



FREEDOM OF INFORMATION ACT OVERVIEW

TOWN OF WILTON

Ira W. Bloom, Esq.
Peter V. Gelderman, Esq.

BERCHEM MOSES, P.C.
1221 Post Road East
Westport, CT 06880
Ira: (203) 571-1715
Pete: (203) 571-1720

e-mail: ibloom@berchemmoses.com
e-mail: pgelderman@berchemmoses.com

www.berchemmoses.com

January 24, 2024

INTRODUCTION

The Freedom of Information Act (the “FOIA”), Conn. Gen. Stat. §§1-200 through 1-241, inclusive, represents Connecticut’s commitment to open government and a strong policy in favor of public access to meetings and records. The laws concerning access to public meetings are strict and it is suggested that the Town take a very conservative approach in the interpretation and implementation of those laws. Subject to narrow exceptions, the FOIA mandates that the public has access to the meetings of public agencies.

The FOIA also provides rules regarding the public’s access to records maintained by the Town and its departments and elected and appointed officials.

The following is an overview of the FOIA to the extent it relates to the public’s access to the meetings of boards, commissions, committees and subcommittees, and to the public’s right to obtain copies of public records. Part One addresses public meetings, and Part Two addresses public records.

PART ONE: PUBLIC MEETINGS

I. PUBLIC AGENCIES

What is a public agency?

Conn. Gen. Stat. § 1-200 defines a public agency as 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*, and also includes any judicial office, official, or body or committee thereof, but only in respect to its or their administrative functions.

Note that the definition of public agency includes any “committee” created by the public agency (i.e., a board or commission). Committees and subcommittees are subject to the same requirements of the FOIA. This includes any subcommittee, task force, and working group created by any board or commission.

II. MEETINGS

A. What is a meeting?

1. A “meeting” means a 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. (Conn. Gen. Stat. § 1-200(2))
2. Note that a meeting does not include “an administrative or staff meeting of a single-member public agency.” For example, a staff meeting of the First Selectwoman is not a meeting.
3. Also note that a quorum of one public agency who are present at any event which has been noticed and conducted as a meeting of another public agency under the FOIA shall not be deemed to be holding a meeting.
4. A conference call, email discussion, or other communication by means of electronic equipment may constitute a meeting.
5. In general, there is a meeting anytime a quorum of a public agency convenes in person or electronically to discuss or act upon a matter for which it has responsibility. The definition actually describes three kinds of gatherings that can constitute a meeting: regular, special, and emergency special meetings. The Connecticut Supreme Court has determined that “hearings or other proceedings” of less than a quorum may also trigger FOIA requirements. This is discussed in more detail in Section II.D. below.

B. What isn’t a meeting?

There are several statutory exclusions in the definition of “meeting.” They are:

1. Meetings of a personnel search committee for executive level employment candidates.
2. Chance or social meetings not for the purpose of discussing official business.
3. Strategy or negotiations with respect to collective bargaining.
4. Political caucuses.
5. An administrative or staff meeting of a single-member public agency (e.g., the First Selectwoman).

6. Communication limited to notice of meetings of any public agency or the agendas thereof.

C. Do e-mail communications constitute a meeting under the FOIA?

Yes. If a quorum of the body communicates by email about a matter over which the body has supervision, jurisdiction, control or advisory power, a meeting is being conducted. It is important for each member of the public agency to remind other members of this rule and to stop any discussion of such matters over email. Discussions about purely administrative matters (e.g., scheduling the date or time of a meeting) are not considered “meetings” under FOIA.

Question: Could you ever properly conduct a meeting by email communications? The Commission has stated that it is unlikely that email communications among agency members would be able to be conducted in a manner that comports with the open meeting requirements of the FOIA because those persons interested in attending the meeting would not have the opportunity to hear or see the discussion and actions as they transpired at the meeting.

D. Quorum; Meetings of Less Than a Quorum

1. The minimum number of members of an agency who constitute a quorum is not provided in the FOIA. It is generally a majority, but a different amount may be provided in the Town Charter or other state or local law, or the agency’s governing documents.

2. The Freedom of Information Act and the policy behind it seek to avoid “secret meetings” and doing public business in private.

3. A question often arises as to whether a gathering of less than a quorum of a public agency is a “meeting” that requires a notice, agenda, public access, and minutes. The answer depends on whether the group has been authorized by the public agency to take action on behalf of the public agency.

4. Any group of people that is less than a quorum of a public agency, whether or not the group is officially called a committee, subcommittee, working group, or task force of a public agency, that has been asked or authorized (by request by the public agency or by law, rules, regulations, etc.) to research or evaluate an issue, draft a document, conduct a site visit, or otherwise take action on an issue on behalf of the public agency, must hold their meetings in public, with proper notices, agendas, and minutes, even though they do not make up a quorum of the public agency.

5. However, if the group of less than a quorum of the public agency has *not* been asked or authorized to act on behalf of the public agency, then gatherings by the group are not “meetings” under the Freedom of Information Act. This might include co-petitioners working together to coordinate drafting and presenting a new ordinance.

6. A recent Connecticut Supreme Court case, City of Meriden v. Freedom of Information Commission, 338 Conn. 310 (2021), ruled that there is no public meeting if there is a gathering of less than a quorum of the members of a public agency, unless the group has been given express authority to take action on behalf of the whole public agency, by either:

- statute, regulation, ordinance, charter, bylaw, or other legal authority, or
- official resolution of the public agency. The case seems to suggest that *implied* authority (when the public agency is aware that the group exists and is meeting but does not authorize it) is not enough to constitute a public meeting.

7. Remember that any meeting of a quorum of a public agency, which includes committees, subcommittees, etc., is also a meeting and requires a proper notice, agenda, public access, and minutes.

E. Types of Meetings; Notice of Meetings

The FOIA recognizes three types of meetings.

1. Regular Meetings are those for which the public agency must file a schedule with the Town Clerk by January 31 for the ensuing year. These are meetings whose times, dates, and places do not typically change.

- New agenda items may be added at the meeting with a 2/3 vote of the members present and voting. (Note that an abstention is not a vote.)

2. Special Meetings are those not included on the list of regular meetings.

- No new business may be added at the meeting.

3. Emergency Special Meetings may be called in an emergency without advance notice (the term “emergency” will be strictly construed).

- The content of the meeting and any action taken is limited to the matter that required the emergency meeting.

- Minutes setting forth the nature of the emergency and the proceedings occurring must be filed with the Town Clerk within 72 hours.

F. Requirements for In-Person, Remote (Solely Electronic), And Hybrid Meetings

1. Electronic Meetings. Effective July 1, 2021, public meetings may be conducted as in-person, fully remote (e.g., fully Zoom), or hybrid meetings (members of the public may participate in person or by Zoom).

2. Remote participation by members of the public agency:

Every public agency that is meeting in person must provide any member of the public agency (but not the public) the opportunity to participate remotely, except that the agency is not required to adjourn or postpone the meeting if a member of the agency loses connection to the meeting, unless that member is needed to form a quorum. Any member of the agency who participates remotely must make a good faith effort to state their name and title (if applicable) before speaking.

3. Notices and Agendas:

- a. Meeting Notice Must Identify Type of Meeting. All meeting notices must identify whether the meeting will be in-person, remote, or hybrid.

- b. Notice and Agendas of **All Regular Meetings**:

- A notice of all regular meetings for the year is posted in January in the Town Clerks' office. If a meeting is not on that list, it is a special meeting.
- Agendas must be available to the public at least 24 hours in advance:
 - In the agency's regular office; and
 - In the Town Clerk's office; and
 - For remote or hybrid meetings, also on the agency's website (if one exists)
- Additional 48-Hour Notice Needed for **Remote or Hybrid Regular Meetings**: At least 48 hours prior to an electronic (remote or hybrid) regular meeting, the agency must provide direct notice by mail or email (or other electronic means where the notice can be retained and printed if necessary) to agency members. The agency must also post notice:

- In the agency's regular office;
- In the Town Clerk's office; and
- On the agency website (if one exists).

c. Notice and Agenda of All Special Meetings:

- At least 24 hours prior to the meeting, the agency must post the meeting notice and agenda:
 - In the Town Clerk's office; and
 - on the agency's website (if one exists).

4. For Meetings Where the Public Can Attend Remotely (i.e., remote or hybrid meetings):

a. Notice Must Include Instructions for Public Participation. The notice and agenda (if different) must each include instructions for the public to attend the meeting and to provide comment or otherwise participate in the meeting, by means of electronic equipment or in person, as applicable.

b. Speakers State Name and Title, if any. Agency members and members of the public who participate remotely must make a good faith effort to state their name and title (if applicable) before speaking.

c. Interruption. Whenever a remote or hybrid meeting is interrupted by the failure, disconnection, or, in the chairperson's determination, unacceptable degradation of the electronic connection, or if a member necessary to form a quorum is unable to participate due to such connectivity issues:

- The agency may, between 30 and 120 minutes after the lost connection, resume the meeting:
 - In person, if a quorum is present in person, or
 - Remotely, if a remote quorum exists or has been restored.
- The agency may adjourn or postpone the meeting to a new date.
- The agency must, if possible, post a notification on its website to inform any remote attendees of the expected time that the meeting will resume or of the adjournment or postponement of the meeting. The agency may also announce at the beginning of the meeting what procedure to follow for resumption if any connectivity issues arise.

d. Disruption. The chair of the meeting may remove a remote participant who causes disorder, until the offender conforms to order or, if necessary, until the close of the meeting.

e. Additional Rules for **Regular** Electronic Meetings (But Not Executive Sessions or Special Meetings):

- Upon written request submitted at least 24 hours prior to a meeting, the agency must provide any member of the public:
 - A physical location; and
 - Any “electronic equipment,” (which includes but is not limited to “telephonic, video or other conferencing platforms”) necessary to attend the meeting in real-time.
- The public must have the same opportunity to provide comment or testimony and otherwise participate in the meeting as if the meeting were in-person, except that the agency is not required to adjourn or postpone if a member of the public loses connection to the meeting.
- If a quorum of the agency members attends the meeting from the same physical location, members of the public must also be allowed to attend the meeting in-person at that location.
- The agency must record or transcribe the meeting.
- Within 7 days of the meeting and for at least 45 days after the meeting, the agency must post the recording or transcription of the meeting on the agency website and make it available in the agency’s office for the public to view, listen to, and copy.

5. For ALL meetings, whether in-person, remote, or hybrid:

- a. Roll Call Vote. If any member of the agency participates remotely in any meeting, votes must be taken by roll call unless the vote is unanimous.
- b. Minutes Identify Any Remote Participation. If any member of the agency participates remotely in any meeting, meeting minutes must identify which agency members attended in person and which members attended remotely.
- c. Adjournments Posted on Website. Adjournment notices must also be posted on the agency website.
- d. Failure to follow proper procedures can result in voiding a public agency’s action.

III. EXECUTIVE SESSIONS

- A. Only agency members may attend, except for persons invited to testify or to give opinion (attendance is limited to the time during which persons are providing testimony or opinion).
- B. 2/3 of those members of the public agency present and voting must vote at a public meeting to go into executive session. (Note that an abstention is not a vote.) ***Must always convene in public to go into executive session, even if the meeting is only for an executive session.***
- C. Allowed for:
 - 1. Discussion concerning the appointment, employment, performance, evaluation, health, or dismissal of a public officer or employee, provided that such individual may require that discussion be held at an open meeting;
 - 2. Strategy and negotiations with respect to pending claims or pending litigation to which the public agency or a member thereof, because of the member's conduct as a member of such agency, is a party until such litigation or claim has been finally adjudicated or otherwise settled;
 - 3. Security issues;
 - 4. Discussion of the selection of a site or the lease, sale or purchase of real estate when publicity would adversely impact the price; and
 - 5. Discussion of any matter which would result in the disclosure of certain other public records or the information contained therein that are otherwise exempt from disclosure under Section 1-210 (e.g., certain police records).
- D. Meeting Notice and Agenda:
 - 1. The meeting notice must state a permissible reason for the executive session. It is not enough to simply recite the executive session exemption of the FOIA on which the public agency is relying. For example, if the executive session is to discuss litigation, it is not sufficient to simply state, "it is anticipated that the Board will go into executive session to discuss litigation." Instead, the Chairman should state the following: "It is anticipated that the Board of Finance will go into executive session to discuss the case of Bloom v. Town of Weston." Adding the name of the case will more consistently follow the Act and the Commission's rulings.

2. For electronic meetings expected to go into executive session, is important to remember to schedule two electronic sessions (e.g., Zoom links or conference call numbers) for executive sessions: One for the public portion of the meeting, and one for the executive session. Only the Zoom link (or conference call number) for the public portion of the meeting is published in the meeting notice and agenda. The agency meets in the public meeting to vote to go into executive session, and then exits the public meeting and uses the unpublished Zoom link (or conference call number) to enter the executive session. Since no votes are taken in executive sessions, the public agency must go back into the public Zoom meeting (or conference call) to take any votes resulting from the executive session.

E. Conduct of the Meeting. There are specific requirements for conducting business in executive session:

1. No votes are taken in executive session. Only discussion is permitted. Any votes are taken in open session.

2. No minutes are taken during executive session. Minutes are taken only during the public portion of the meeting. The minutes of the public meeting must include the vote to go into executive session; the reason for the executive session; and the names of the persons in attendance at the executive session. The minutes should also include what time the public agency convened to go into executive session and the time it adjourned and resumed the meeting in public.

IV. MISCELLANEOUS MEETING REQUIREMENTS

A. Contents of Agendas

1. The FOIA doesn't provide any clear guidance as to the level of detail that is required in an agenda. However, the agenda should adequately identify the business to be transacted and the date, time, and place.

2. For regular meetings, try to avoid "Other business" or "new business" without specific items listed beneath those headings.

3. Do not use "other business" or "new business" for special meetings since agenda items cannot be added at the meeting.

4. When convening in an executive session is a possibility, the agenda should say "it is anticipated that the Board/Commission will go

into executive session” and list the potential exceptions for executive session as specifically as possible as described above.

5. Meeting Chairs are responsible for stopping any discussion about a non-agenda item and re-orienting the meeting back to the agenda.

B. Minutes; Filing of Minutes

1. Generally, minutes must be available for public inspection with seven (7) days of the meeting to which they refer (Conn. Gen. Stat. § 1-225 (a)). Minutes should include, at a minimum, the following:
 - a. When the meeting was convened and adjourned.
 - b. Time and place of the meeting.
 - c. Which member of the public agency were present and how they voted.
 - d. Statement of each issue discussed or acted on.
 - e. Purpose of any executive session and who attended.
 - f. If any agency members participated remotely, which members participated remotely and which were in person.
2. Hard copies of the minutes must be maintained and filed with the designated person in the department which oversees the particular board, commission, committee, or subcommittee.
3. For those boards, commissions, and committees for whom the Town Clerk is not the custodian of the minutes, it is nevertheless recommended that a paper copy also be sent to the Town Clerk’s office to be preserved in the Town’s archives.

C. Record of Votes

The record of the votes (as distinguished from the meeting minutes) of all members of the public agency must be reduced to writing and be available for public inspection within forty-eight (48) hours of the meeting. The votes shall be recorded in the minutes of the session at which taken.

V. **PUBLIC PARTICIPATION AND CONDUCT OF PUBLIC MEETINGS**

- A. Members of the public have the right to attend the public portion of all meetings (but not executive sessions). Members of the public have the right

to attend anonymously and may not be required to register, sign in, or identify themselves as a condition of attendance, whether the meeting is in-person, remote or hybrid.

- B. The FOIA does not, by itself, give the public the right to speak or otherwise participate in meetings.
- C. Members of the public and the media have the right to record or broadcast meetings. However, the agency may, in advance, establish procedures for broadcasting.
- D. If a member of the public creates a disturbance, the agency may remove him or her. If the disturbance persists, the public agency may order the room cleared and continue in session. (The media, except any members participating in the disturbance, must be allowed to remain in attendance.) The procedures for removing members of the public from remote or hybrid meetings is described above.
- E. Meetings may be adjourned to a specified time and place. Written notice of the time and place of any adjourned meeting must be posted near the door of the place of the adjourned meeting and on the public agency's website, if applicable, within 24 hours after the time of adjournment.

PART TWO: PUBLIC RECORDS

INTRODUCTION:

Town departments, boards, and commissions, routinely receive requests for public records, documents and other information in accordance with FOIA. FOIA requires that a public agency respond to a records request "promptly" and notify the requestor of any denial of a record request within 4 days. Generally speaking, each public agency is expected to respond to a FOIA records request immediately and no later than four business days of the receipt of such requests. Every public agency has the responsibility to promptly search for and otherwise locate and make available all documents that are responsive to each FOIA request. The role of the Town Attorney's Office is to provide advice and counsel to public agencies, and to assist and otherwise facilitate the disclosure of documents requested under FOIA.

A. DEFINITION OF PUBLIC RECORDS:

A public record or file is defined as any recorded data or information relating to the conduct of the public's business prepared, owned, used, received or retained by a public agency, whether the information is handwritten, typed, tape-recorded, printed, photocopied, photographed or recorded by any other method.

B. EMAILS, TEXTS, AND OTHER ELECTRONIC RECORDS:

Emails, texts, audio and video recordings, and computer-stored or generated documents also fall within this definition. Even emails and texts using personal email addresses and personal cell phone numbers are public records if a member of a public agency is conducting Town or agency business using those addresses or numbers. The member of the public agency must maintain those records under state record retention rules, and the public has a right to obtain copies of them.

C. EXEMPTIONS FROM DISCLOSURE:

The FOIA contains many exemptions from disclosure, including attorney-client privileged communications, personal notes and drafts, certain law enforcement records, and certain personal information. Please contact the Town Attorney's Office if you have any questions about what may be withheld.

D. RECORD RETENTION GUIDELINES:

The Connecticut State Library promulgates Retention Schedules for municipal records here: <https://ctstatelibrary.org/publicrecords/general-schedules-municipal/>. Depending on the type of records, they may need to be maintained for several years, or permanently. For example, routine correspondence, including FOIA requests, must be maintained for 2 years. Emails that are "transitory messages – (i.e., non-record material such as junk mail, publications, notices, reviews, announcements, employee activities, routine business activities, casual and routine communications similar to telephone conversations" can be deleted "at will." Email messages that are less than

permanent may be erased after the retention period for the equivalent hard copy has passed, and then may be destroyed. Email messages that are permanent “(i.e., documenting state policy or policy process, protection of vital public information)” may be deleted after transferred to paper or microfilm. Meeting agendas may be destroyed after one year, but meeting minutes must be permanently retained by the municipality. Voice mail messages may be deleted at will absent special circumstances.

QUESTIONS? Please contact Ira or Pete with any questions. (Contact information is on the cover sheet.)
