issues - generally would not violate the attorney-client privilege, and thus is required under the FOIA. The logic for requiring some description of the type of personnel matter or the general nature of the litigation being discussed would also apply to requiring some general statement/description of the attorney’s legal opinion, understanding that there may be a rare case where even the description of the subject matter by itself would actually destroy the attorney-client privilege.

It is important to remember that the FOIC has maintained a modicum of common sense. For example, and as I have noted on prior occasions, the need for specificity in an agenda item does **not** include a requirement that the agency identify *by name* any individual to be discussed in executive session. However, this need for specificity will likely require the identification of the type of employee being discussed. Sommaruga, p. 27.

These and other types of issues are discussed in more detail in ***Understanding the Connecticut Freedom of Information Act and Access to Public Meetings and Records***, by **Mark J. Sommaruga, Esq.** To order a copy of this book, please [click here](#).

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