
OLR Bill Analysis

sHB 6193

AN ACT SUBJECTING CERTAIN NONSTATE ENTITIES THAT SERVE A GOVERNMENTAL FUNCTION TO THE FREEDOM OF INFORMATION ACT AND THE CODES OF ETHICS.

SUMMARY

This bill subjects certain (1) entities that serve a governmental function, as defined by the bill, to the Freedom of Information Act (FOIA) and (2) individuals appointed to these entities to the state Code of Ethics for Public Officials.

Under the bill, an entity serves a governmental function if, (1) with certain exceptions, any of its members are "public officials" under the state Code of Ethics for Public Officials; (2) it is authorized to spend public funds; or (3) it receives public funds as part of its operations.

EFFECTIVE DATE: October 1, 2021

GOVERNMENTAL FUNCTION

Under the bill, an entity serves a governmental function if it meets one of the three criteria outlined above. With respect to the first criterion, an entity serves a governmental function if its board of directors or corporate governance includes any of the following members:

1. a statewide elected officer or member or member-elect of the legislature,
2. a person appointed to any office in any branch of state government by the governor or one of his appointees,
3. a public member or representative of the teachers' unions or state employees' unions appointed to the Investment Advisory Council,

4. a quasi-public agency member or director, or
5. the governor's spouse.

These individuals (other than judges and members of advisory boards) are all "public officials" under the Code of Ethics for Public Officials (see below). (Presumably, they must serve on the entity's board in their official capacity to trigger the bill's requirements.)

CODE OF ETHICS

By law, the Code of Ethics for Public Officials applies to state employees and specified public officials. Among other things, the code prohibits covered individuals from having any financial interest in a business that is in substantial conflict with their official duties (CGS § 1-84(a)).

Under existing law, "public officials" includes each of the individuals listed above (other than judges and members of advisory boards), plus any person appointed or elected by the legislature or a member of either house. The bill additionally classifies as "public officials" certain members of entities that are not state agencies or quasi-public agencies but that serve a governmental function as defined in the bill. Specifically, it applies to members of these entities' boards who are appointed by the governor or one of his appointees, a statewide officer, or a legislator.

FOIA

Among other things, FOIA requires state and municipal public agencies and quasi-public agencies, with limited exceptions, to (1) make their records and files available to the public for inspection and copying; (2) post their meeting agendas and minutes; and (3) allow the public to attend their meetings (CGS §§ 1-210 & 1-225).

Under current law, FOIA applies to non-public entities to the extent they are deemed to be the functional equivalent of a public agency (CGS § 1-200(1)(B)). To determine whether a person is the "functional equivalent" of a public agency, courts and the Freedom of Information Commission (FOIC) apply a four-part test established by the

Connecticut Supreme Court in *Board of Trustees of Woodstock Academy v. FOI Commission*, 181 Conn. 544 (1980). One component of this test is whether the entity performs a governmental function (see BACKGROUND).

The bill expands FOIA's definition of public agency to include non-public entities that perform a governmental function, as defined by the bill (see above). (The bill's definition of "governmental function" is broader than the definition used by courts and FOIC for the functional equivalent test (see BACKGROUND).)

The bill additionally classifies, as the "functional equivalent" of a public agency, the same entity board members whom it defines as "public officials" under the Code of Ethics for Public Officials (see above). Specifically, it applies to members (1) appointed by the governor or one of his appointees, a statewide officer, or a legislator and (2) serving on entities that are not state agencies or quasi-public agencies but that serve a governmental function as defined in the bill. (The legal effect of this provision is unclear.)

BACKGROUND

Functional Equivalent Test

FOIA's functional equivalent test consists of the following factors:

1. whether the entity performs a governmental function,
2. the level of government funding,
3. the extent of government involvement or regulation, and
4. whether the entity was created by government (*Woodstock, supra*).

When it established the test, the Connecticut Supreme Court stated that these criteria should be applied on a case-by-case basis. In a later case, the court held that an entity need not meet all four criteria in order to be held to be a functional equivalent. Rather, "[a]ll relevant factors are to be considered cumulatively, with no single factor being

essential or conclusive" (*Connecticut Humane Society v. FOI Commission*, 218 Conn. 757, 761 (1991)).

Governmental Function: Common Law

In applying the functional equivalent test in a 1998 case, the Appellate Court held that "Performing a government service pursuant to contract does not make an entity a public agency subject to [FOIA].... The key to determining whether an entity is a government agency or merely a contractor with the government is whether the government is really involved in the core of the program" (*Domestic Violence Services of Greater New Haven, Inc. v. Freedom of Information Commission*, 47 Conn. App. 466 (1998)).

Governmental Function: Statutory Requirement

Separate from the functional equivalent test, FOIA also requires that each contract exceeding \$2.5 million between a public agency and a person for the performance of a governmental function provide that the public agency is entitled to receive a copy of records and files related to the performance of the governmental function (CGS § 1-218).

For purposes of this requirement, "governmental function" generally includes a public agency program's administration or management by a person that, among other things, participates in formulating governmental policies or decisions connected to the program's administration or management. It does not include the mere provision of goods or services to a public agency without delegated program management or administration responsibilities (CGS § 1-200(11)).

COMMITTEE ACTION

Government Administration and Elections Committee

Joint Favorable Substitute

Yea 18 Nay 1 (03/31/2021)