FOI 101: A Crash Course In The FOI Act

Connecticut Freedom of Information Commission
Russell Blair – Director of Education & Communications
860-256-3968 | russell.blair@ct.gov

Brief History Of The FOIA

"The legislature finds and declares that secrecy in government is inherently inconsistent with a true democracy, that the people have a right to be fully informed of the action taken by public agencies in order that they may retain control over the instruments they have created; that the people do not yield their sovereignty to the agencies which serve them; that the people in delegating authority do not give their public servants the right to decide what is good for them to know." — **Freedom of Information Act Preamble, Oct. 1, 1975**



Connecticut Gov. Ella Grasso

FOIA Basics

- The Freedom of Information Act grants public access to **meetings** and **records** of public agencies
- The Freedom of Information Commission settles disputes that arise when citizens believe agencies are not following the law through complaints and contested case hearings
- The Commission can order the production of records, issues fines, nullify votes taken at a public meeting and order mandatory training, among other remedies

What is a Public Agency?

- “Public agency” or “agency” means: (A) Any executive, administrative or legislative office of the state or any political subdivision of the state and any state or town agency, any department, institution, bureau, board, commission, authority or official of the state or of any city, town, borough, municipal corporation, school district, regional district or other district or other political subdivision of the state, **including any committee of, or created by**, any such office, subdivision, agency, department, institution, bureau, board, commission, authority or official
- Board of Trustees of Woodstock Academy v. FOIA (1980): Created “functional equivalent” test
  1. Whether the entity performs a government function
  2. The level of government funding
  3. The extent of government involvement or regulation, and
  4. Whether the entity was created by government

Meetings


THE AGENDA FOR THIS MEETING IS TO TRY TO FIGURE OUT WHY WE'RE HAVING THIS MEETING.
TOM FISH BURNE
© marketoonist.com

Meetings, Overview

- “Meeting” means 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. – Sec. 1-200, CT General Statutes
- Anybody can attend (no required sign up); boards set their own rules for public comment
- Meetings may be photographed, recorded or broadcast

Email & Meetings

- From meeting definition: **“whether in person or by means of electronic equipment”**
- OK to discuss items to add to agenda, or scheduling matters
- Back-and-forth debate over issues should be saved for public meeting



Regular Meeting vs. Special Meeting

- Meetings according to regular schedule filed with your municipality or the state
- Notice/agenda filed at least 24 hours in advance
- By a 2/3 vote items can be added to the agenda during the meeting
- Minutes must be filed within 7 calendar days

- Meetings outside of your regular schedule
- Notice/agenda filed at least 24 hours in advance **AND** must be posted on website
- Additional items **CANNOT** be added to the agenda during the meeting
- Minutes must be filed within 7 business days

Emergency Meetings

- Must only be called if there is a **bona fide emergency** that cannot wait 24 hours
- No notice or agenda is required
- Only emergency matters may be considered
- Minutes must be filed within 72 hours of the meeting, posted online and state the reason for the emergency

NEWS

Ridgefield erred on emergency meeting, Supreme Court rules

State Supreme Court rules Board of Selectmen erred by declaring emergency



Robert Miller
Dec. 30, 2009

RIDGEFIELD -- The state Supreme Court has ruled that the town's Board of Selectmen illegally held an emergency meeting in 2006 when it accepted the resignation of Deputy Fire Chief Anthony Gaeta.

The court's decision upholds the 2007 finding of the state's Freedom of Information Commission -- that there was no valid emergency in the case, and that therefore, the selectmen illegally held the meeting without public notice.

"A situation must be unexpected and it must demand immediate action such that it is impossible for the public agency to give 24 hours notice of a meeting."— **Board of Selectmen of the Town of Ridgefield vs. Freedom of Information Commission (2010)**

When Is A Meeting Not A Meeting?

- The Freedom of Information Act carves out exemptions to its meeting requirements for the following:

  Personnel search committees for executive-level employees
  Strategy or negotiations related to collective bargaining
  Caucuses
  Staff meetings
  Chance/social meetings

Minutes

- Requirements: record of who voted for what or for whom, who was in attendance at the meeting and who attended any executive sessions
- Must be available within 7 days of the meeting (draft minutes are OK)
- Still required even if a recording of a virtual meeting is posted



"As I read the minutes of our last meeting, please keep in mind that each minute actually felt more like an hour."

Electronic/Remote Meetings

- Regular meetings: Require 48-hour notice with instructions to attend; agenda can come 24 hours before
- Special meetings: Require 24-hour notice with agenda
- Online-only regular meetings must be recorded and posted on the agency's website within 7 days and available for at least 45 days
- You must still submit minutes, even if a recording is available
- Online participants can be kicked out if they are being disruptive (same as at an in-person meeting)
- Board members can **always** participate remotely, but remote participation is not required for the public

Executive Session

- It’s OK to meet behind closed doors for **five specific reasons:**

  Personnel matters (Notify individual, they can demand open session)
  Pending claims or litigation
  Security
  Sale or lease of property
  Discussion of records exempt from FOIA

- Must vote by 2/3 to go into Executive Session
- Meetings still require notice/agenda (try to be specific on topic)
- You cannot vote during Executive Session
- Staff can be invited in to assist; do not create a second audience

Records


DOES NORTH CAROLINA HAVE A PLAN TO IMPROVE HOW IT HANDLES PUBLIC RECORDS?
CERTAINLY!
FIRST, FILL THESE OUT IN TRIPLICATE, HAVE ALL COPIES NOTARIZED AND FILED WITH THE APPROPRIATE AGENCY.
SOMEONE WILL RESPOND WITH AN ANSWER IN THREE MONTHS.
STATE GOV'T
JOHN COLE

Public Records, Definition In FOI Act

- **“Public records or files”** means any recorded data or information relating to the conduct of the public's business prepared, owned, used, received or retained by a public agency, or to which a public agency is entitled to receive a copy by law or contract under section 1-218, whether such data or information be handwritten, typed, taperecorded, videotaped, printed, photostated, photographed or recorded by any other method.
- Except as otherwise provided by any federal law or state statute, **all records maintained or kept on file by any public agency, whether or not such records are required by any law or by any rule or regulation, shall be public records** and every person shall have the right to (1) inspect such records promptly during regular office or business hours, (2) copy such records in accordance with subsection (g) of section 1-212, or (3) receive a copy of such records in accordance with section 1-212.

Public Records, Overview

- Agencies do not have to answer questions, do research or create records that don't already exist
- No requirement that a specific form be used
- Public can inspect records at **no charge**
- **You can charge** for paper copies at 50 cents per page (cities & towns) or 25 cents per page (state agencies); can also charge for digital storage (USB drive, DVD); if more than $10 is owed you can collect the fee up front
- $20 per session fee for portable scanner (not cellphone)
- Can't charge for copies of electronic records expect in special circumstances

How Long Do I Have to Fulfill A Request?

- Must acknowledge records requests **within 4 business days**
- Must fulfill record requests “promptly.”
- **Advisory Opinion No. 51:** Without undue delay. FOI a primary duty.
- Consider: the volume of records requested; the amount of personnel time necessary to comply with the request; the time by which the requestor needs the information contained in the records; the time constraints under which the agency must complete its other work; the importance of the records to the requester, if ascertainable; and the importance to the public of completing the other agency business without the loss of the personnel time involved in complying with the request

Exemptions, Exceptions

- **Exemptions:** Permissive (optional), Sec. 1-210

- **Exceptions:** "Except as otherwise provided by any federal law or state statute."
  - Federal laws: FERPA
  - Other state statutes (examples)
    - CGS § 10-151c: Public school teacher evaluations
    - CGS § 1-82a: Ethics complaints (prior to probable cause finding)
    - CGS § 36a-21: Department of Banking records

Examples Of FOI Exemptions In 1-210

- Preliminary drafts/notes
- Personnel or medical files that would be an invasion of privacy if disclosed
- Certain law enforcement records
- Records relating to pending claims/litigation
- Trade secrets
- Test questions, scoring keys and other examination material
- Real estate appraisals while acquisition of a property is pending
- Records related to collective bargaining strategy/negotiation
- Records protected by attorney-client privilege
- Information obtained by use of illegal means
- Whistleblower complaints
- Adoption records
- Plans/records that pose a security risk
- Responses to bid solicitations, RFPs (until contract is awarded)

Personnel Files

- Only exempt if there is an invasion of personal privacy
- Two-part test: Highly offensive and not a matter of public concern (Perkins v. FOIC, 1993)
- If there is a privacy concern, contact the employee, they have the right to request the records be withheld

Preliminary Drafts/Notes

- “Preliminary drafts or notes” relates to advisory opinions, recommendations and deliberations comprising part of process by which government decisions and policies are formulated; they reflect that aspect of the agency's function that precedes formal and informal decision making
- Public interest in withholding documents must outweigh public interest in disclosure

Security Risk

- Agencies do not have to release records “when there are reasonable grounds to believe disclosure may result in a safety risk.”
- State agencies: Consult with the Commissioner of the Department of Administrative Services
- Cities/towns: Consult with the State Police
- Judicial: Chief Court Administrator makes the call
- Legislative: Executive director of legislative management decides

Attorney-Client Privilege

- Records privileged by the attorney-client relationship can be withheld
- Following factors need to be met (Shew v. FOIC, 1997):
  - The attorney must be acting in a professional capacity for the agency
  - The communications must be made to the attorney by current employees or officials of the agency
  - The communications must relate to the legal advice sought by the agency from the attorney
  - The communications must be made in confidence

Trade Secrets

- Agencies not required to release trade secrets (includes formulas, programs, devices, methods, cost data, customer lists, etc.)
- Trade secrets can belong to a third-party business or a public agency
- Must derive independent economic value from not being known/accessible
- Entity owning trade secret must take reasonable efforts to maintain secrecy

Vexatious Requestors

- CGS § 1-206 (b): Cities/towns/agencies can petition the FOIC for relief from “vexatious requestors”
- Consider: Number of requests filed; scope of the requests; nature, content, language or subject matter of the requests; nature, content, language or subject matter of communications to the agency; pattern of conduct that amounts to an abuse of the rights granted under FOI
- Executive Director determines whether a hearing is warranted; Commission decides to grant or deny petition
- Requestors can be barred from making requests for up to a year; they can appeal in Superior Court