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## OLR Bill Analysis

### sSB 1155

#### ***AN ACT IMPLEMENTING RECOMMENDATIONS OF 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 on contracts for performing a governmental function, rather than throughout FOIA (§§ 1-3);
2. conforms the law on trainings given 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);
4. allows notices of a special meeting to be sent to a public agency's members electronically (§ 7); and
5. clarifies which public agencies must be named in an appeal to FOIC when a request to inspect or copy a record is denied under FOIA's safety risk exemption (§ 11).

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 on 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, 2023

### **§§ 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 on 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 that 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 hold annual training sessions for members of public agencies on FOIA’s provisions (e.g., meeting-related requirements). The bill eliminates requirements for FOIC to hold training on (1) physical requirements for public records (e.g., standard ink) and (2) using electronic nicotine or vapor products. It adds requirements for the commission to hold 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 CAMERAS TO MAKE COPIES**

The bill explicitly allows individuals to copy public records using mobile telephones, cameras, or other portable devices capable of capturing an image of a public record. It does so by deeming these devices 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. Currently 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 give at least 24 hours’ notice of a special meeting, unless there is an emergency. A special meeting is one 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 electronically 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.

### **§ 11 — SECURITY APPEALS**

Under FOIA, an executive branch state agency that receives a request to disclose records potentially subject to FOIA’s safety risk exemption (CGS § 1-210(b)(19)) must consult with the Department of Administrative Services (DAS) commissioner before disclosing the records. A municipal, regional, or district agency must consult with the Department of Emergency Services and Public Protection (DESPP) commissioner. In both cases, FOIA allows the applicable commissioner to direct the custodial agency to withhold the record from disclosure.

Under current law, any FOIC appeal of a denial based on FOIA’s safety risk exemption must be filed against the state, municipal, regional, or district agency that issued the directive to withhold the

record. Under the bill, the appeal must be filed against both the agency with custody of the record and the commissioner (DAS or DESPP, as applicable) that directed the agency to withhold the record.

## **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 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 Substitute

Yea 18    Nay 0    (03/24/2023)