

TOWN OF WESTPORT
REPRESENTATIVE TOWN MEETING

FREEDOM OF INFORMATION ACT OVERVIEW

TOWN OF WESTPORT

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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 of Westport 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 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.

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.

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 Selectman 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. “Subcommittee”: The definition of meeting includes any “committee” created by the public agency (i.e., subcommittee), so subcommittees created by any board or commission are subject to the same requirements.
5. A conference call or other communication by means of electronic equipment may constitute a meeting.
6. In general, there is a meeting anytime a quorum of a public agency convenes to discuss or act upon a matter for which it has responsibility. But note however, that the definition actually describes three kinds of gatherings that can constitute a meeting. The FOIC has viewed gatherings of less than a quorum to trigger FOIA requirements.

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 Selectman).

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

Yes. If distributed among a quorum of the body and the communications relate to a matter over which the body has supervision, jurisdiction, control or advisory power.

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.

C. Participation by Electronic Means.

1. When can/should a member participate in a meeting by telephone/Skype or other similar means?
2. Agency should have a policy.
3. Consider pros and cons.

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 meeting whose times, dates and places do not typically change.

- Agendas must be available to the public at least 24 hours in advance.
- New business may be added to the agenda upon a 2/3 vote of the agency members present and voting.

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

- Notice of the meeting, including the time and place and the business to be transacted must be filed with the Town Clerk at least 24 hours in advance. (Notice, as described, is the equivalent of an agenda.)
- No new business may be added.

- Must post special meeting agenda on the Town’s website.
3. Emergency 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 must be filed with the Town Clerk within 72 hours.

Failure to follow proper procedures can result in voiding a public agency’s action.

F. Board Quorum

1. There are no absolutely clear guidelines when less than a quorum meets.
2. Law and policy behind law seeks to avoid “fake public meetings” and doing public business in private.
3. One case, Windham v. FOIC, 48 Conn. App. 522 (1998), said simply that if there was no quorum, there is no meeting. But see differing view in Emergency Medical Services Comm. v. FOIC, 19 Conn. App. 352 (1989). The FOIC argued that a proceeding of an agency can occur without a quorum. However, see City of Meriden v. FOIC, 191 Conn. App. 648 (2019), *cert. granted* 333 Conn. 926 (2019), for further discussion and clarification of “hearing or other proceeding.” City of Meriden is in the process of being reviewed by the Connecticut Supreme Court on the definition of “proceeding.” We may get more clarity on the quorum issue once this case is decided.

III. EXECUTIVE SESSIONS

- A. Notice must state reason. For example, if the executive session is to discuss litigation, the notice should state the name of the case.
- B. Allowed for:
 1. 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 public discussion would cause a likelihood of an increased price; and

5. Discussion of any matter which would result in the disclosure of certain other public records that are otherwise exempt from disclosure under Section 1-210 (e.g., certain police records).

C. There are specific requirements for conducting business in executive session:

1. Only agency members may attend, except for persons invited to testify or give opinion (attendance is limited to the time during which persons are providing testimony or opinion).

2. 2/3 of those members of the public agency present must vote at a public meeting to go into executive session. ***Must always convene in public to go into executive session, even if the meeting is only for an executive session.***

3. Must state the reasons for adjourning to 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, it is insufficient to simply state, "it is anticipated that the Board will go into executive session to discuss litigation." However, based upon Freedom of Information Commission rulings and court decisions (see Lizotte v. Town of Enfield Planning and Zoning Commission, 1999 WL 72820; Durham Middlefield Interlocal v. FOIC, 1997 WL 491574), it is recommended that the notice specify the case which is being discussed. For example, 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 Westport." Adding the name of the case will more consistently follow the Act and the Commission's rulings.

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

5. 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. PARTICIPATION BY ELECTRONIC MEANS

1. When can/should a member participate in an agency meeting by telephone/Skype or other similar means.
2. Agency should have a policy.
3. Consider pros and cons.

V. MISCELLANEOUS MEETING REQUIREMENTS

1. Agendas

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. If possible avoid items such as:

- "Other business" or "new business" without specific items listed beneath those headings.
- Do not use items above for special meetings (items cannot be added).
- 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.

2. Minutes; Filing of Minutes

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:

- When the meeting was convened and adjourned.
- Time and place of the meeting.

- Which member of the public agency were present and how they voted.
- Statement of each issue discussed or acted on.
- Purpose of any executive session and who attended.

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.

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.

3. Votes

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.

VI. Rules Governing the Conduct of Public Meetings

1. Members of the public have the right to attend the open portion of all meetings. Members of the public may not be required to register or sign in as a condition of attendance. The FOIA does not, by itself, give the public the right to participate in meetings.
2. 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.
3. 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.)
4. Meetings may be adjourned to a specified time and place. Written notice of the time and place must be posted at the door of the place of the adjourned meeting within 24 hours of the time of adjournment. If a hearing is continued within 24 hours, posting at the place of the adjourned meeting must be immediate.

VII. E-MAILS AND VOICE MAIL

The Freedom of Information Commission (“FOIC”) has issued a “Proposed Declaratory Ruling #94 (Email and Voice Mail)” including retention policies (“Report”). It met with so much resistance in Hartford that it was never issued in final form. Nevertheless, we use it as a guideline.

The report identified four issues for attention. These issues and the posited responses follow:

A. Are e-mail and voice mail communications public records?

ANSWER: If they relate to “the conduct of the public’s business,” they constitute public records.

“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.” C.G.S.A. § 1-200.

B. Do e-mail and voice mail communications need to be retained?

ANSWER: A qualified “yes” for a discreet period or permanently depending on content. E-mail and voice mail communications from state employees which have administrative, fiscal, legal or historical value should not be destroyed without reference to C.G.S.A. § 11-8a(c) which contains guidelines for disposition. The Town also follows state guidelines for retention.

The Office of Public Records Administrator (“PRA”) has written (General Letter 98-1, June 1, 1998) that e-mails generally fall within three broad categories: transitory messages, i.e., casual/routine communications similar to telephone conversations (may be immediately deleted); emails with less than permanent retention period (retained in accordance with established policy); and emails with a permanent or permanent/archival retention period (retained in hard copy). The PRA concluded that voice mail is “transitory in nature.” Most may be deleted at will unless the message “may be potentially used as evidence in a trial, such as a bomb threat, or in some other illegal activity.”

C. Is the public entitled to access e-mail and voice mail communications upon request?

ANSWER: Yes, to the same extent as any other public record.

D. Do e-mail and voice mail communications constitute a meeting under the FOI Act?

ANSWER: Yes, they may. If distributed among a quorum of the body and related to a matter over which the body has supervision, jurisdiction, control or advisory

power, a meeting may have occurred. Even individual back-and-forth exchanges between members of the public agency may constitute a meeting.

E. If e-mail and voice mail communications constitute a public meeting, it is possible to conduct such a meeting in a manner that complies with the FOI Act?

ANSWER: Yes, if the meeting is conducted in a manner that comports with the open meeting requirements of the FOI Act. This requires caution, however.

VIII. GOVERNOR LAMONT'S COVID-19 EXECUTIVE ORDERS

Under Executive Order # 7B, issued on March 14, 2020, the Governor suspended the following in person open meeting (FOIA) requirements:

Sections 1-206, 1-225, and 1 226 of the Connecticut General Statutes, and any open meeting provision of any municipal charter, ordinance, or regulation that conflicts with this order, are suspended to the extent necessary to permit any public agency to meet and take such actions authorized by the law without permitting or requiring in-person, public access to such meetings, and to hold such meetings or proceedings remotely by conference call, videoconference or other technology, provided that:

1. the public has the ability to view or listen to each meeting or proceeding in real time, by telephone, video, or other technology;
2. any such meeting or proceeding is recorded or transcribed, and such recording or transcript shall be posted on the agency's website within seven (7) days of the meeting or proceeding, and made available within a reasonable time in the agency's office;
3. the required notice and agenda for each meeting or proceeding is posted on the agency's website and shall include information about how the meeting will be conducted and how the public can access it;
4. any materials relevant to matters on the agenda, including but not limited to materials related to specific applications, if applicable, shall be submitted to the agency a minimum of twenty four (24) hours prior and posted to the agency's website for public inspection prior to, during, and after the meeting, and any exhibits to be submitted by members of the public shall, to the extent feasible, also be submitted to the agency a minimum of twenty-four (24) hours prior to the meeting and posted to the agency's website for public inspection prior to, during, and after the meeting; ***and***

5. all speakers taking part in any such meeting or proceeding shall clearly state their name and title, if applicable, before speaking on each occasion that they speak.

These amended public meeting requirements, unless modified by subsequent Executive Order, will remain in effect until the state of emergency in Connecticut due to COVID-19 has been lifted by the Governor.
