NORCOTT, J., concurring. I reluctantly agree with the majority's ultimate conclusion that the executive session convened by the plaintiffs, the Connecticut Medical Examining Board (board) and its chairperson, on February 17, 2009, to discuss a letter from the complainants, Attorney Michael Courtney and the Office of the Chief Public Defender, dated February 13, 2009 (letter), was a violation of the Freedom of Information Act (act), General Statutes § 1-200 et seq. Specifically, the majority reviews the letter, which had advised the board of a potential conflict of interest in its legal representation, and determines it was not a " '[p]ending claim' " as defined by § 1-200 (6) and (8)[1] for purposes of authorizing the executive session under General Statutes § 1-231.[2] I write separately, however, because I disagree with the majority's primary analytical focus on the language of the letter, rather than first addressing the nature of the proceedings in which it was filed. Rather than parsing the language of a specific filing in the first instance, I would look instead to the context in which that filing was made to determine whether an executive session to discuss it was permissible under the act. Because the context surrounding the facts of the present case, namely, a request for a declaratory ruling from the board under General Statutes § 4-176 (a),[3] does not, by itself, constitute a "pending claim" within the meaning of § 1-200 (6) and (8),[4] and, as the majority points out, because the letter contains no indication that the complainants would assert any legal rights against the board, I conclude that the board improperly convened the executive session at issue. Accordingly, I concur in the majority's decision to affirm the judgment of the trial court dismissing the board's administrative appeal from the decision of the named defendant, the Freedom of Information Commission (commission). See footnote 1 of the majority opinion.

I begin by noting my agreement with the majority's statement of the facts, procedural history, standard of review, and background legal principles. Thus, I turn to the board's argument that the record contains substantial evidence that the board had "convene[d] in executive session to discuss strategy and negotiations with respect to a pending claim," namely, the complainants' request for a "declaratory ruling requesting a determination as to whether it is permissible in Connecticut for a physician to participate in the execution of condemned Connecticut inmates using lethal injection." I believe it is important to address this particular claim as a threshold matter because the majority's approach of immediately determining whether the letter "constitutes notice of a 'pending claim' of conflict of interest"

creates a risk of missing the forest through the trees, if extended to future cases challenging an agency's decision to go into executive session.[5] Put differently, rather than parsing the language of the letter to determine whether it amounted to a pending claim; see *Board of Education* v. *Freedom of Information Commission*, 217 Conn. 153, 162–63, 585 A.2d 82 (1991); I would always look first instead to the procedural context in which the letter was filed in order to determine whether an executive session was permissible under § 1-200 (6) (B) before considering the language of any particular filing therein.[6] This is because, in my view, if the context of the administrative proceeding underlying the filing at issue amounts to a "pending claim," *any* documents associated with that proceeding would, a fortiori, appropriately be the subject of an executive session.

Like the majority, I recognize the well established "basic policy of the [act that] supports limiting the exceptions to open meetings. This court has said that it will construe the act to favor disclosure and that exceptions to disclosure must be narrowly construed. . . . The burden of establishing the applicability of an exception rests upon the party claiming it. . . . We have not, however, hesitated to apply an exception where the party seeking it has met the burden of establishing that it applies." (Citations omitted; internal quotation marks omitted.) *Furhman* v. *Freedom of Information Commission*, 243 Conn. 427, 432, 703 A.2d 624 (1997).

Thus, I turn to the board's specific arguments on this issue. Relying on *Stamford* v. *Freedom of Information Commission*, 241 Conn. 310, 696 A.2d 321 (1997), the board contends that the complainants' request for declaratory ruling constituted a pending claim because "an agency's granting of a declaratory ruling is subject to judicial review and its denial of such a ruling is subject to judicial relief. General Statutes § 4-176. Clearly, such discussions in executive session constituted strategy with respect to a pending claim as the purpose of the meeting was to discuss how to respond to the issues raised in the letter." I disagree with the board's argument. Given the plain language of our statutory scheme, I conclude that a request to an agency for a declaratory ruling is not by itself a "pending claim" under § 1-200 (6) (B), despite the fact that the agency's declaratory ruling could ultimately be the subject of an administrative appeal to the trial court.

On this point, I find instructive a Superior Court decision, *Ansonia Library Board of Directors* v. *Freedom of Information Commission*, 42 Conn. Supp. 84, 600 A.2d 1058 (1991), concluding that a library board had improperly conducted an executive session to discuss a prior commission decision in its favor because that matter was no longer pending before the commission, despite the then existing possibility of an administrative

appeal from the commission's decision and fact that "the [library] board reasonably expected an appeal from [the complainant], particularly considering his prior litigious conduct towards the library board." Id., 90. The Superior Court, relying on this court's decision in *Board of Education* v. *Freedom of Information Commission*, supra, 217 Conn. 153, rejected the library board's claim "that it should not have to wait until the appeal was actually taken to discuss litigation strategy to defend a further appeal by [the complainant], and that until the [statutory] appeal period . . . had expired, the possibility of an appeal could be considered 'pending litigation.' " *Ansonia Library Board of Directors* v. *Freedom of Information Commission*, supra, 90. The court noted that, without an indication on the record that the complainant "had indicated that he was considering or was going to take an appeal . . . too broad a reading of the 'pending claims or litigation' exception would encourage executive sessions and undercut the fundamental purpose of the [act], namely openness of proceedings of public, governmental agencies. The statute should not be extended to allow an executive session during the time for taking an appeal under General Statutes § 4-183 from a final decision of an administrative agency where no further appeal was in fact threatened." Id.; see also id., 91 ("After the [commission] made a decision on [the complainant's] claim to it, he no longer had a pending claim under the statutory definition. The possibility that he might bring a further appeal to the Superior Court, without actual notice that an appeal would be brought, is not 'pending litigation.' "). Ultimately, the court emphasized that, "the library board was not allowed to go into executive session because of the unstated possibility that [the complainant] might appeal the [library] board's decision." Id., 92.

The Superior Court decision in *Ansonia Library Board of Directors* is consistent with a commentator's recent observation that, although pending claim or litigation exceptions such as that articulated in § 1-200 (6) (B) exist to allow "the public body to make sensitive decisions without the knowledge of various opposing parties," these exceptions nevertheless should be cautiously applied because "much of the business of public boards involves decisions which someone will take offense at and might start a lawsuit, conceivably almost all public business could be considered to be related to litigation in some way, and thus the exception would swallow the rule . . . ." Annot., 35 A.L.R.5th 113, § 2 [a] (1996). Thus, I conclude that the mere possibility of an administrative appeal from an agency's decision does not render a petition to that agency or board for action, such as a request for a declaratory ruling like that filed in this case under § 4-176, a "pending claim" for purposes of the act. Compare *Manning* v. *East Tawas*, 234 Mich. App. 244, 250–51, 593 N.W.2d 649

(1999) (city council properly met in closed session to discuss litigation already pending as result of its decision to approve plaintiffs' proposed site plan), and *Warder* v. *Board of Regents*, 75 App. Div. 2d 666, 667, 426 N.Y.S.2d 849 (1980) (board properly met in executive session to discuss already pending litigation, brought against it by applicants), aff'd, 53 N.Y.2d 186, 423 N.E.2d 352, 440 N.Y.S.2d 875, cert. denied, 454 U.S. 1125, 102 S. Ct. 974, 71 L. Ed. 2d 112 (1981),[7] with *Accardi* v. *Mayor & Council of North Wildwood*, 145 N.J. Super. 532, 542, 368 A.2d 416 (1976) (rejecting zoning board's argument that "any variance application is 'in anticipation' of litigation because any application can be appealed" as "defeat[ing] the very purpose of the [state freedom of information law]").

Thus, although it is plausible that the board's decision on the complainants' request for a declaratory ruling might ultimately be subject to judicial challenge through an administrative appeal—particularly given its controversial subject matter—there is, nevertheless, no indication in the complainants' request for a declaratory ruling "set[ting] 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." General Statutes § 1-200 (8). Put differently, there is nothing in the complainants' request for a declaratory ruling that is at all adversarial in nature with respect to the *board itself*. See *Board of Education* v. *Freedom of Information Commission*, supra, 217 Conn. 162–63 (during dispute about high school literary magazine, school board properly met in executive session with legal counsel to consider letter from attorney that sought compliance with demand in order to avert threatened action). Moreover, given the myriad administrative agency matters that could form the basis for a subsequent administrative appeal, it would be a classic example of an exception swallowing a rule to consider this request for a declaratory ruling to be a "pending [claim]" against the board as a "party . . . ." General Statutes § 1-200 (6) (B). Accordingly, I conclude that the mere possibility of an administrative appeal arising from the board's carrying out its routine business by taking action on the merits of the complainants' request for a declaratory ruling is not enough to render it a pending claim for purposes of justifying an executive session under the act.[8]

In my view, however, the result in the current case, although dictated by the existing statutory scheme, calls for legislative attention to provide increased protection of the relationships between public bodies and the attorneys that serve them, both in the deliberative and litigation processes. Although the legislature has established an attorney-client privilege for public agencies; see General Statutes § 52-146r;[9] § 1-231 (b) tempers that promise of confidentiality by making clear that the statutory privilege does not provide carte blanche for agencies

to conduct executive sessions with their attorneys, limiting such sessions to the purposes identified in § 1-200 (6) (B). See *Board of Education* v. *Freedom of Information Commission*, supra, 217 Conn. 162–63. Thus, although cognizant of the need for public agencies to conduct their business openly, I would urge the legislature to safeguard the relationships between public agencies and their attorneys by permitting the use of executive sessions to explore matters implicating the foundation of the attorney-client relationship, such as the conflict of interest issue highlighted by the complainants in this case. Cf. *Olson* v. *Accessory Controls & Equipment Corp.*, 254 Conn. 145, 157, 757 A.2d 14 (2000) ("In Connecticut, the attorney-client privilege protects both the confidential giving of professional advice by an attorney acting in the capacity of a legal advisor to those who can act on it, as well as the giving of information to the lawyer to enable counsel to give sound and informed advice. . . . The privilege fosters full and frank communications between attorneys and their clients and thereby promote[s] the broader public interests in the observation of law and [the] administration of justice." [Citation omitted; internal quotation marks omitted.]).

Like the majority, I would, therefore, affirm the judgment of the trial court.

[1] General Statutes § 1-200 provides in relevant part: "(6) 'Executive sessions' means 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 a political subdivision of the state when publicity regarding such site, lease, sale, purchase or construction would cause a likelihood of increased price 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. . . .

"(8) 'Pending claim' means 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. . . ." (Emphasis added.)

Although our legislature amended § 1-200 in 2011; see Public Acts 2011, No. 11-220, § 1; that amendment has no bearing on the present appeal. In the interest of simplicity, I refer to the current revision of the statute.

[2] General Statutes § 1-231 provides: "(a) At 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 and, provided further, that the minutes of such executive session shall disclose all persons who are in attendance except job applicants who attend for the purpose of being interviewed by such agency.

"(b) 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."

[3] General Statutes § 4-176 (a) provides: "Any person may petition an agency, or an agency may on its own motion initiate a proceeding, for a declaratory ruling as to the validity of any regulation, or the applicability to specified circumstances of a provision of the general statutes, a regulation, or a final decision on a matter within the jurisdiction of the agency."

[4] I recognize that the majority's opinion, which touches briefly on this issue; see footnote 12 of the majority opinion; in large part reflects the briefing and argument of this case, as well as the trial court's memorandum of decision dismissing the board's administrative appeal. I note, however, that this issue is raised squarely in the board's brief to this court.

[5] The majority then specifically declines " to reach the issue of whether the executive session in question involved strategy and negotiations" under § 1-200 (6) (B), determining that, "[b]ecause the letter . . . is not a pending claim, § 1-200 (6) (B) is not satisfied regardless of whether the executive session involved strategy and negotiations." See footnote 15 of the majority opinion.

[6] The majority criticizes my focus on the procedural context of the filing at issue as "inconsistent with the language and focus of § 1-200 (6) and (8)" on the ground that "a pending claim [is] '*a* written notice to an agency,' " because "[t]he clear meaning of '*a* written notice' is a single document communicating the intent to institute an action. . . . The first step in determining whether a pending claim exists, therefore, is to identify and analyze that document." (Citation omitted; emphasis altered.) See footnote 10 of the majority opinion. I respectfully suggest that the majority's criticism is drastically overstated, and is a significant misunderstanding of my point. I agree with the majority that the plain language of § 1-200 (8) requires a written filing, and part company from the majority on the facts of this case *only as to the particular document* that forms the starting point for my analysis. Unlike the majority, which begins and ends its analysis with the letter, however, I start my inquiry with the complainants' request for a declaratory ruling pursuant to § 4-176, which, as a document filed with the board, similarly satisfies the "written notice" aspect of § 1-200 (8), even when it is viewed strictly in the singular in accordance with the majority's approach. Viewed more realistically, in my view, the request for a declaratory ruling provides the prism through which we should consider the letter.

[7] Cf. *Concerned Citizens to Review Jefferson Valley Mall* v. *Town Board*, 83 App. Div. 2d 612, 613, 441 N.Y.S.2d 292 (Concluding that town board improperly met in executive session with shopping mall developer because litigation exception's "purpose . . . was to enable a public body to discuss pending litigation privately, without baring its strategy to its adversary through mandatory public meetings . . . . Thus the provision should not be construed to shield private discussions between a public body and a private litigant from the general requirement that 'public business be performed in an open and public manner' . . . ." [Citations omitted.]), appeal dismissed, 54 N.Y.2d 957, 429 N.E.2d 833, 445 N.Y.S.2d 154 (1981).

[8] I find the board's reliance on *Stamford* v. *Freedom of Information Commission*, supra, 241 Conn. 310, to be misplaced. That case does not support its contention that a request for a declaratory ruling is a pending claim because "an agency's granting of a declaratory ruling is subject to judicial review and its denial of such a ruling is subject to judicial relief" under § 4-176. In *Stamford*, this court concluded that a report prepared by a private attorney retained to "conduct an investigation into the propriety of several of the [city's] contracts and payments related to construction of a municipal transfer and recycling station, a municipal 'haulaway' by [a private contractor], and repairs to a municipal incinerator," was exempt from disclosure under the act. (Footnote omitted.) Id., 312. In so concluding, this court relied on correspondence from the attorney to the contractor "outlining the scope of his investigation and from [the contractor] to the [city] formally requesting the [investigative] report"; id., 315; and held that "the only reasonable determination that the commission could have reached was that the [investigative] report did so pertain" 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.' " Id., 317–18. The court noted that the correspondence from the attorney made clear that the report pertained to matters that were encompassed in litigation between the city and the contractor that already was pending. Id., 319. Given the existence therein of litigation to which the public body already was a party, *Stamford* is readily distinguishable from the present case, the record of which does not even contain a dispute or

threat of litigation between the board and the complainants or another third party. See *Board of Education* v. *Freedom of Information Commission*, supra, 217 Conn. 162–63; see also *Furhman* v. *Freedom of Information Commission*, supra, 243 Conn. 430–33 (town council's executive session to discuss with counsel town's response to landfill permit application pending before state Department of Environmental Protection was permissible discussion of "strategy and negotiations" when that discussion included feasibility of civil actions, review of environmental consultants' reports, hiring of lobbyists to aid in administrative proceedings, and budget for undertaking matter, as "cost of additional consultants and attorneys was a factor to be considered with respect to any action to enforce a legal right" and "[d]iscussion of the relevant costs of those attorneys and consultants is therefore 'consideration' of 'action' within the statutory exemption").

[9] General Statutes § 52-146r provides "(a) As used in this section:

"(1) 'Authorized representative' means an individual empowered by a public agency to assert the confidentiality of communications that are privileged under this section;

"(2) 'Confidential communications' means all oral and written communications transmitted in confidence between a public official or employee of a public agency acting in the performance of his or her duties or within the scope of his or her employment and a government attorney relating to legal advice sought by the public agency or a public official or employee of such public agency from that attorney, and all records prepared by the government attorney in furtherance of the rendition of such legal advice;

"(3) 'Government attorney' means a person admitted to the bar of this state and employed by a public agency or retained by a public agency or public official to provide legal advice to the public agency or a public official or employee of such public agency; and

"(4) 'Public agency' means 'public agency' as defined in section 1-200.

"(b) In any civil or criminal case or proceeding or in any legislative or administrative proceeding, all confidential communications shall be privileged and a government attorney shall not disclose any such communications unless an authorized representative of the public agency consents to waive the privilege and allow such disclosure."

"[T]he essential elements of the attorney-client privilege under both statutory and common law are identical. Therefore, for purposes of both [General Statutes] §§ 1-210 (b) (1) and 52-146r, we apply a four part test to determine whether communications are privileged: (1) the attorney must be acting in a professional capacity for the agency, (2) the communications must be made to the attorney by current employees or officials of the agency, (3) the communications must relate to the legal advice sought by the agency from the attorney, and (4) the communications must be made in confidence." (Internal quotation marks omitted.) *Lash* v. *Freedom of Information Commission*, 300 Conn. 511, 516, 14 A.3d 998 (2011).