

The Freedom of Information Act Social Media and Electronic Communications

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FOIA Basics – Quick Review of Connecticut’s “Sunshine” Law

- **Section 1-200 (Formerly Sec. 1-18a) - Definitions.** As used in this chapter, the following words and phrases shall have the following meanings, except where such terms are used in a context which clearly indicates the contrary:
 - (1) **“Public agency”** or **“agency”** means: (A) Any executive, administrative or legislative office of the state or any political subdivision of the state and any state or town agency, any department, institution, bureau, board, commission, authority or official of the state or of any city, town, borough, municipal corporation, school district, regional district or other district or other political subdivision of the state, including any committee of, or created by, any such office, subdivision, agency, department, institution, bureau, board, commission, authority or official....

FOIA Basics – Quick Review of Connecticut’s “Sunshine” Law

(2) **“Meeting”** means any hearing or other proceeding of a public agency, any convening or assembly of a quorum of a multimember public agency, and any communication by or to a quorum of a multimember public agency, whether in person or *by means of electronic equipment*, to discuss or act upon a matter over which the public agency has supervision, control, jurisdiction or advisory power. “Meeting” does not include: Any meeting of a personnel search committee for executive level employment candidates; any chance meeting, or a social meeting neither planned nor intended for the purpose of discussing matters relating to official business; strategy or negotiations with respect to collective bargaining; a caucus of members of a single political party notwithstanding that such members also constitute a quorum of a public agency; an administrative or staff meeting of a single-member public agency; and communication limited to notice of meetings of any public agency or the agendas thereof....

FOIA Basics – Quick Review of Connecticut’s “Sunshine” Law

(5) **“Public records or files”** means any recorded data or information relating to the conduct of the public's business prepared, owned, used, received or retained by a public agency, or to which a public agency is entitled to receive a copy by law or contract under section 1-218, whether such data or information be handwritten, typed, tape-recorded, printed, photostated, photographed or recorded by any other method.

Meetings – Electronic Communication Concerns...

- Email communications can result in an unnoticed meeting taking place
- Case example highlights (Docket #FIC 2004-406):
 - FOIC found that a quorum of the respondent communicated by email beginning on December 12, 2003, and continuing through at least July 12, 2004, to raise, discuss and “brainstorm” substantive matters coming before the respondent, such as guidelines for determining conflicts of interest, what, in general, constitutes unethical behavior, how to respond to requests for advisory opinions, comments on drafts of documents, and whether in fact their email conversations might constitute meetings subject to the FOI Act.

Meetings – Electronic Communication Concerns...

- FOIC also found that such communications and meetings were not open to the public, although emails of these discussions were subsequently provided to the complainant.... The respondent did not file notices of its email meetings or prepare minutes of those meetings.
- Some of the communication between members of the respondent was confined to exchanges of drafts and comments; comments on matters of form such as word choices, combining paragraphs or correcting spelling or grammar in draft documents; dropping certain formal requirements, such as the requirement that a complaint be sworn before a notary; and reminders concerning deadlines. Some of these communications were comparable to work that would be conducted by staff members, if the respondent had staff. Nonetheless, this work was actually performed by the respondent itself.

Meetings – Electronic Communication Concerns...

- However, FOIC determined that much of the communication among a quorum of the respondent was significantly more substantive, such as: discussion concerning guidelines for determining conflicts of interest; discussion concerning what, in general, constitutes unethical behavior; discussion concerning how to respond to requests for advisory opinions; and discussion concerning whether the respondent's email conversations on the above topics constituted meetings subject to the FOI Act.
- FOIC further determined that all of the documents discussed and drafted by the members of the respondent, and all of the substantive concerns raised in their communications, were ultimately discussed openly by the respondent at its regular meetings.

Meetings – Electronic Communication Concerns...

- “It is found that while sometimes the communications among a quorum of the respondent were limited to the agendas of the respondent’s meetings, as permitted by §1-200(2), G.S., and reminders about deadlines, most often they concerned substantive matters over which the respondent had supervision, control, jurisdiction or advisory power, within the meaning of §1-200(2), G.S., as found in paragraphs 6 and 7 of the findings, above.”
- “It is also found that the respondent’s motive was to educate itself on ethics matters, and that a quorum of the respondent corresponded by email in order to brainstorm, to exchange ideas more efficiently, and to be prepared to discuss matters more fully and competently at its public meetings.”
- Unfortunately, “[N]otwithstanding the respondent’s *good intentions*, it is concluded that the email communications among a quorum of the respondent beginning on December 12, 2003, and continuing through at least July 12, 2004 were “meetings” within the meaning of §1-200(2), G.S.”

Meetings – Electronic Communication Concerns...

Here is another example of how email communications can result in FOIA violations when the emailing occurs between agency members after a public meeting (Docket #FIC 2008-491, June 10, 2009)

- Following an executive session in which a personnel search committee reported to the full agency on the committee's recommendations for a pair of positions the agency went back into public session and held a series of votes, but without a majority agreeing on selections.
- Then, after the meeting, one member emailed another member to seek a change in vote. The member did in fact change her vote after this.
- FOIC concluded that the communication that "encouraged another board member" to change her vote, and the subsequent casting of the changed vote, "constituted a 'proceeding' of the respondent" public agency and this should have occurred a public meeting."

Meetings – Electronic Communication Concerns...

- What does the future (*present*) hold?
 - Twitter “meetings?”
 - Facebook “meetings?”
 - Blogging “meetings?”
- Is it possible to hold a lawful email meeting?
- Is it possible to hold a lawful video/teleconference meeting?

Records – Electronic Communication Concerns...

- The Office of the Public Records Administrator addressed the topic of email records a few years ago in a general letter:
- [GL 2009-2: Management and Retention of Email and other Electronic Messages](#)
- Basically, GL 2009-2 explains the steps you need to take to understand what emails you should retain (or not) and if retaining them how to determine the retention period.

Records – Electronic Communication Concerns...

Query – extend same basic concepts to text messages? Other electronic communications? Here is a key excerpt from the general letter:

Steps to determine the retention period of electronic messages:

- Step 1: Determine whether the message is a public record or a non-record
- Step 2: If the message is a non-record, destroy at will (e.g., spam and unsolicited advertisements).

Records – Electronic Communication Concerns...

- Step 3: If the message is a record, determine which records series the message belongs to, for example:
 - If the message is Transitory Correspondence (S1-060), delete at will
 - If the message is Routine Correspondence (S1-070), retain for 2 years
 - If the message is All Other Correspondence (S1-080), retain for the equivalent records series. For example, if an e-mail is related to a fiscal transaction like Accounts Receivable and Payable (S3-010), retain 3 years, or until audited, whichever is later.
- Step 4: Maintain the messages for the required retention period under the equivalent records series. Once the retention period has been satisfied, submit a Records Disposal Authorization (Form RC-075 for municipalities/Form RC-108 for state agencies).

Records – Electronic Communication Concerns...

How about Facebook and other types of social media postings?

- The FOI Commission recently issued a decision (FIC 2016-0430, May 24, 2017 – under appeal at this time) involving social media postings. Underlying facts involve a public employee posting “on his personal social media pages (Facebook, Linked In, Twitter)... public comments during his personal time and on his personal devices” and the comments involved then ongoing litigation his public agency was a party to.
- A request was made for “all responsive social media communications by employees of respondent” but before filing the request Complainant had a forensic expert collect all publicly available data from the employee’s social media accounts
- Just as the agency was receiving the FOIA request, the employee took down or hid his public posts... but did not inform anyone else at the agency!

Records – Electronic Communication Concerns...

Naturally, when Complainant received records from the agency he knew that they did not match what his forensic expert had collected

- Issues in the case – are the records public records?
- Did Respondents fail to comply with the request?
 - FOIC does not answer the first question... because it finds the answer to the second question is “no.” Since Respondents did not know that certain postings were taken down or hidden from public view, and the employee never told them this, they responded to the request as completely as they could
- Did the Respondents dodge a bullet?

Records – Electronic Communication Concerns...

Here is another case to consider...

- In 2013 the FOIC decided a case in which all voice mail and text messages from a Mayor's cell phone (town supplied) were requested (FIC 2012-564, August 14, 2013).
- How did Complainant know there were text messages on the Mayor's cell phone? The Mayor had handed his cellphone to his executive secretary to show her a picture on the phone, and when she attempted to forward a copy to herself she discovered there were text messages about her and the Complainant... one referring to the executive secretary in derogatory fashion and implying an intimate relationship between her and Complainant (a selectman in the same town)

Records – Electronic Communication Concerns...

- Respondents advised the Complainant they would compile responsive records and also told him that the Mayor instructed the town manager to contact the cell phone provider “to determine the most efficient manner to retrieve the requested information.”
- On retrieving the messages, turns out the wireless provider said the most expedient way to do that was for town manager to review and transcribe the messages himself, which he did, leaving some out that were between Mayor and his family members, and which he then deleted. Town manager also redacted just two words from the remaining, responsive messages.

Records – Electronic Communication Concerns...

- At the hearing Complainant alleged that the redactions and the failure to produce all messages was improper, and the Hearing Officer ordered Respondents to submit unredacted copies of all messages for *in camera* review. Problem – the text messages were only retrievable for a 10 day period, after which they were erased from the wireless provider’s system, and the erased messages could not be recovered from the cell phone’s memory card!
- Although FOIC accepted the testimony that the erased messages were personal communications not subject to FOIA (i.e. not “public records”) “a preferable practice going forward would be to retain any such records until such time as the Commission has rendered a final decision.” Emphasis added.

Questions?



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