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Understanding Connecticut's Freedom of Information Act

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So, What Is The FOIA?

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- Connecticut's Freedom of Information Act ("**FOIA**") was enacted in 1975.
- Connecticut's Freedom of Information Commission ("FOIC") is primarily responsible for enforcement of our FOIA.
- 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.
- The FOIA also sets forth numerous exceptions to its open meetings and records requirements.

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So, What Is A "Public Agency"?

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- A "public agency" is not only the agency itself, but also includes any committee (or "subcommittee") of or **created by** the agency. *Connecticut General Statutes §1-200(1).*
- Thus, board subcommittees generally must comply with all of the same FOIA requirements as the board itself.
- Covers most quasi-public agencies and the "**functional equivalent**" of public agencies (i.e., **entities publicly funded/created, highly regulated, and/or performing a governmental function**).

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So, What Is A "Public Record"?

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- 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, videotaped, printed, photostated, photographed or recorded by any other method." *Connecticut General Statutes §1-200(5).*

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So, What Is A "Meeting"?

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- "**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).*
- "Quorum" is generally required for a "meeting" to be covered by FOIA, except for a "hearing" or other "proceeding." *Meriden v. FOIC*, 338 Conn. 310 (2021).
- "Meetings" can include "workshops" and "informational sessions." Don't be cute with labels to try to avoid the FOIA.

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Post-COVID: The Continuing Remote/Hybrid Meetings Option

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- Prior to COVID-19, occasional telephonic (or Skype) participation by missing board member. Then came COVID-19.
- Public Act 22-3 amended the FOIA, preserving for the most part elements of pandemic-era Executive Orders concerning "remote" and "hybrid" meetings.
- A public agency (such as a board or any of its committees) **can** hold meetings that are accessible to the public through 1) electronic equipment only (i.e., **"remote meetings"**) or 2) remote participation in conjunction with an in-person meeting (i.e., "**hybrid meetings**").
- For these meetings, boards must use technology that "facilitates real-time public access to meetings," such as "telephonic, video or other conferencing platforms."

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Notice and Posting Requirements for Remote/Hybrid Meetings

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- If a board intends to conduct a remote or hybrid **regular meeting**, it must provide at **least 48 hours** 1) advance written or electronic notification to each board member and 2) notice to the public, posted in its office and on its website.

- Boards still must post agendas for these regular meetings at least 24 hours in advance; the notice/agenda must include instructions for the public to access the meeting.

- A notice of a **special meeting** must be posted 24 hours in advance and indicate whether it will be conducted solely or in part via electronic equipment (with instructions for accessing the meeting).

- **PLEASE NOTE**: Notices of adjournment must also be posted on the agency's website.

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Public Access For Remote Regular Meetings

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If a board conducts a meeting (other than an executive session or special meeting) **solely** by means of electronic equipment, it must

- provide any member of the public (upon a written request at least 24 hours in advance of the meeting) with a physical location and electronic equipment necessary to attend the meeting in real-time;
- record or transcribe the meeting (excluding portions held in executive session), with any transcription/recording to be posted on its website and made available to the public in the board's office no later than seven days after the meeting and for at least 45 days thereafter; and
- if a quorum of board members attend a meeting via electronic equipment from the same physical location, permit the public to attend the meeting in that location.

NOTE: Boards are not required to provide such access/equipment for in-person or hybrid meetings, since the public can access such meetings by merely showing up.

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Remote/Hybrid Meetings and Public Comments

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- Members of the public attending remotely must be provided with the same opportunity to provide comment and participate in the meeting **that they would be accorded if it was in-person**.

- Boards are NOT required to offer persons attending a meeting remotely the opportunity for comment if they are not required by law for persons attending in-person.

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Board Member Remote Participation

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- Board members may be provided with the opportunity to participate in meetings remotely, even if it is an in-person meeting.
- Boards are not required to adjourn or postpone a meeting if a member loses the ability to participate because of issues with that member's electronic connection, **unless the member's participation is necessary for a quorum**.
- Unless unanimous, votes taken at a meeting at which any member participates remotely shall be taken by rollcall.
- Meeting minutes must identify which members attended in-person or remotely.

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Conduct at Remote/Hybrid Meetings

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- **IDENTIFY YOURSELF**: Any board member or member of the public participating in a meeting conducted via electronic equipment shall make a good faith effort to state one's name and title (if applicable) at the outset of each occasion that the person participates orally during an uninterrupted dialogue or series of questions and answers.
- **MAINTAINING ORDER**: Those attending remotely/ electronically who are disrupting a meeting so as to render the orderly conduct of the meeting unfeasible may have their attendance terminated until such times as such persons conform to order (or until the meeting is closed, if necessary). There is a similar provision for town meetings.

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If Technology Fails

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- A board is not required to adjourn/postpone a meeting if a member of the public loses the ability to participate because of issues with their connection.
- If a meeting conducted via electronic equipment is interrupted by disconnection or an unacceptable degradation of the electronic equipment, or if a board member necessary to form a quorum loses the ability to participate because of such issues with the member's connection, the board may (at least 30 minutes -but not more than two hours- after the interruption) resume the meeting 1) in-person, if a quorum is present in-person, or 2) if a quorum is restored via electronic equipment, solely or in part by such equipment.
- The board shall (if practicable) post a notification on its website and inform attendees by electronic transmission of the expected time of resumption, or the adjournment or postponement of the meeting, and may announce at the beginning of meetings what preplanned procedures exist in the event of an interruption.

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Thoughts on Remote/Hybrid Provisions??

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- While the new law continues much of what was in prior Executive Orders, there are important distinctions, such as having to provide (upon request) a physical location with electronic equipment necessary to attend a remote regular meeting.
- **A board can still choose to conduct traditional in-person meetings (and avoid some of these new issues). Your call!**
- The new law **arguably** provides board members with a right to attend meetings remotely (even meetings held in-person)???
- Interplay between Public Act 22-3 and **board bylaws** addressing circumstances and procedures for remote participation in meetings by board members (as per *Robert's Rules of Order*)? You may need to revise these bylaws.

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"Inadvertent" Electronic Meetings

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- 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? **WATCH OUT**. *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 **very afraid** of hitting the "**reply all**" button).

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So What About Retreats?

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

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When Is A Meeting A "Non-meeting"?

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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.

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Additional "Collective Bargaining" Issues (Besides Usual Negotiations)

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- **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"?** Teacher interest arbitrations are not covered by FOIA at all. *Gould v. FOIC*, 314 Conn. 802 (2014). In addition, school non-certified and municipal employee interest arbitrations under MERA are exempt from the FOIA

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Considerations For Meetings

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- **Regular v. Special Meetings**: differences and scheduling
- **24 hours**' notice and posting of agenda. "**Emergency meeting**" exception exists in theory, but not really in practice.
- **Adding items** to agendas at regular (but *not* **special**) meetings via a **2/3** vote of agency members who are present and voting
- **Votes** by members must be in **public**
- **Make Available Record of Votes/Minutes:** Within 48 hours and 7 days, respectively. **Don't procrastinate; can use drafts**.
- **Recording** by public and media
- **Website posting?** Usually *(pre-pandemic)* just required for special meetings notices. Now required for remote meetings and -

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Public Act 23-160/CGS §10-220 - Just For School Boards!

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- Expressly requires **local and regional boards of education** conducting a regular *or* special meeting to 1) make available for public inspection the **agenda** for the meeting, along with "**any associated documents** that may be reviewed by members of the board at the meeting" *and* 2) post such agenda and documents on the school district's **website**.
- The requirement of having such "associated materials" be available to the public prior to the meeting (and be posted online) would clearly not apply to records that are exempt from public disclosure, but it basically requires that traditional "board members packets" be produced/be available in advance to the public at large.
- This new law does not specify when (and how much in advance of the meeting) "board member packet" documents must be posted. In addition, the law also does not address unique circumstances where the materials may not have been available or even existed prior to the meeting; post as soon as reasonably possible?
- **Not a part of the FOIA; who will enforce (CSDE?)**

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*Agenda Items-You Need **Some** Specificity*

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- The following agenda items have been found by the FOIC to be insufficient:
  - "New business"
  - "A lease"
  - "Pending litigations"
  - "Various personnel matters"
  - "Possible discussion on pending appeals"
  - "Executive Session to discuss Appointments, Transfers, Resignations, Retirement Personnel, Real Estate and Threatened Litigation"
- Agenda items should include the phrasing "discussion and possible action" if action on an item is anticipated.
- A board does not have address every item listed on its agenda.

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Minutes

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- FOIA does not indicate how detailed the minutes of a meeting should be, besides a command that votes be recorded so that the public can determine how each member voted.
- Meeting minutes should reflect: 1) the agency members present; 2) the text of all motions and resolutions voted on, along with the votes cast by each member; 3) **if** there is an executive session, the reason for such session; 4) except where there is an exception under the law, those persons present during an executive session, along with the times that the agency (and those persons) entered/exited executive session; 5) the date and time the meeting was convened and adjourned; 6) the meeting location; and 7) a general description of those items from the agenda that were discussed at the meeting.
- FOIC has noted that FOIA generally requires that minutes provide an "accurate" record of the proceedings.
- Beyond that, there is **no** requirement under the FOIA that the minutes be akin to a verbatim transcript of the meeting.
- To repeat an old maxim, **sometimes less is more**.

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Timelines Are Important!

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- In determining the deadline for a notice, agenda, record of votes or minutes of **"special meeting"** or an **"emergency meeting"** to be filed or posted, Saturdays, Sundays, legal holidays and any day on which the office of the public agency, the clerk of the applicable political subdivision or the clerk of each municipal member of any multi-town agency (as the case may be) is closed shall be excluded.
- However, this does **not** apply to a "**regular meeting**." Thus the 24 hours' notice and the seven day minutes requirements mean that! This requirement is strictly enforced.
- **Please note**: With respect to the 24-hour notice/agenda requirement, the FOIC generally has concluded that this is meant to ensure that notice of a special meeting is posted in a town clerk's office for at least a 24-hour period that includes a minimum of one full business day. As such, if you are meeting on a weekend, you may essentially have to file/post the agenda at least by the close of business on a Thursday.

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Keeping Order

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- If a meeting is interrupted by any person so as to render the orderly conduct of the meeting unfeasible, ***and if*** order cannot be restored by the removal of persons willfully interrupting the meeting, the agency may order the meeting room cleared and continue with its meeting. CGS §1-232.
- Only matters on the agenda may be considered in such a meeting.
- "Duly accredited" representatives of the press/news media, except those participating in the disturbance, must be allowed to attend.
- **PRACTICAL POINTERS**: Before an agency seeks to remove a possibly "unruly" person from a meeting, it must first ask the person to refrain from speaking and/or to sit down.
- Clearing the room is a measure of last resort, and only can be done if one can prove that order could not have been restored merely by the removal of the individual(s) who were interrupting the meeting.

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Public Access and Comments

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- A public agency must permit any member of the public to attend meetings without being required to register by name, furnish information of any kind, complete a questionnaire, or fulfill any other condition before entering the meeting place. *Connecticut General Statutes §1-225(e).*
- While an agency may have a sign-in sheet for persons attending or speaking at a meeting, the agency cannot then prevent members of the public who refuse to provide their names from attending the meeting.
- While the FOIA gives the public the right to be present at meetings, nothing in the FOIA confers upon the public the right to speak at a meeting. *Mosby v. Chairman, Norwalk Board of Education,* #FIC 2013-384 (April 9, 2014).
- An agency's determination as to whether to even permit public comments at its meetings is governed by other policy considerations (and under certain circumstances, legal/constitutional mandates concerning viewpoint neutrality) but is **not** a matter that concerns the FOIC.

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Executive Session

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- Executive session is a manner in which a subject may be addressed, not an agenda item onto itself.
  - Simply listing “Executive Session” as an agenda item is impermissible.
- Technically, no requirement to state that an executive session will be taking place in a meeting agenda (but it is a recommended courtesy).
- Of course, you need a valid reason (as set forth in the FOIA).
- When moving to enter, you need to provide *some* specificity as to the purpose of the executive session (do not simply say “personnel matter” or even “attorney client privileged communication”).
- 2/3 vote of those present and voting required to enter into executive session.
- Motion must state reason(s) for as to the purpose of the executive session.
- **Attendance must be limited to members of the public agency and those persons invited to “present testimony or opinion pertinent to matters before said body.” (So, what about the presence of the Superintendent?)**

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"Popular" Reasons For Executive Session: "Personnel Matter"

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- ***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 only applies to a discussion regarding a specific employee, not general classes or categories of employees.
- This exception would include discussions by a board on filling a vacancy in its membership (including candidate interviews).
- 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.***

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Other Common Reasons For Executive Sessions

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- ***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***.
  - Would include discussion of whether to initiate litigation or other legal action.
- ***Matters concerning security strategy or the deployment of security personnel, or devices affecting public security***.

  -Examples: Discussion of the layout of the security system, the best types of security devices to use to secure a building and where these devices should be located.

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Other Common Reasons For Executive Sessions

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- ***Discussion of the selection of a site or the lease, sale, or purchase of real estate by the state (or political subdivision)*** when publicity regarding such site, lease, sale, purchase or construction would adversely impact its price **until** such time as all of the property has been acquired, or all proceedings or transactions concerning the property have been terminated or abandoned.
- 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 ....

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Public Records and "Personnel Files" Exemption

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- 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**.

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Evaluations and Records of Employee Misconduct

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- 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.
- **Most employee evaluations are public records subject to disclosure**. Teacher (and school administrator) evaluations are a notable exception, but **written** superintendent evaluations must be disclosed.
- Residential addresses of public employees are generally public records, with limited exceptions (e.g., police, fire, and under certain circumstance, clerks, registrars of voters and other elections officials). *Connecticut General Statutes §1-217*.

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Student Records Exemption

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- Applies to **education records** which are protected from disclosure under the Family Educational Rights and Privacy Act. *See Connecticut General Statutes §1-210(b)(17), as amended by Public Act 25-124*.
- 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).
- Access to videotapes with student images? *Vasquez v. Superintendent of Schools, Hartford Public Schools*, #FIC 2023-0489 (July 24, 2026).

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"Trade Secret" Exception

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- ***Trade secrets (Connecticut General Statutes §1-210(b)(5)).*** Need not disclose "trade secrets," defined as "information, including formulas, patterns, compilations, programs, devices, methods, techniques, processes, drawings, cost data, or customer lists, film or television scripts or detailed production budgets that:

  (a) derive independent economic value, actual or potential, from not being generally known to, and not being readily ascertainable by proper means by, other persons who can obtain economic value from its disclosure or use, and

  (b) are the subject of efforts that are reasonable under the circumstances to maintain secrecy" and "commercial or financial information given in confidence, not required by statute."

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Examples of "trade secrets"

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- **Portions of RFP responses (even after there is a final contract)** could be exempt from disclosure where the information is not generally known to competitors (e.g., size and scope of proposed facilities and amenities to be provided at a gaming facility, database fields). *Rubin v. Executive Director, Connecticut Airport Authority,* #FIC 2016-0035 (August 24, 2016); *Database USA LLC v. Commissioner, Connecticut Department of Administrative Services, #FIC 2015-209* (February 10, 2016).
- This exception has been repeatedly found to cover the formula and calculations used by a company hired to **calculate property assessments for a municipality**. *Vartulli v. Chairman, Board of Assessment, City of Stamford*, #FIC 2013-029 (October 23, 2013).

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Attorney-Client Privilege

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- 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.

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Arrest Reports and Access

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- ***Connecticut General Statutes §1-215***: Arrest records (including arrest warrant applications and affidavits, and for arrests without a warrant, official arrest or incident reports) are generally deemed to be public records from the time of the arrest and subject to disclosure.
- Law enforcement officials are only permitted to redact/withhold from disclosure 1) the identity of witnesses, 2) specific information about the commission of a crime, which the agency reasonably believes (if disclosed) may prejudice a pending prosecution or a prospective law enforcement action, or 3) any information that a court has ordered to be sealed from public inspection or disclosure.
- Conn. Gen. Stat.§1-215 is **only** applicable during the period in which a prosecution is pending against a person who is the subject of the record.
- At all other times (i.e., after the prosecution is no longer pending), the other FOIA provisions concerning the disclosure of such records govern, which leads to …

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Connecticut General Statutes §1-210(b)(3): Law Enforcement Records Exemptions

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Records of law enforcement agencies not otherwise available to the public which were compiled in connection with the detection or investigation of crime, if disclosure of the records would not be in the public interest because it would result in the disclosure of:

- the identity of informants (or mandated reporters of suspected child abuse/neglect) not otherwise known or witnesses not otherwise known whose safety would be endangered or who would be subject to threat or intimidation if their identity was made known,
- the identity of minor witnesses;
- signed or sworn statements of witnesses,
- information to be used in a prospective law enforcement action if prejudicial to such action,
- investigatory techniques not otherwise known to the general public,
- arrest records of a juvenile, which shall also include any investigatory files, concerning the arrest of such juvenile, compiled for law enforcement purposes,
- the name and address of the victim of a sexual assault, voyeurism, injury or risk of injury, or impairing of morals, or family violence, or of an attempt thereof, or
- uncorroborated allegations subject to destruction under Conn. Gen. Stat. §1-216.

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Other Notable Exemptions

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- ***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." (Example: personal notes, prior drafts of contracts or reports)

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Other Notable Exemptions

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- ***Real estate appraisals (Connecticut General Statutes §1-210(b)(7))***. Need not disclose "contents of real estate appraisals, engineering or feasibility estimates and evaluations made for or by an agency relative to the acquisition of property or to prospective public supply and construction contracts, until such time as all of the property has been acquired or all proceedings or transactions have been terminated or abandoned, provided the law of eminent domain shall not be affected by this provision."
- ***Safety risk (Connecticut General Statutes §1-210(b)(19))***. Exempts from disclosure documents where there are reasonable grounds to believe that disclosure may result in a safety risk; keep in mind procedural requirements (i.e., DESPP consultation).
- **Of course, records exempt due to other state or federal laws**.

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Compliance With Requests

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- 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).
- ***IMPORTANT:*** agencies may require that requests for copies be in writing, but not requests to inspect records.

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Mode of Compliance: Copies

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- 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*."

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Fees For Copies?

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- An agency may charge fees for copies of records (electronic or otherwise). Cannot charge for search or retrieval of records.
- 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.
- Use of "**handheld scanners**" by requester. *Connecticut General Statutes §1-212(g).* May charge fee up to $20.
- Use of cellphones to get free copies? Agency has some discretion (including saying "no"). See *Paulsen v. Superintendent of Schools, Bethel Public Schools*, #FIC 2015-663 (June 8, 2016).

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Fees To Inspect Records?

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- 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.

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Time to Comply with Requests?

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- 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 (or ten)* 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.

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*Requests for Personnel Records?**

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- **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 before giving employee or union right to object to disclosure. (If so, ten days for compliance).*
- Since the FOIC has the power to issue fines, an agency should not give employees the blanket right to object to the disclosure of all records.
- Public Act 18-93 amended the FOIA so as to require a public agency disclosing such records (**after** disclosure) to then make a "reasonable attempt" to notify the employee and union representative, if any, of a request for (and release of) records.

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Complying with Requests to Inspect Records

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- 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 the 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."

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The Burdens of the Job

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- 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.

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FOIA Compliance Is A Job Duty!!

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- While FOIA compliance is not your only job duty, it is an **important** job duty, **even for the Office of the Governor.** *Haigh v. Governor, State of Connecticut*, #FIC 2021-0214 (October 12, 2022).
- 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).

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Electronic Records and the FOIA

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- 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).
- "Personal" messages? If occasional, may be exempt from disclosure. (**But be careful**.)

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Destruction Of Records & The Records Retention Act

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- 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.
- State Library-not FOIC-has jurisdiction over these matters

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Retention of E-mails?

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- 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.

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Who Is Responsible For Saving E-mails?

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- Usually, the sender is responsible for retaining the e-mail.
- Recipient is responsible for maintaining e-mail where the sender is from outside the agency (e.g., 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.
- It is a good idea for an agency to have a policy on retention.

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What About Voicemail?

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- 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 …

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"Litigation Hold"

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- 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.

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Penalties For Violating the FOIA

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- A person alleging a denial of FOIA rights may file a complaint with the FOIC. *See* Conn. Gen. Stat. §1-206(b)(1).
- In **rare** circumstance, an agency can petition the FOIC to avoid a hearing. *See* Conn. Gen. Stat. §1-206(b)(2) and (4).
- If it finds that a public agency violated FOIA, the FOIC may:
  - order the agency to produce or copy any public records that were improperly withheld.
  - impose a fine of not less than $20 and not more than **$5,000 ("new"-10/1/23)** against the agency's record custodian or official if the agency acted 1) "without reasonable grounds" **or engaged in 2) "a practice or pattern of conduct that constitutes an obstruction" of any FOIA right *or* "reckless, willful, or wanton misconduct" in delaying or denying responses to public records requests ("new" too). More fines lately, as FOIC feels the new law reflects a desire for stricter enforcement!**
  - declare agency action to be "null and void."
  - order the agency to provide relief that the FOIC "believes appropriate to remedy the denial of any right conferred by the FOIA."

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So, Who Pays The Fine?

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- FOIC imposes civil penalty against “the custodian or other official directly responsible for the denial” of any FOIA right.
- Sometimes, the FOIC will go with “the buck stops here approach,” as a Chair/”CEO” will be deemed to have ultimate responsibility for FOIA compliance (and also may be a public agency is his/her own right), even if arguably, an underling or even the attorney was to blame.
- Other times, that same person is really the person who actually “did it.”
- Role of candor before the FOIC.
- A public agency is not required to reimburse individual for fine, but it is not prohibited from doing so either.

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What If Someone Is Making "Vexatious Requests"? A "New" Tool

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- In light of **Public Act 18-95/CGS §1-210(b)(6)**, public agencies may petition the FOIC for relief from "vexatious requesters." **This is still a somewhat rare remedy.**
- The petition must detail a vexatious history of requests, such as: 1) the number of requests filed and total number of pending requests; 2) the scope of the requests; 3) the *nature, content, language or subject matter* of the requests; 4) the nature, content, language or subject matter of other oral/written communications to the agency from the requester; and 5) a pattern of conduct that amounts to an abuse of the right to access information under the FOIA or an interference with the operation of the agency.
- If the FOIC hears and then votes to grant the agency's petition, the relief may include an order that the agency need not comply with future requests from the requester for a period of up to one year.
- Recent examples?

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Criminal Penalties For Destroying Records

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- **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.

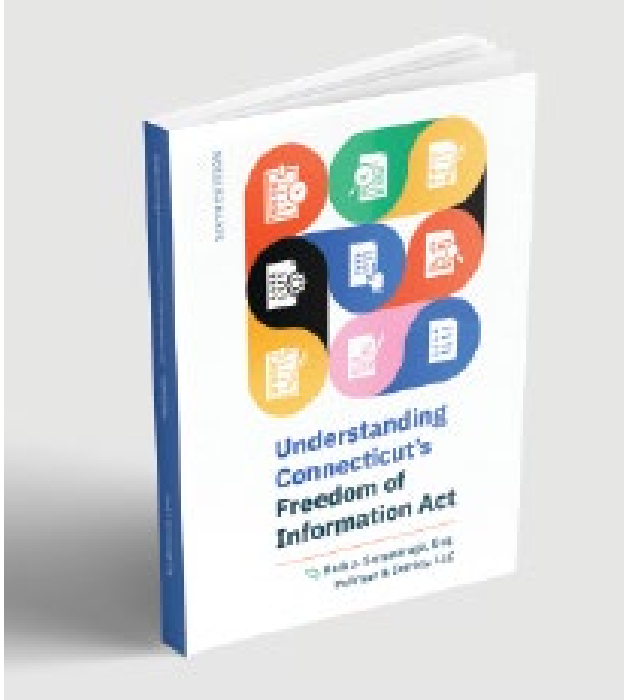
- **The FOIA itself has its own (albeit less serious) penalties**.

  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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FOIA Resource (Mark and His Book☺)



Understanding Connecticut's Freedom of Information Act
(6th Edition 2023)

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https://www.cabe.org/page.cfm?p=1256&pback=1240

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FOIA Resource (Russell and the FOIC☺)

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