
OLR Bill Analysis

HB 5458

AN ACT CONCERNING REVISIONS TO THE FREEDOM OF INFORMATION ACT RECOMMENDED BY THE FREEDOM OF INFORMATION COMMISSION.

SUMMARY

This bill makes several unrelated changes to the Freedom of Information Act (FOIA), including the following:

1. limits the applicability of FOIA's definition of "governmental function" so that it applies only to one statute concerning contracts for performing a governmental function, rather than throughout FOIA (§§ 1-3);
2. generally conforms the law on trainings provided by the Freedom of Information Commission (FOIC) to current practice (§ 4);
3. explicitly allows the copying of public records using mobile telephones or cameras (§ 6); and
4. allows notices of a special meeting to be sent to a public agency's members by electronic transmission (§ 7).

Additionally, the bill specifies that FOIA's disclosure exemption for records covered by the federal Family Educational Rights and Privacy Act (FERPA) applies to education records, rather than educational records as current law provides (§ 5). This conforms with terminology used in FERPA (20 U.S.C. § 1232g(4)).

Lastly, the bill makes technical and conforming changes. Among other things, it amends provisions concerning the awarding of state government information technology contracts to remove erroneous references to (1) FOIC training and fees for copying public records and (2) the statutory list of department heads (§§ 8-10).

EFFECTIVE DATE: October 1, 2022

§§ 1-3 — GOVERNMENTAL FUNCTION

Under FOIA, “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.

The bill limits this definition’s applicability so that it applies only to one statute concerning contracts for performing a governmental function, rather than throughout FOIA as under current law (see BACKGROUND). In doing so, the bill clarifies that the statutory definition does not apply at common law, where “governmental function” has a similar (though not identical) meaning (see BACKGROUND).

Under current law, “governmental function” also appears in a FOIA provision which generally prohibits public agencies from entering into contracts that impair the public’s right to inspect or copy records stored in a computer system the agency owns, leases, or uses in the course of its governmental functions. The bill makes a conforming change by eliminating the reference to governmental functions.

§ 4 — FOIC TRAINING

The law requires FOIC to conduct annual training sessions for members of public agencies on FOIA’s provisions (e.g., meeting-related requirements). The bill eliminates requirements for FOIC to provide training on (1) physical requirements for public records (e.g., standard ink); (2) using electronic nicotine or vapor products; and (3) injunctive relief from frivolous, unreasonable, or harassing FOIC appeals. It adds requirements for the commission to provide training on (1) contracts for the performance of a governmental function, (2) veterans’ military records, and (3) court actions involving FOIA.

§ 6 — USING MOBILE PHONES AND CAMERA TO MAKE COPIES

The bill explicitly allows individuals to use mobile telephones and cameras to copy public records. It does so by deeming them to be “hand-held scanners” as defined in FOIA.

FOIA allows (1) individuals to use a hand-held scanner to copy records and (2) public agencies to charge up to \$20 each time an individual uses a scanner to copy records at the agency. Under FOIA, a “hand-held scanner” is a battery-operated electronic scanning device that leaves no mark or impression on the records and does not unreasonably interfere with the agency’s operations.

§ 7 — NOTICES OF A SPECIAL MEETING

Under FOIA, public agencies must provide at least 24 hours’ notice of a special meeting unless there is an emergency. A special meeting is one that is held to consider business that (1) was unforeseen when scheduling regular meetings and (2) should be addressed before the next regular meeting.

The bill allows notices of a special meeting to be sent to a public agency’s members by electronic transmission or by mail to their homes. Current law requires that the notice be delivered to the member’s home. Current law also allows members to waive delivery of the notice by filing a written waiver with the agency’s clerk or secretary. The bill allows members to submit these waivers electronically or by mail.

BACKGROUND

Contract for Performance of a Governmental Function

By law, each contract exceeding \$2.5 million between a public agency and a person for the performance of a “governmental function” must state that the public agency is entitled to receive a copy of records and files related to the performance of the governmental function. The contract must also indicate that these records or files are subject to FOIA and may be disclosed by the public agency under FOIA.

Governmental Function: Common Law

By 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 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.

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)).

COMMITTEE ACTION

Government Administration and Elections Committee

Joint Favorable

Yea 19 Nay 0 (03/29/2022)