

FINAL REPORT
PUBLIC ACCESS AND ACCOUNTABILITY LEGISLATION
CONNECTICUT GENERAL ASSEMBLY
2008 REGULAR SESSION and the
JUNE 11, 2008 SPECIAL SESSION

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The 2008 “short” 13-week legislative session yielded little new law, positive or negative, in the name of open and accessible government. A “draw” would be an accurate way to describe this year’s session.

Despite the lack of significant change, the Commission tracked more than 80 bills that, in one form or another, would have affected the public’s access to government. The Commission also submitted testimony on 23 bills.

The Commission’s legislative agenda this session was modest. The main priority of the FOIC for the 2008 session was the same as it was for the 2007 session, to legislatively define the term “administrative functions” within the Freedom of Information Act (FOIA) as it applies to the Judicial Department (see HB 5528 and SB 605). The lack of a statutory definition has allowed the courts to provide their own definition on a case-by-case basis and this has led to confusing results. This ad hoc system was most evident in the recent and well-known case, Clerk v. Freedom of Information Commission, 278 Conn. 28 (2006) wherein the Supreme Court decided that basic docketing information contained on the court’s computer system was not “administrative” and could not be accessed pursuant to the FOI Act. For the second year in a row, this definition was contained in a “court openness” bill that, also for the second year in a row, passed the Senate (this year unanimously) but was never called in the House.

For the third time in four sessions, the FOIC sought a bill that would exempt the residential addresses of all employees of public agencies from disclosure under the FOIA. The Commission desired this non-disclosure bill in the hope of eliminating the inconsistent application of the provision concerning home addresses of non-elected public officials and employees. The Commission feels that the hodgepodge of address exclusions in §1-217 is unworkable and possibly unconstitutional. Once again this initiative failed, although many entities, state and local, are now involved in earnest discussions aimed at rectifying the confusion caused by §1-217. To perhaps highlight the growing concerns about §1-217, two more employee groups were added to the existing list of excluded addresses: Department of Environmental Protection police officers (see SB 615) and Department of Mental Health and Addiction Services employees who have direct client contact (see SB 204). While the FOIC did not support these additions, we did not actively oppose them, as these new exemptions are more limited in their application to certain arguably at-risk employees.

The final legislative initiative was technical legislation that shifted the requirement that public agencies maintain minutes of their proceedings to the appropriate section of the Freedom of Information Act (see HB 5318). This proposal was enacted.

Each legislative session has a backdrop issue or issues. This year the most significant backdrop issue revolved around the aftermath of the Cheshire home-invasion tragedy and corresponding legislative action aimed at improving aspects of the criminal justice system.

A significant component of this action concerned the sharing of criminal justice information between various agencies and branches of government, as well as the creation of a central repository of this data. The creation of this cross-agency information sharing mechanism has interesting Freedom of Information implications. For example, the Division of Criminal Justice is exempted almost completely from FOI laws, while the Department of Correction and the Judicial Department have different standards for access.

Another “backdrop issue” with potential FOI implications revolved around the fallout from the infamous stolen Department of Revenue Services laptop. This helped trigger several legislative proposals aimed at heightened concern for identity theft and loss of personal data. Openness advocates need to remain vigilant as attempts to address these kinds of issues ignore the possibility that public access might intentionally or unintentionally be negatively impacted.

Positive developments in this legislative session revolve largely around what legislation the FOIC was able to defeat (see favorable results—bills defeated). The Commission saw significant challenges to open and accessible government made by those entities that recently have been on the “losing” end of Commission decisions. Those entities this session included private health insurance companies, the Department of Correction, and Connecticut’s Higher Education system (UConn, the CSU system and the Community college system) among others. The special session on June 11th saw passage of an ethics bill that contained positive changes that public agencies post their agendas and minutes on their websites (see HB 6502).

Several legislators deserve special thanks for their efforts on behalf of open government this session including: Rep. Christopher Caruso (D-Bridgeport), Sen. Leonard Fasano (R-North Haven), Rep. John Geragosian (D-New Britain), Rep. Robert Godfrey (D-Danbury), Rep. Michael Lawlor (D-East Haven), Sen. Andrew McDonald (D-Stamford), Sen. Gayle Slossberg (D-Milford) and Rep. Diana Urban (D-North Stonington).

FAVORABLE RESULTS—BILLS PASSED.

1. HB 5318; PA 08-18. AN ACT CONCERNING TECHNICAL REVISIONS TO THE FREEDOM OF INFORMATION ACT.

This bill was purely technical in nature. It moved the last sentence of §1-210 (Access to public records. Exempt records.) which states that: “Each such agency shall make, keep and maintain a record of the proceedings of its meetings” to the end of the more appropriate section governing meetings, which is §1-225 (Meetings of government agencies to be public. Recording of votes. Schedule and agenda of meetings to be filed and posted on web sites. Notice of special meetings. Executive sessions.)

2. HB 5113; PA 08-105. AN ACT CONCERNING PROFESSIONAL EMPLOYER ORGANIZATIONS AND EMPLOYEE MISCLASSIFICATION.

This bill requires professional services organizations to register with the Labor Department and be subject to certain obligations and conditions in order to operate in Connecticut. This particular bill, known to be a personal priority of Speaker Jim Amann (D-Milford), originally contained language stating that, “All information obtained from a professional employer organization ...shall be confidential and shall not be published or open to inspection, except as otherwise required by law.” After discussion with advocates for the bill, we were able to explain that the information advocates were trying to protect (personal financial information, taxpayer identification numbers and client lists) was already protected. The language was changed to read: “All information obtained from a professional employer organization...shall be subject to disclosure in accordance with the provisions of chapter 14 (the FOIA) of the general statutes.”

3. HB 5658; PA 08-167. AN ACT CONCERNING THE CONFIDENTIALITY OF SOCIAL SECURITY NUMBERS.

This bill, along with others aimed at protecting people from identity theft, establishes a civil penalty of \$500 for each violation. The initial concern for the FOIC centered around the potentially chilling effect that this might have on public agency disclosure of records that might contain social security numbers or other personal information. Disclosure under the FOIA could, theoretically, establish civil liability to the victim for the disclosing public agency. This concern was addressed in the bill’s final form that contained language stating that “The provisions of this section shall not apply to any agency or political subdivision of the state.”

4. HB 6502 (special session, no public act number yet). AN ACT CONCERNING COMPREHENSIVE ETHICS REFORM.

The special session on June 11, 2008 saw passage of a long-anticipated ethics reform bill that contained Internet web-posting requirements for public agencies. Beginning on October 1, 2008 agencies that have a website available will now have to post their meeting agendas and minutes online, subject to the same time requirements that currently exist for posting agendas or having minutes available to the public.

Favorable results—Bills defeated.

1. HB 5690. AN ACT CONCERNING THE FREEDOM OF INFORMATION ACT.

This bill was reported favorably out of the Insurance and Real Estate Committee, and represented an attempt by private health insurance companies (managed care organizations) to limit access to their records when they were performing governmental functions. The original bill language said that it applied only to records “created for the purpose of performing a government function under their contracts with the Department of Social Services...and shall not, for any purpose, extend to documents related to other programs or functions of the managed care organizations.” The final version reported favorably out of the Insurance Committee was significantly *worse*. The substitute bill expanded the scope to *any* private entity performing a government function (state or local), and provided that such entities could assert *any* exemption to disclosure. The revised bill would also actually *prohibit* disclosure until ordered to do so after adjudication by the FOIC. Also, the objecting private entity would automatically be deemed a party in the adjudicatory process. The bill further added an exemption to §1-210(b) for “(r)ecords or files related to programs or functions not created for the purpose of performing a government function...or other records or files specifically exempted from disclosure under a contract...” Fortunately this truly breathtaking assault on the FOIA was referred to the Government Administration and Elections Committee and the co-chairs of that committee, Sen. Gayle Slossberg and Rep. Christopher Caruso agreed to kill the bill.

2. HB 5592. AN ACT CONCERNING THE DEPARTMENT OF CORRECTION.

This bill, raised in the Judiciary Committee, was the Department of Correction's (DOC) agency bill and contained significant attempts to do an end-run around several FOIC decisions that are currently on appeal in the state's courts. It was essentially an attempt to legislate DOC's desire to severely limit inmates' access rights afforded under the FOIA. The first section of the bill would have provided a blanket FOI prohibition, absent a court order, on the disclosure of "personnel or medical files or any similar file" of DOC employees (both current and former) to incarcerated individuals. In recent cases involving personnel-type records of DOC employees requested by incarcerated individuals, the DOC argued that personnel-type records should never be provided to an inmate. The FOIC rejected such a broad pronouncement and has ruled on such cases under existing law that permits the nondisclosure of such records only under limited and proven circumstances.

The second section of the bill would have required that when *any* person makes a request to *any* public agency for *any* public record under the FOIA "regarding a correctional institution or facility," the agency receiving the request would have to notify the DOC, and the DOC could then require the agency that maintains the record to withhold it. This proposal could have resulted in numerous violations of the FOIA's promptness provisions. It also would add another layer to the existing mechanism for review and decision-making concerning the disclosure of *any* records, wherever they are maintained, when there are reasonable grounds to believe that disclosure may result in a safety risk. Currently that process for all state agencies is handled by the Department of Public Works in conjunction with the subject agency and by the Department of Emergency Management and Homeland Security for municipal agencies.

The third section of the bill dealt with fees that can be charged to inmates for copies of public records. The DOC proposal was that inmates would always be charged twenty-five cents per page for requested records and that if the inmate had insufficient funds to pay the fee at the time the records were requested, the DOC would encumber the inmate's internal inmate account. DOC would essentially have created a credit system, not contemplated by the current law. Rather than come up with a straightforward standard of indigence (as is required under the law) concerning inmates, the DOC argued that no inmate should ever be considered indigent because the cost of incarceration should be counted as income. Clearly this would have a chilling effect on inmates' requests for records.

The Commission provided strong testimony against this bill and it did not make it out of the Judiciary Committee, thanks to the co-chairs, Sen. Andrew McDonald and Rep. Mike Lawlor.

3. HB5050. AN ACT CONCERNING HOSPITAL-BASED OCCUPATIONAL SCHOOLS AND TECHNICAL REVISIONS TO THE HIGHER EDUCATION AND EMPLOYMENT ADVANCEMENT STATUTES.

Midway through the session, the FOIC heard that the Department of Higher Education would be offering an amendment exempting “tenure committees” at Connecticut’s public colleges from the FOIA. This was a direct response to a recent Commission decision (on appeal) that said that a particular tenure committee (created by the University pursuant to its contract with the professor’s union at Southern Connecticut State University) was a public agency. In the final week of the session, an amendment appeared in the Senate on HB 5050, the Department of Higher Education’s technical bill that had already passed the House. The FOIC strenuously objected on multiple grounds, including that this issue was currently on appeal to the Superior Court and that this proposed substantive change in the law had not been the subject of a public hearing. The Senate successfully passed the amendment on a May 1 vote of 33-3 with Sen. Len Fasano (R-North Haven) voicing opposition (Sens. McKinney and Roraback were the other dissenters). The amendment triggered a referral to the Government Administration and Elections Committee. The Commission then went to work, holding a late-night discussion in the Speaker’s inner chambers with representatives of the Department of Higher Education and the University professors’ private lobbyist. Under pressure from Reps. Christopher Caruso (D-Bridgeport) and Diana Urban (D-North Stonington), eventually it was agreed that Executive Director and General Counsel Colleen Murphy would write a letter explaining the contours of the decision. In an extremely rare move, the Senate suspended its rules the next day (May 2) to allow reconsideration of the bill and stripped this terrible amendment unanimously and without comment. Many Capitol observers were surprised to see the Commission’s success against one of the most powerful lobbying forces at the Capitol, the higher education system, united with the private lobbyists of the university professor’s association. This bill did ultimately pass, after the deletion of the harmful FOI language.

4. HB 5594. AN ACT CONCERNING A CORPORATE TAX CREDIT AND AN INCOME TAX CREDIT FOR DONATIONS TO EDUCATION FOUNDATIONS.

This bill contained language that defined “education foundation,” and stated, “Such an organization, fund or other legal entity shall not be deemed to be a state agency or a public agency, as defined in [the FOIA].” Education foundations (private non-profit entities created to enrich local public education) were seeking to be treated like The UConn Foundation and not be subject to the FOIA. The Commission testified in front of the Education Committee and met with the leading sponsor of the bill to explain why such a broad exclusion should not pass and how such an exemption for educational foundations could result in less public trust of these organizations. The bill made it out of the committee with the

objectionable language still in place. The bill was referred to the Finance, Revenue and Bonding Committee, where it died.

5. SB 164. AN ACT ADOPTING THE NATIONAL ASSOCIATION OF INSURANCE COMMISSIONERS' INTERSTATE INSURANCE PRODUCT REGULATION COMPACT.

Under this bill, Connecticut would join a multi-state authority to receive, review, and make regulatory decisions on insurance product filings. The FOIC objected to this bill as it would thwart government access by ceding control of public records that would be available under the Connecticut statute to this multi-state authority whose access provisions could be contrary to the Connecticut law and were not codified in statute. This bill passed the Senate but died on the House Calendar.

6. HB 5643. AN ACT EXEMPTING CERTAIN PUBLIC SERVICE COMPANY RECORDS FROM DISCLOSURE.

This bill, in its original form before the Public Safety and Security Committee, contained a very negative provision that would allow agencies to contract away the explicit and clear-cut statutory fee structure in the FOIA. The bill's language provided that if a requested record is the "subject of" a licensing agreement entered into by a public agency with a company, the fee for a copy of such record, for both paper and electronic records, would be controlled by the fees set forth in the contract. This bill would have struck at the very heart of the FOIA, which is aimed at ensuring public access to records at the lowest possible cost. This bill had no "ceiling" on fees, would have had a chilling effect on requesters and essentially would have resulted in a denial of access to those who couldn't pay. The Public Safety and Security Committee stripped the objectionable provision from the bill. This bill had other interesting twists on its way to ultimate failure. After the fees provision was stripped, the FOIC then supported the bill for a period of weeks due to other provisions involving the Department of Emergency Management and Homeland Security, access to water company records and a technical "fix" to the appeals process involving records subject to security analysis. Upon further study, the Commission withdrew its support for the water company provisions and the bill died on the House Calendar.

7. HB 5935. AN ACT CONCERNING THE DISCLOSURE OF POLICE AND OTHER PUBLIC RECORDS AND THE TOLLING OF TIME PERIODS FOR BRINGING A CIVIL ACTION WHILE POLICE INVESTIGATIONS ARE PENDING.

This proposal, brought forward in the Judiciary Committee (and killed there), would have changed §1-213(b)(1) from “[n]othing in the Freedom of Information Act shall be deemed in any manner to: ... **limit** the rights of litigants”, to “[n]othing in the Freedom of Information Act shall be deemed in any manner to: ... **affect** the rights of litigants”. This proposal was puzzling to the Commission since the law concerning rights of access under the FOIA versus the rights of access under the laws of discovery is clear and well-settled. Simply put, it is well established that disclosure under the FOIA is governed by the FOIA, irrespective of whether records are disclosable under the rules of discovery. A sinister purpose behind the proposed change would be the desire to void a person’s FOIA rights when that person is involved in litigation with a public agency. This proposal, thankfully, did not make it out of committee.

Unfavorable results—Bills defeated.

1. HB 5528. AN ACT CONCERNING THE FREEDOM OF INFORMATION ACT.

This bill was raised by the Judiciary Committee and incorporated all three of the Commission’s legislative proposals: moving the minutes requirement to the appropriate section of the act (see HB 5318); the FOI definition of “administrative functions” regarding access to Judicial Branch records (see SB 605); and an attempt to treat the residential addresses of governmental employees equally by limiting the disclosure of *all* governmental employees residential addresses. The proposal concerning employee addresses definitely drew the most heat (and misinformation) during the public hearing. The bill did not make it out of the Judiciary Committee largely due to the passionate but misinformed testimony delivered at the public hearing. Employee union representatives and others misread our proposal as eliminating address disclosure provisions and stripping them of a protection. After the testimony at that public hearing, the Commission decided not to press the issue any further during this year’s session. The FOIC will continue to look at statutory language that would both address the Commission’s concerns and be acceptable to other interested parties.

2. **SB 605. AN ACT CONCERNING JUDICIAL BRANCH OPENNESS.**

SB 605 was this year's attempt to incorporate into statute various openness reforms for the state's Judicial Branch. Many will recall the fate of this bill in 2007 when it died on the House Calendar because, we were told, Rep. William Dyson (D-New Haven) threatened to call his amendment abolishing the death penalty if the bill came up on the House floor, effectively killing the bill. Death penalty supporters have a solid majority in the House so the amendment would be quixotic, but the leadership wanted to avoid a lengthy debate and not to force members to cast a death penalty vote.

SB 605 was a compromise bill, weaker in many respects than the 2007 bill. But, the bill contained the biggest issue for the Commission this session, a statutory FOIA definition of "administrative functions" regarding the Judicial Branch (see above HB 5528). After the public hearing, the language was re-negotiated between the Judicial Branch and the co-chairmen of the Judiciary Committee, Sen. Andrew McDonald (D-Stamford) and Rep. Michael Lawlor (D-East Haven). The amended bill removed "rule-making" from the definition sought by the FOIC, but attempted to give the legislature much more of a say in, and the power to reject, rules to be adopted by the courts. The bill passed the Senate on Monday, May 5th (session ended at midnight on Wednesday, May 7th). However, the Judicial Branch withdrew its support (overnight) saying that it had misinterpreted the compromise language concerning the role of the General Assembly in Judicial Branch rule-making. To make matters worse, Rep. Dyson once again parked his death penalty amendment on the bill in a clear parliamentary ploy to provide extra insurance that the bill would die. Needless to say, advocates of open government and, in particular, advocates of greater Judicial Branch openness, many of them CCFOI members, were greatly disappointed by the second straight last minute defeat of this legislation. The Judiciary co-chairs were clearly disturbed by the Judicial Branch's change of heart and were reported in the press to be more open to the notion of putting forth a Constitutional Amendment to correct the problem.

Neutral results—Bills passed.

Both of these bills add new employee address exemptions to §1-217. The FOIC did not support these additions, and under other circumstances, would have tried to defeat them as we have in years past. However, the Commission decided not to actively oppose these additions as both new exemptions are of limited application to certain, arguably at-risk employees.

1. SB 204; PA 08-120. AN ACT CONCERNING ACCESS TO CERTAIN PUBLIC RECORDS.

This bill prohibits the disclosure of the residential addresses of employees of the Department of Mental Health and Addiction Services who have direct client contact.

2. SB 615; PA 08-186. AN ACT CONCERNING ENVIRONMENTAL CONSERVATION POLICE OFFICERS, CLEANING PRODUCTS, THE STATE HAZARDOUS WASTE PROGRAM DEMONSTRATION PROJECTS, A STUDY OF THE NORWALK RIVER WATERSHED, AND THE SALE OF CERTAIN REAL PROPERTY.

This bill prohibits the disclosure of the residential addresses of the sworn law enforcement officers of the Department of Environmental Protection.