

FREEDOM OF INFORMATION ACT – AVOIDING PITFALLS

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IN GENERAL:

I. Familiarize yourself and public officials with the Act and its requirements:

A. Read the Act: CGS. 1-200, et seq. Take the time to read the Act through and familiarize yourself with the terminology, exceptions, exemptions and the categories covered.

B. Read the Regulations. There are FOIA regulations, §1-21j-1, et seq. They cover adjudication of complaints, rules of evidence, in camera review, number of copies (original plus 2), extensions of time, etc. (**Note:** regulations still refer to the old statutory citation, CGS §1-21i et seq.)

C. Make sure that all agencies and officials know the Act exists, applies to them and its general outlines.

D. Offer Seminars. Encourage everyone to participate in seminars given by you or the many divisions of the bar, CCM, CAMA, zoning and planning committees and the FOIC.

E. Penny Wise and Pound Foolish. Even in these difficult budgetary times, it is short sighted not to utilize you as a resource to avoid having to defend an FOIA appeal.

II. Resources:

A. CAMA and the list serve. Someone is likely to have confronted your issue before and, if not, may offer some direction to a source.

B. Counsel for other municipal agencies, for example, the zoning commission or other board. Your predecessor town counsel is also a good source of experience and institutional memory.

C. Call the FOIC. Thomas Hennick, Public Education officer has been helpful when uncommon issues arise. (Not regarding pending matters and do not overdo it.)

E. FOIA online sources:

1. FOI website, <http://www.state.ct.us/foi/>. Has links to FOI Act, regulations, Commission final decisions, advisory opinions, declaratory decisions and Court decisions. There is a search and advanced search function which will return basically everything on the site containing a selected search sequence.

2. The CaseMaster system may be a more facile way to search FOI decisions by keywords, date, agency type, statute number, etc. (Advisory opinions and declaratory decisions are not on Case Master except to the extent they are cited in a final decision of the FOIC.)

WHAT IS COVERED BY THE ACT:

I. The Act applies to all areas of access to public information and access to meetings. Includes information or data which is typed, handwritten, tape-recorded, printed, photographed or computer-stored, most inter-agency and intra-agency memoranda or

letters. *This includes your invoices, so be careful what you put in there lest you reveal too much.*

II. The act covers what must not be disclosed: The important question may be what *must not* be an open meeting and what *must not* be disclosed. The privacy interests of employees, companies doing business with the municipality, law enforcement, and minors, among others, may be implicated.

WHO IS COVERED BY THE ACT:

I. The Act applies to all agencies of the Municipality: From the Mayor's office, council or selectmen, through and including every department, board, commission, or agent of the municipality doing the public's business right down to the ad hoc committee created to advise an agency. Ie., an economic development agency, sewer authority, public works commission, water authority, harbor commission, parking authority, a nonprofit development corporation, or "any other agency designated and authorized by a municipality to undertake a project." If there is any connection to public business and it is established or employed by any public agency, it is covered.

II. Private entities are also covered. "Any person [in the broad statutory sense] to the extent such person is deemed to be the functional equivalent of a public agency pursuant to law . . ." It depends on whether the private entity performs a municipal function; or is significantly funded by the municipality or significantly regulated by the town. CGS §1-200(1)(B)

Note: Requests for records of a private entity are not valid unless they go through the public agency, CGS §1-218.

Note: CGS §1-218 Contracts for more than \$2.5 million must provide that agency is entitled to all records re the government function and that the records are subject to disclosure. But see CGS§1-210(b)(5,8 &10) re trade secrets and personal financial information.

PRECONDITIONS PROHIBITED:

An agency cannot set pre-conditions on access to public records or public meetings. You cannot make people sign in, explain why they are at a meeting, nor ask them why they want a public record or how they plan to utilize it. See CGS §1-225(e) re meetings.

MEETINGS:

As long as the statutory requirements for notice and posting are complied with (see Appendix A) and the door to the meeting room is not locked, there is not likely to be a FOIA problem with a public meeting or a successful appeal. However the denial of access to a meeting or the holding of a secret or unnoticed meeting carries with it the potentially serious penalty of voiding any action taken at the meeting. CGS §1-206(b)(1)

The requirements of notice of meetings (and public hearings) are often covered under other statutes having to do with town meetings, zoning hearings and the like. FOIA generally covers the matters of access to the meetings and the posting of agendas, votes and minutes. There are some notice requirements under FOIA for special and emergency meetings, adjournments and continuances. (See Appendix)

Random Pitfall Avoidance:

A. Individuals can request notice of meetings: Be aware of CGS §1-227. Individuals can request that they be mailed notice of meetings of any public agency at least one week before the meeting. E-mail probably suffices for compliance and will save time and money (though the agency may charge for the service). The request must be renewed each year.

B. Web Posting of Agendas and Minutes: PA 08-3 added the requirement for web posting of agendas and minutes now contained in the Act at §1-225. The language leaves some unanswered questions about the “if available” language. So far there is not much guidance.

C. Counting days for all posting provisions: Saturdays, Sundays, legal holidays and any day on which the office of the agency, or the town or city clerk, as the case may be, is closed, is excluded. CGS 1-225(g)

D. No Executive Sessions for general legal advice: Executive Sessions are defined at CGS §1-200(6); procedure at CGS §1-231. General legal advice to a public agency in a meeting is not a proper subject of an executive session. The attorney client privilege cannot be invoked to justify an executive session unless it is advice on a matter specifically covered under CGS §1-200 (6), ie. pending claim, litigation, negotiations, etc.

Note: “Pending Claim” and “Pending Litigation” justifying an executive session require at least a *written notice* of a demand for legal relief or statement of intention to sue.

Note: Executive session requires 2/3rds vote of members present and voting at a public meeting and statement of appropriate purpose. CGS§1-225(f)

E. Executive Sessions re Employee Status: One recognized purpose for Executive Session is to discuss an employees status, performance, discharge, etc. (CGS §1-200(6)(a)). The employee may “require” that the discussion be held in an open meeting. Query: What if that discussion is likely to disclose information that is exempt from disclosure or may impact another employee, individual, law enforcement strategy, or the privacy of a minor? Err on the side of non-disclosure.

F. No E-mail “Meetings”: Review and comment among members through e-mail chains out of public view is (1) a “Meeting” if it is a “. . . communication by or to a quorum of a multi-member public agency . . .” (and it does not matter if it is one e-mail at a time, sent seriatim, or one to a whole distribution list); (2) subject to disclosure; (3) likely to be embarrassing to someone. E-mail may be used for sending notices, scheduling meetings and circulating agenda’s, not discussion of or action on the merits.

G. When do you have a Joint Meeting of Agencies: A quorum of the members of one public agency attending a meeting of another public agency does not constitute a meeting of the members of the attending agency. But, if the issue is important and there is likely to significant discussion of comment by the members of the attending agency, better practice may be to notice a meeting of both agencies to avoid any question, particularly if the matter is one that the members of the attending agency may have to consider or act upon.

ACCESS TO RECORDS:

The majority of appeals stem from record disclosure requests.

Random Pitfall Avoidance:

A. Respond to requests quickly, whether denying the request or not.

- All requests for copies should be (and can be) required to be in writing. CGS §1-212(a).
- CGS §1-206 requires that only *denial* of access to records be made in writing within four business days of request.
- Copies just required to be delivered “promptly” (CGS §1-212(a)).
- Denial is presumed after four days. CGS §1-206(a).
- If it is going to take some time to assemble records, better practice is to let the party know so there is no appeal based upon a presumed denial.
- If the request is not clear, it is best to try to work out the issues with the request if you can to avoid mis-understandings and possible appeals.
- It may also serve to help educate the requester about what is a proper request and what can and cannot be disclosed. Citizens are frequently just in the dark about what is proper.
- If a technical violation occurs and an appeal follows, prompt response will stand the agency in better light with the Commission and be less likely to bring a sanction.

B. Do not have to create a record that does not exist: An index, a compendium, a list of data, a collection that is not otherwise collected, or an explanation of some public action, etc. (Agency can be asked to extract and collect types or categories of data from computer stored records, however.)

C. Employees (and their Union) must be notified of personnel record request: CGS §1-214. If a request is made for a personnel file, the employee (and his Union) must be notified and they have 10 days to object to the disclosure. Objection must be under oath that there is good cause for the objection. If no objection, agency “shall” disclose. Applies to present and former employees, so finding a former employee to notify can be an issue.

D. Employment Termination Agreements are subject to disclosure: CGS §1-214a. Regardless of the cause of termination or language of the confidentiality clause, the document is subject to disclosure. So don’t worry about drafting confidentiality clauses.

E. Disclosure Exemptions are not all listed in the Act: The Act has twenty-four listed categories of items not subject to disclosure. CGS §1-210(b). Also anything exempt from disclosure as “. . . provided by any federal law or state statute.” There are many such categories under state law, though they primarily relate to confidential court filings in criminal and family court. (There are also specific statutes in the Act on arrest records, mostly can disclose CGS §1-215; Veterans records filed with the town, mostly cannot disclose, CGS §1-219; Uncorroborated allegations of crime, probably exempt as investigatory records, but must be destroyed after one year, CGS §1-216.)

F. Some private entity records are private: Though private company’s doing business with a public agency can be subject to the act, not all records subject to disclosure. Exemptions include proprietary, trade secret, tax and financial information.

CGS §1-210(b)(5,8,10). The fact that such information gets into the hands of the public agency does not make it a public record subject to disclosure. If someone asks for it, the private company should be advised and let them carry the defense.

G. Non-disclosure of residential address of certain individuals, CGS§1-217. The Act precludes the disclosure of residential address of judges, prosecutors, public defenders, firefighters, judicial department employees, DCF employees and many others. The Act does not tell us how the agency is supposed to know how these folks are employed. The Act does not preclude the keeping of the record, nor, for example, posting it on the GIS or assessment web site! So far, a Town cannot be required to remove the record.

FOIC APPEALS:

A. First contact the assigned ombudsman. FOIC Regs.§1-21j-29(d). They can be very effective in resolving misunderstandings, educating the appellant (or you) about what is reasonable and likely if the appeal proceeds. In the case of a committed gadfly, the ombudsman will be able to do little.

B. Appeal Period: 30 days from denial of access to public meeting or records. If unnoticed or secret meeting then 30 days from actual notice. Check the dates or if one is not mentioned, appeal may be subject to dismissal without hearing under CGS §1-206(b)(2).

C. Appeal can only be taken by person actually denied. Avenging angel gadflies trying to challenge a “practice” are not proper appellants unless they are a victim of it. Appeal may be subject to dismissal motion under CGS §1-206(b)(2) or (4).

D. Technical violations amounting to harmless error subject to dismissal: CGS §1-206(b)(4). Minor matters can be dismissed on the record.

Note: The Commission seems to err on the side of having hearings rather than granting dismissals without hearing, probably due to the “pro se” filing of most appeals so don’t get your hopes up for a dismissal, but it may force an appellant to clarify the claim.

E. Hearings are informal, but you are making a record for appeal. Hearing procedures in the Regulations provide for an informal hearing procedure before a Commissioner or staff attorney. Rules of Evidence are recognized, sort of. However, do not be complacent; this is your record upon which all subsequent proceedings are based. After the hearing it is possible to brief the issues if needs be. Frequently having a few copies of cases or FOIC decisions in hand are enough in the usual run if citizen appeals.

F. Parties and Interevenors: FOIC Regs. §1-21j-30 and §1-21j-31. Anyone whose rights, duties or privileges are likely to be determined by the appeal can be made a party. In the case of an employee whose personnel records are being sought or those of a company that is doing business with the public agency should be made a party. Given that they are likely the true party in interest, should probably take the lead in the defense of the appeal. Others may intervene “in the interests of justice” and if it will “not impair the orderly conduct of the proceeding.”

G. It is your Burden of Proof. If there has been a denial of access, the burden will be on the agency (you) to prove the denial was justified under some statutory exemption.

Note: that the FOIC Rules of Evidence (FOIC Regs. §1-21j-37(f)) make provision for in camera review of records, particularly if privacy considerations are in play.

H. Assume nothing, attend the full Commission review of the Proposed Decision. It is best practice to attend the full Commission's consideration of the proposed decision even if the hearing officer went your way. Anything can happen there. You will have an opportunity to submit a brief and to argue if you feel the matter is a close question. Obviously if things have not gone your way, it is an opportunity to turn things around.

I. Pre-emptive appeals. An appeal can be taken with respect to an announced upcoming executive session. CGS §1-206(b). Commission will hold a preliminary probable cause hearing and if cause is found that a violation may occur, agency is precluded from executive session on the announced purpose until appeal resolved.

J. If the agency messed up, try contrition. In the general run of appeals the sanctions run to a direction to disclose the record and a firm statement not to do it again.

K. Swatting Gadflies, Frivolous Appeals. Those taking appeals "without reasonable grounds and solely for the purpose of harassing the agency" are subject to sanction of up to \$1,000. CGS §1-206(b)(2). An appeal taken to court found to be solely taken for purposes of delay may subject the appellant (the public agency or citizen) to sanction of attorneys fees of up to \$1,000; CGS §1-206(b).

The agency can also seek to restrain frivolous appeals by direct action in the Superior Court against anyone who was denied a hearing by the FOIC because the FOIC found the appeal or the underlying request ". . . would perpetrate an injustice or would constitute an abuse of the commission's administrative process." CGS §1-241.

APPEALS TO SUPERIOR COURT.

Know the UAPA:

- A. Appeals to Superior Court are taken per the Uniform Administrative Procedure Act (UAPA), CGS §4-183. CGS §1-206(d)**
- B. Appeal period: 45 days, CGS §4-183.**
- C. Service is on the FOIC, not the Attorney General. CGS §1-206(d).**
- D. In camera review by Court of disputed documents that are subject of appeal and inclusion of them as part of the record on appeal, but under seal.**
- E. Appeal does not stay order of the Commission, so apply for a stay immediately when you appeal if there is a need to protect records or the action taken at a meeting that may be in jeopardy. CGS §4-183(f).**

APPEALS TO APPELLATE COURT:

Appeal as of right. CGS 51-197b.

Appendix A FOIA Meeting Notice and Posting Requirements, CGS §1-225

A. Regular Meetings:

1. The meetings of all public agencies, except executive sessions, open to the public.
2. The votes of each member of agency reduced to writing and made available for public inspection within 48 hours and also recorded in the minutes.
3. Minutes shall be available within 7 days for public inspection *and posted on such public agency's Internet web site, if available.*
4. Agency shall file, not later than Jan. 31st of each year, with the clerk of the city or town the schedule of regular meetings for the ensuing year; no meeting sooner than 30 days after schedule has been filed.
5. Agendas filed no less than 24 hour before regular meetings with clerk (and at the offices of the agency if any).
6. Upon affirmative vote of 2/3 of the members present and voting, any subsequent business not included in filed agendas may be considered and acted upon at such meetings. (Does not apply to public hearings or special meetings)

B. Special Meetings:

1. Notice of each special meeting of every public agency posted not less than 24 hours before the meeting on the Internet web site, if available.
2. Filed with the clerk of the municipality not less than 24 hours prior to the time of meeting.
3. The clerk shall cause notice to be posted in their office.
4. The notice shall specify the time and place of the special meeting and the business to be transacted.
5. No other business shall be considered at the special meeting.
6. Must also be abode service on members, to be received prior to such special meeting, unless written waiver of service at or prior to the time the meeting convenes. Such waiver may be given by telegram (quaint). The requirement of delivery of written notice not required for any member who is actually present at the meeting.

C. Emergency meetings: Special Meeting notice may be dispensed with but a copy of the minutes of every such emergency special meeting adequately setting forth the nature of the emergency and the proceedings occurring at such meeting shall be filed with the Town clerk, not later than 72 hours following the meeting.

D. Adjournment of Meetings CGS§1-228: Notice of Adjourned meeting same as Special Meeting. Post notice of Adjournment within 24 hours at door of location where meeting was held. Adjourned meeting at same time as original meeting unless new time specified.

C. Continuance of Hearings CGS§1-229: Same as adjournment unless continuance less than 24 hours, then immediately post notice on door of place of meeting.