



House of Representatives

General Assembly

File No. 497

January Session, 2021

Substitute House Bill No. 6193

House of Representatives, April 19, 2021

The Committee on Government Administration and Elections reported through REP. FOX of the 148th Dist., Chairperson of the Committee on the part of the House, that the substitute bill ought to pass.

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

Be it enacted by the Senate and House of Representatives in General Assembly convened:

1 Section 1. (NEW) (*Effective July 1, 2021*) (a) An entity serves a
2 governmental function if such entity (1) has as a member of its board of
3 directors or as part of its corporate governance, (A) any state-wide
4 elected officer or any member or member-elect of the General Assembly,
5 (B) any person appointed to any office of the legislative, judicial or
6 executive branch of state government by the Governor or an appointee
7 of the Governor, with or without the advice and consent of the General
8 Assembly, (C) any public member or representative of the teachers'
9 unions or state employees' unions appointed to the Investment
10 Advisory Council pursuant to subsection (a) of section 3-13b of the
11 general statutes, (D) any member or director of a quasi-public agency,
12 or (E) the spouse of the Governor, (2) is authorized to expend public
13 funds, or (3) receives public funds as part of such entity's operations.

14 (b) Any person appointed by a member of the General Assembly, a
15 state-wide elected officer, the Governor or an appointee of the Governor
16 to serve on the board of an entity that (1) is not a state agency or quasi-
17 public agency, as such terms are defined in section 1-79 of the general
18 statutes, as amended by this act, and (2) serves a governmental function,
19 as described in subsection (a) of this section, shall be deemed the
20 functional equivalent of a public agency, as defined in section 1-200 of
21 the general statutes, as amended by this act.

22 Sec. 2. Subdivision (11) of section 1-79 of the general statutes is
23 repealed and the following is substituted in lieu thereof (*Effective July 1,*
24 *2021*):

25 (11) "Public official" means any state-wide elected officer, any
26 member or member-elect of the General Assembly, any person
27 appointed to any office of the legislative, judicial or executive branch of
28 state government by the Governor or an appointee of the Governor,
29 with or without the advice and consent of the General Assembly, any
30 public member or representative of the teachers' unions or state
31 employees' unions appointed to the Investment Advisory Council
32 pursuant to subsection (a) of section 3-13b, any person appointed or
33 elected by the General Assembly or by any member of either house
34 thereof, any member or director of a quasi-public agency, [and] the
35 spouse of the Governor and any person appointed by a member of the
36 General Assembly, a state-wide elected officer, the Governor or an
37 appointee of the Governor to serve on the board of an entity that is not
38 a state or quasi-public agency but serves a governmental function, as
39 described in subsection (a) of section 1 of this act, but does not include
40 a member of an advisory board, a judge of any court either elected or
41 appointed or a senator or representative in Congress.

42 Sec. 3. Subdivision (1) of section 1-200 of the general statutes is
43 repealed and the following is substituted in lieu thereof (*Effective July 1,*
44 *2021*):

45 (1) "Public agency" or "agency" means:

46 (A) Any executive, administrative or legislative office of the state or
 47 any political subdivision of the state and any state or town agency, any
 48 department, institution, bureau, board, commission, authority or official
 49 of the state or of any city, town, borough, municipal corporation, school
 50 district, regional district or other district or other political subdivision of
 51 the state, including any committee of, or created by, any such office,
 52 subdivision, agency, department, institution, bureau, board,
 53 commission, authority or official, any entity that serves a governmental
 54 function, as described in subsection (a) of section 1 of this act, and also
 55 includes any judicial office, official, or body or committee thereof but
 56 only with respect to its or their administrative functions, and for
 57 purposes of this subparagraph, "judicial office" includes, but is not
 58 limited to, the Division of Public Defender Services;

59 (B) Any person to the extent such person is deemed to be the
 60 functional equivalent of a public agency pursuant to law, including, but
 61 not limited to, any person described in subsection (b) of section 1 of this
 62 act; or

63 (C) Any "implementing agency", as defined in section 32-222.

This act shall take effect as follows and shall amend the following sections:		
Section 1	July 1, 2021	New section
Sec. 2	July 1, 2021	1-79(11)
Sec. 3	July 1, 2021	1-200(1)

Statement of Legislative Commissioners:

Section 2 and Section 4 were combined into Section 1 for consistency with standard drafting conventions.

GAE *Joint Favorable Subst.*

The following Fiscal Impact Statement and Bill Analysis are prepared for the benefit of the members of the General Assembly, solely for purposes of information, summarization and explanation and do not represent the intent of the General Assembly or either chamber thereof for any purpose. In general, fiscal impacts are based upon a variety of informational sources, including the analyst's professional knowledge. Whenever applicable, agency data is consulted as part of the analysis, however final products do not necessarily reflect an assessment from any specific department.

OFA Fiscal Note

State Impact: None

Municipal Impact: None

Explanation

This bill subjects certain entities that serve a governmental function to the Freedom of Information Act and individuals appointed to these entities to the state Code of Ethics for Public Officials. There is no fiscal impact as the Freedom of Information Commission and the Office of State Ethics have the expertise to handle complaints that may arise as a result of this bill.

The Out Years

State Impact: None

Municipal Impact: None

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)