

Understanding the Connecticut Freedom of Information Act

Presented By:

Mark J. Sommaruga, Esq.

Pullman & Comley, LLC

Thomas A. Hennick

Freedom of Information Commission

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So What Is The FOIA?

- Connecticut's Freedom of Information Act ("FOIA") was enacted in 1975.
- The FOIA essentially has two requirements: 1) meetings of public agencies must be held in open, and 2) records of public agencies are subject to disclosure and inspection by the public at large.
- However, the FOIA also sets forth numerous exceptions to its open meetings and records requirements.

What Is A Public Agency?

- A “public agency” is not only the named agency itself, but also includes any committee (or “subcommittee”) of or **created by** the agency. *Connecticut General Statutes §1-200(1)*.
- Thus, board of education subcommittees generally must comply with all of the same FOIA requirements as the board itself.
- Query: Charter schools and charter management organizations?

What Is A Public Record?

- A public record includes “any recorded data or information relating to the conduct of the public’s business prepared, owned, used, received or retained by a public agency, ... , whether such data or information be handwritten, typed, tape-recorded, printed, photostated, photographed or recorded by any other method.”
Connecticut General Statutes §1-200(5).
- **PLEASE NOTE:** “Public records” may even be created when public employees use public equipment for personal purposes.

What Is A “Meeting”?

- “Any hearing or other proceeding of a public agency, any convening or assembly of a quorum of a multimember public agency, and any communication by or to a quorum of a multimember public agency, **whether in person or by means of electronic equipment**, to discuss or act upon a matter over which the public agency has supervision, control, jurisdiction or advisory power.” *Connecticut General Statutes §1-200(2)*.

“Electronic Meetings”

- Telephonic participation by agency members that allows the public to monitor the conduct of the meeting and the individual participation in the meeting by agency members (e.g., Skype, speakerphone) does not violate the FOIA.
- Optimal if board’s bylaws address circumstances and procedures for telephonic participation in meetings by board members.

Inadvertent Meetings

- A series of telephone calls or “telephone polling” (or e-mails and “e-mail polling”) by and between a quorum of board members concerning board business may be deemed to be a “meeting.”
- What about an e-mail sent to the entire board of education?
WATCH OUT. See *Mauer v. Member, Board of Education, Regional School District 1*, #FIC 2013-367 (April 23, 2014).
- **Best practices:** 1) do **not** send an e-mail to the entire membership (or quorum) of the board discussing board business; and 2) if you receive such an e-mail, **do not reply** (and be afraid, be very afraid, of hitting the “reply all” button)

Board Of Education Retreats?

- They are “meetings” and thus must be posted.
- Can you have them in executive session? **RISKY**. See *Fetchick v. Board of Education, Newtown Public Schools*, #FIC 2010-245 (February 23, 2011).
- A general discussion of board member roles and responsibilities should be in public.

When is a meeting a “non-meeting”?

Exceptions to “meeting” definition include:

- Personnel search committee for executive level candidates;
- Chance or social meeting neither planned nor intended for the purpose of discussing board business;
- Discussions of strategy or negotiations for collective bargaining;
- Caucus of board members of a single political party;
- Administrative or staff meeting of a single-member public agency;
- Communication limited to notice of board meeting or its agenda;
- Quorum of the board who are present at any event which has been noticed and conducted as a meeting of *another* agency

“Collective bargaining” issues

- Employee grievance hearing? Usually, absent some other exception, evidentiary portion is in public but deliberation can be in private (“non-meeting” or executive session)
- “Interest arbitration”? Connecticut Supreme Court surprisingly ruled that teacher interest arbitrations are not covered by FOIA at all. *Gould v. FOIC*, 314 Conn. 802 (2014).

Considerations for meetings

- 24 hours' notice and posting of agenda
- Agenda items-sufficient specificity (do not simply say “personnel matter” or “litigation”)
- Adding items to agendas at regular (but not special) meetings via 2/3 vote
- Votes by members must be in public
- Minutes/record of votes
- Website posting: just required for notices of special meetings
- Order: keeping control v. over-reaching
- Recording by public and media

Keys for Executive Session

- You need a 2/3 vote.
- You need a valid reason (as set forth in the FOIA).
- You need to provide *some* specificity as to the purpose of the executive session (do not simply say “personnel matter”).
- Query: Who can attend besides board members?

“Popular” reasons for executive session-personnel issues

- ***Discussion concerning the appointment, employment, performance, evaluation, health or dismissal of a public officer or employee, provided that such individual may require that the discussion be held at an open meeting***
- This exception usually does not provide a basis to have the evidentiary portion of an employee grievance or administrative hearing (as opposed to the deliberation phase) in executive session. ***Deliberation=discussion; evidence does not.***

Other common reasons for executive sessions

- Strategy and negotiations with respect to pending claims or pending litigation involving board (or board member)-until such litigation or claim has been finally adjudicated or otherwise settled.
- Discussion of any matter that would result in the disclosure of confidential records or information excluded from the FOIA's disclosure requirements under Connecticut General Statutes §1-210(b), which leads to exempt records such as

Personnel Files Exemption

- Need not disclose “personnel or medical files and similar files the disclosure of which would constitute an invasion of personal privacy.” *Connecticut General Statutes §1-210(b)(2)*.
- This exception precludes disclosure of such files **only** when the information sought “does not pertain to legitimate matters of public concern **and** is highly offensive to a reasonable person.” *Perkins v. FOIC*, 228 Conn. 158 (1993). **This is a tough burden.**

Records Of Employee Misconduct

- Teacher evaluations may be exempt, *but...*
- Records of alleged misconduct by an employee are usually subject to disclosure, as “the public has a right to know not only who their public employees are, but also when their public employees are and are not performing their duties.” *Perkins v. FOIC, supra.*

Student Records Exemption

- Applies to educational records which are protected from disclosure under the Family Educational Rights and Privacy Act. See *Connecticut General Statutes §1-210(b)(17)*.
- This exception applies not only to student records but also to “personally identifiable information” concerning the student.
- Can board still be required to produce student record and simply redact student names? **It depends.** See *Smith v. Superintendent, Middletown Public Schools*, #FIC 2013-333 (January 30, 2014).

Attorney-Client Privilege

- Protects communications between a public official and attorney that are confidential, made in the course of the professional relationship, and relate to legal advice sought by the agency. *Connecticut General Statutes §52-146r.*
- If a **written** communication offers such confidential legal advice, and **if the agency maintains the confidentiality of the advice** and written legal opinion, then the record is exempt from disclosure. *Dostaler v. Town of East Hampton, #FIC 2008-041 (July 9, 2008).*
- Key for an **executive session?** Must have **written** communication.

Other Notable Exemptions

- **Pending claims (Connecticut General Statutes §1-210(b)(4)).** Need not disclose “records pertaining 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.”
- **Preliminary drafts and notes (Connecticut General Statutes §1-210(b)(1)).** Need not disclose “preliminary drafts or notes provided the public agency has determined that the public interest in withholding such documents clearly outweighs the public interest in disclosure.”

Compliance With Requests

- Public has the right to 1) inspect records during regular business hours, and 2) receive copies of records, subject to FOIA fees and payment procedures. *Connecticut General Statutes §1-210(a)*.
- The FOIA does not require agencies to 1) respond to written questions or inquiries or 2) create documents. *Howard v. Regional School District No. 14, #FIC 2011-075 (August 24, 2011)*.
- **NOTE**- agencies may require that requests for copies be in writing, but not requests to inspect records.

Mode of compliance-copies

- The type of copy to be provided is within the discretion of the public agency, except the agency (1) must provide a certified copy if requested, and (2) cannot not provide an electronic or fax copy of the record if the applicant does not have access to a computer or fax machine. ***Connecticut General Statutes §1-212(a)***.
- Separate FOIA provision for “computer stored” records: agency must provide a copy of any such nonexempt data “on paper, disk, tape or any other electronic storage device *or medium requested by the person, if the agency can reasonably make such copy or have such copy made.*”

Fees for copies?

- An agency may charge fees for copies of records (electronic or otherwise).
- For most municipal public agencies, fees for “paper” copies may not exceed \$0.50 per page. If providing a copy requires transcription, the fee may not exceed the cost of transcription.
Connecticut General Statutes §1-212(a)(B).
- FOIA has exceptions to fee requirement.

Fees to inspect records?

- **NO!!!!** Regardless of the fees that may be properly charged for *copies* of records, there is **no** right to charge for a request to *inspect* records. *Smith v. Human Resources, Connecticut Lottery Corporation*, #FIC 2007-228 (February 13, 2008).
- If the requester then wishes to receive a copy of the record, the agency can then charge the appropriate copying fee.

Time to Comply with Requests?

- Persons have a right to inspect records “**promptly**”; *Connecticut General Statutes §1-210(a)*; and a right to receive “**promptly**” copies of such records. *Connecticut General Statutes §1-212(a)*.
- A denial of a request must be made in writing within four business days of the request; failure to comply within this time period is deemed a denial. *Connecticut General Statutes §1-206(a)*.
- This deadline does **not** actually require an agency to produce copies of all of the documents within this time period.
- As such, within four business days of the request, at least tell the requesting party the general status of compliance with the request and, more specifically, whether you are going to deny or withhold certain (or all of the) documents that have been requested.

Requests for Personnel Records?

- Common myth: employee or union has automatic right to object to disclosure of any personnel records.
- **NO!** The agency must first reasonably believe that the disclosure of such records would legally constitute an invasion of privacy.
- Since the FOIC has the power to issue fines, an agency should not give employees the blanket right to object to disclosure of all records.

Complying with Requests to Inspect Records

- Public records must be accessible and available to a person requesting access “promptly” during regular business hours.
- A public agency has the right to take steps to protect records from “destruction or mutilation.” Such steps include having personnel present to supervise the inspection of documents.
- While FOIA does not explicitly empower an agency to require that a person make an appointment to inspect public records, the FOIC also opined that conflicts over requests for immediate access could be resolved by “reason and courtesy.”

The Burdens of the Job

- The fact that a request seeks numerous documents or that the records may be located in many files does not in itself provide a defense to complying with the request, especially where the citizen has specifically identified the records sought. *Wildin v. FOIC*, 56 Conn. App. 683, 686-7 (1999).
- The FOIA requires a public agency to comply with even a broad request for specific records **even if the search is time consuming or burdensome**. See *Rubinowitz v. Greenwich Emergency Medical Service*, #FIC 1987-188.

FOIA compliance is a job duty

- While the burdensome nature of a request may excuse you from immediate compliance, you are still obligated to diligently search for the requested records, even if such search is time-consuming. *Maurer v. Office of Corp. Counsel, City of Danbury*, #FIC 2011-370 (June 13, 2012) *affirmed*, 2013 WL 5289790 (Conn. Super. 2013) (disclosure required even where city would have to manually pull every personnel and medical file of all of its employees).

Electronic Records and the FOIA

- Any electronic messages sent or received by a public agency (whether by agency members or employees) relating to the conduct of the agency's business are subject to disclosure. **Board members and employees should proceed accordingly.**
- Use of a personal e-mail account to send/receive e-mails concerning public business does **not** shield e-mail from disclosure under the FOIA.
- Instant messaging or text messages may be public records. *Smith v. Town of Putnam*, #FIC 2012-564 (August 14, 2013).

Destruction Of Records & The Records Retention Act

- Several statutes limit if not prohibit the destruction of public records.
- Length of time that public records should be retained? See Connecticut State Library/Public Records Administrator retention guidelines. (<http://www.cslib.org/publicrecords>).
- Records are **not** subject to destruction **unless and until** permitted by these retention guidelines.

Retention of E-mails?

- See *Advisory Opinion of Public Records Administrator on Management of E-mail and other Electronic Messages* (<http://www.cslib.org/publicrecords/GL2009-2Email.pdf>).
- Electronic messages must be retained according to the equivalent records series from the state records retention schedule.
- The same rule applies to attachments to e-mail.

Who Is Responsible For Saving E-mails?

- Usually, sender of the e-mail is responsible for retaining the e-mail.
- Recipient is responsible for maintaining e-mail where the sender is from outside the agency (e.g., a member of the public).
- Recipient is responsible for maintaining the message if he/she has altered the message (or added/revised any attachments).
- When there is a thread of e-mails, the Public Records Administrator's guidance indicates you need only retain the last message, as long as it includes all prior messages.

What About Voicemail?

- The FOIA does not “require any public agency to transcribe the content of any voice mail message and retain such record for any period of time.” *Connecticut General Statutes §1-213(b)(3)*.
- Of course, if litigation is threatened, there may be a need (if not a desire) to preserve such recordings, which leads to ...

“Litigation hold”

- A record should **not** be destroyed if any litigation, claim, audit, **FOIA request**, legal process, subpoena, or other legal action involving the record is initiated **before** the record has been disposed of (**even if** its retention period has expired and approval for its destruction has been granted). The record must be retained until the completion of (and the resolution of all issues that arise from) the legal action.
- To be blunt, if you are ever in this situation, you should immediately contact legal counsel.

Penalties For Violating the FOIA

- A person who believes that he/she was denied any right conferred by the FOIA may file a complaint with the FOIC pursuant to Connecticut General Statutes §1-206(b)(1).
- If the FOIC finds that an agency violated FOIA:
 - (1) it may order the agency to produce or copy any public records that were improperly withheld.
 - (2) it may impose a fine of not less than \$20 and not more than \$1,000 against the public agency's record custodian or official if the agency acted "without reasonable grounds."
 - (3) it may declare agency action to be "null and void."
 - (4) it may order the agency to provide relief that the FOIC "in its discretion believes appropriate to remedy the denial of any right conferred by the FOIA."

Criminal Penalties For Destroying Records

- **Connecticut General Statutes §53-153:**

Any person who, “willfully and corruptly,” takes away, alters, mutilates or destroys any document or property in the possession of “any institution, board, commission, department or officer of the state or any county or municipality or court, . . . shall be imprisoned not more than ten years.

- **The FOIA itself has its own (albeit less serious) penalties.**

Any person who willfully, knowingly and with intent to do so, destroys, mutilates or otherwise disposes of any public record without the approval required under the law or who alters any public record, shall be guilty of a class A misdemeanor and each such occurrence shall constitute a separate offense.

NOTE: It is also a class B misdemeanor for a member of a public agency to fail to comply with an order of the FOIC. There are no known FOIC prisons.

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