Freedom of Information (FOIA) Workshop:

Basic Overview of the FOI Act for Public Agency Officials

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The Law
The Freedom of Information Act ("FOIA")

(formerly §§ 1-15 through 1-21k)

- Represents Connecticut’s commitment to open government and a strong policy in favor of public access to meetings and records

Subject to narrow exceptions, which are strictly construed, the FOIA mandates that the public has access to:

- **Meetings** of public agencies
- **Records** that are developed and/or maintained by public agencies
“Public Agency” or “Agency”

…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 and also includes any judicial office, official or body or committee thereof, but only in respect to its or their administrative functions.

Conn. Gen. Stat. § 1-200 (formerly § 1-18a)
...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.

Conn. Gen. Stat. § 1-200
“Meeting” Does NOT Include:

- Any meeting of a personnel search committee for executive level employment candidates
- Any chance meeting, or a social meeting neither planned nor intended for the purpose of discussing matters relating to official business
- Strategy or negotiations with respect to collective bargaining
- A caucus of members of a single political party notwithstanding that such members also constitute a quorum of a public agency
- An administrative or staff meeting of a single-member public agency; and communication limited to notice of meetings of any public agency or the agendas thereof
Meetings

A conference call or other communication by means of electronic equipment may constitute a meeting.

Agencies are cautioned to be particularly careful that email exchanges may constitute a meeting for FOIA purposes and email communications may result in an unnoticed meeting taking place.
Case Example

Docket #FIC 2004-406

- FOIC found that a quorum of the respondents communicated by email beginning on December 12, 2003, and continuing through at least July 12, 2004.

- Raised, discussed and “brainstormed” substantive matters, such as: guidelines for determining conflicts of interest; what, in general constitutes unethical behavior; how to respond to requests for advisory opinions; comments on drafts of documents, and whether in fact their email conversations might constitute meetings subject to the FOIA.
Meetings and Electronic Communication Concerns

- FOIC also found that such communications and meetings were not open to the public, although emails of these discussions were subsequently provided to the complainant, the respondent did not file notices of its email meetings or prepare minutes of those meetings.

- Some of the communications between members of the respondent were confined to exchanges of drafts and comments; comments on matters of form such as word choices, combining paragraphs or correcting spelling or grammar in draft documents; dropping certain formal requirements, such as the requirement that a complaint be sworn before a notary; and reminders concerning deadlines.

- Some of these communications were comparable to work that would be conducted by staff members, if the respondent had staff. Nonetheless, this work was actually performed by the respondent itself.
Meetings and Electronic Communication Concerns

- However, FOIC determined that much of the communication among a quorum of the respondent was significantly more substantive, such as: discussion concerning guidelines for determining conflicts of interest; discussion concerning what, in general, constitutes unethical behavior; discussion concerning how to respond to requests for advisory opinions; and discussion concerning whether the respondent’s email conversations on the above topics constituted meetings subject to the FOI Act.

- FOIC further determined that all of the documents discussed and drafted by the members of the respondent, and all of the substantive concerns raised in their communications, were ultimately discussed openly by the respondent at its regular meetings.
“It is found that while sometimes the communications among a quorum of the respondent were limited to the agendas of the respondent’s meetings, as permitted by § 1-200(2), G.S., and reminders about deadlines, most often they concerned substantive matters over which the respondent had supervision, control, jurisdiction or advisory power, within the meaning of § 1-200(2), G.S. . . .”
...“It is also found that the respondent’s motive was to educate itself on ethics matters, and that a quorum of the respondent corresponded by email in order to brainstorm, to exchange ideas more efficiently, and to be prepared to discuss matters more fully and competently at its public meetings.”
Meetings and Electronic Communication Concerns

“...Unfortunately, “[N]otwithstanding the respondent’s good intentions, it is concluded that the email communications among a quorum of the respondent beginning on December 12, 2003, and continuing through at least July 12, 2004 were ‘meetings’ within the meaning of § 1-200(2), G.S.”
Meetings and Electronic Communications Concerns

What does the future (present!) hold?

- Twitter “meetings”
- Facebook “meetings”
- Blogging “meetings”

Is it possible to hold a lawful email meeting?

Is it possible to hold a lawful video/teleconference meeting?
Records
“Public Records” Under FOIA

...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, photostatted, photographed or recorded by any other method.

Conn. Gen. Stat. § 1-200(5) (formerly § 1-18a(d))
Records

FOIA

Except as otherwise provided by any federal or state law, all records maintained or kept on file by any public agency shall be public records.

Note: this means that public agencies may rely on confidentiality or nondisclosure provisions of federal or state statutes (but not regulations) that may apply to their public records, in addition to any exemptions, exclusions or exceptions from disclosure that are contained in the FOIA itself.

Every person shall have the right to promptly inspect such records during regular business hours and the public agency must provide copies of any such documents upon request, unless the records requested are exempt under the FOIA.
Public Access
With limited exceptions, the FOIA mandates that the public has access to all records that are developed and/or maintained by public agencies.

Copies
A public agency that maintains public records in a computer storage system must provide a copy of any nonexempt data contained in such records on paper, disk, tape or any other electronic storage device or medium requested if the agency can reasonably make such copy or have such copy made.
Public Rights
Public agencies are prohibited from entering into contracts that would impair the right of the public under the FOIA to inspect or copy the agency's nonexempt public records that exist in a computer system owned, leased or otherwise used by an agency.

Purchasing
Before acquiring any computer system, equipment or software a public agency must consider whether the proposed system, equipment or software adequately provides for the rights of the public under the FOIA at the least cost possible to the agency and to persons entitled to access to nonexempt public records.
Computer Stored Public Records

Office of Information and Technology (OIT)
The Office of Information and Technology (OIT) is required by statute to adopt written guidelines to assist municipal agencies in carrying out this purpose and those agencies are supposed to consult with the OIT when looking into new computer systems.
Records and Electronic Communication Concerns

GL 2009-2

- The Office of the Public Records Administrator addressed the topic of email records a few years ago in a general letter.


- GL 2009-2 explains the steps you need to take to understand what emails you should retain (or not) and if retaining them how to determine the retention period.
Do we extend the same basic concepts to text messages?

Other electronic communications?
Records and Electronic Communication Concerns

• Step 3: If the message is a record, determine which records series the message belongs to, for example:
  - If the message is Transitory Correspondence (S1-060), delete at will
  - If the message is Routine Correspondence (S1-070), retain for 2 years
  - If the message is All Other Correspondence (S1-080), retain for the equivalent records series. For example, if an e-mail is related to a fiscal transaction like Accounts Receivable and Payable (S3-010), retain 3 years, or until audited, whichever is later.
Step 4: Maintain the messages for the required retention period under the equivalent records series. Once the retention period has been satisfied, submit a Records Disposal Authorization (Form RC-075 for municipalities/Form RC-108 for state agencies).
Cases
**Morrin v. FOIC**

FIC 2016-0430, May 24, 2017, aff’d, 2019 WL 4060477

- FOI Commission decision involving social media postings

- Public employee posted “on his personal social media pages (Facebook, LinkedIn, Twitter)…. public comments during his personal time and on his personal devices” and the comments involved then ongoing litigation his public agency was a party to.

- A request was made for “all responsive social media communications by employees of respondent” but before filing the request Complainant had a forensic expert collect all publicly available data from the employee’s social media accounts.

- Just as the agency was receiving the FOIA request, the employee took down or hid his public posts… but did not inform anyone else at the agency!
Naturally, when the complainant received records from the agency, he knew that they did not match what his forensic expert had collected.
The Court never addressed this issue either, instead only finding that the Commission acted unreasonably by declining to determine whether the records were public records.

Did respondents fail to comply with the request?

- FOIC does not answer the first question... because it finds the answer to the second question is “no.” Since Respondents did not know that certain postings were taken down or hidden from public view, and the employee never told them this, they responded to the request as completely as they could.
The Court concluded, however, that the Respondent did not violate the act, because the Complainant had all the records available to him.

Essentially, the Commission’s dismissal was appropriate because the dispute was moot—it could not provide any practical relief.
Records and Electronic Communication Concerns

Lessons to be learned from *Morrin*

- It is still undecided if social media posts can be considered public records subject to disclosure, **but**

- The fact that they are publicly available in the first place could either:
  1) render the dispute moot, or
  2) perhaps lead to the conclusion the such records are already being disclosed pursuant to FOIA.
Here is another case to consider…

- In 2013 the FOIC decided a case in which all voice mail and text messages from a Mayor’s cell phone (town supplied) were requested (FIC 2012-564, August 14, 2013).

How did Complainant know there were text messages on the Mayor’s cell phone?

- The Mayor had handed his cellphone to his executive secretary to show her a picture on the phone, and when she attempted to forward a copy to herself she discovered there were text messages about her and the Complainant—one referring to the executive secretary in derogatory fashion and implying an intimate relationship between her and Complainant (a selectman in the same town).
Respondents advised the Complainant they would compile responsive records and also told him that the Mayor instructed the town manager to contact the cell phone provider “to determine the most efficient manner to retrieve the requested information.”

On retrieving the messages, turns out the wireless provider said the most expedient way to do that was for town manager to review and transcribe the messages himself, which he did, leaving some out that were between Mayor and his family members, and which he then deleted. Town manager also redacted just two words from the remaining, responsive messages.
At the hearing Complainant alleged that the redactions and the failure to produce all messages was improper, and the Hearing Officer ordered Respondents to submit unredacted copies of all messages for in camera review. Problem – the text messages were only retrievable for a 10 day period, after which they were erased from the wireless provider’s system, and the erased messages could not be recovered from the cell phone’s memory card!
But, “a preferable practice going forward would be to retain any such records until such time as the Commission has rendered a final decision.”

FOIC accepted the testimony that the erased messages were personal communications not subject to FOIA (i.e. not “public records”)

Result
Best Practices
Best Practices

- Take care with email messages and text messages between agency members—communications can constitute meetings and subject to FOIA notice requirements.

- Note the respective retention timelines for various records—emails and texts almost assuredly must be retained for certain periods of time depending on their nature.

- Social media posts are still an undecided question. Best practice would be to educate agency members to ensure they do not post confidential information.
Questions?