

FINAL REPORT
PUBLIC ACCESS AND GOVERNMENT ACCOUNTABILITY
LEGISLATION
2009 SESSION, CONNECTICUT GENERAL ASSEMBLY

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As most Connecticut residents know, the 2009 five-month long legislative session ended without a state budget. It also ended without any major developments, positive or negative, in the name of open and accessible government.

While the lack of a budget is widely viewed as a negative development, proponents of open and accessible government, in light of some of the deeply troubling access-related proposals that legislators were considering, cheered when the clock struck midnight on June 3 with minimal damage to the core of the Freedom of Information (FOI) Act.

With a special session looming, the celebration could be short-lived. Several of the proposals, some of which clearly were aimed at severely limiting access to certain governmental entities, could be revived when the legislators reconvene.

But for now, access advocates can be relieved that the astonishingly wide-range of legislative proposals aimed at limiting access to government have not yet become law. The FOI exemptions were not always the thrust of some of the proposed legislation but various raised bills included language that would have kept from the public records about gasoline prices, regional planning projects, broadband accessibility and certain personnel records to highlight a few. At one point there were at least 15 such troubling proposed exemptions to disclosure still being considered.

By far the biggest headache for access advocates was a bill that became a two-headed monster by session's end, HB 6709, An Act Concerning the Department of Correction.

For several years, the FOI Commission has been in deep discussions with Department of Correction (DOC) officials about the dramatic increase in FOI activity involving inmates. A court ruling earlier this decade ordered the FOIC and DOC to allow telephonic hearings for inmates before the commission and has led to an increase in both FOI requests to DOC, according to DOC officials, and an increase in complaints filed by inmates against various public agencies with the FOIC.

DOC, citing increased workload and security concerns, has proposed several sweeping changes to the FOI act aimed at eliminating access to its records. Although some of the proposed exemptions targeted inmates, the FOIC has countered that the proposed amendments were too broad, giving the DOC the power to restrict access to records, not only to inmates, but to other citizens, and to bypass time-tested standards for disclosure already in place in the FOI Act.

The DOC proposal this year, included in HB 6709, sought to exempt from disclosure under the FOIA, personnel, medical, or similar files about current or former DOC employees to people under DOC custody. As it has consistently, the FOIC argued that current law contains the proper balance, allowing the release of personnel, medical, or similar files unless the DOC offers proof that disclosure would constitute an invasion of personal privacy or a safety risk.

FOIC staff attempted to persuade the DOC and the Legislature that the proposed exemption was both premature and unnecessary. FOIC statistics indicate that no more than one or two cases a year since 2006 have resulted in a commission ruling that personnel or disciplinary records must be released to an inmate, and only after it was determined that the DOC had failed to prove that release of the records would be an invasion of privacy or a safety risk. In addition, DOC appeals of three of those decisions are still pending in court. The FOIC argued that it would be prudent to wait for the court process to be completed before altering the FOI Act.

DOC was unmoved by those arguments, however, and with Judiciary Committee Chairman Michael Lawlor as a sponsor, brought forward a bill with the proposed new exemption. The bill cleared several committees and landed on the House calendar. It became the aforementioned two-headed monster when Lawlor offered an amendment to the bill tacking on the remnants of another anti-access bill proposed by the Office of the Victim Advocate (See HB 6670 below) that was thought to have been killed in committee.

FOIC staff had almost daily discussions with legislators about the bill for more than a month as it sat on the House calendar. Then, almost without warning, the bill, without the disturbing Victim's Advocate amendment, was brought out on the next-to-the-last day of the session, June 2, and passed overwhelmingly by the House. Surprisingly, it was not called by the Senate on the session's final day and, for now, has been defeated (See details below).

The lack of action on HB 6709 mirrored the ultimate end for many of the bills we were watching carefully. Several bills the access community supported also expired on the House and Senate calendars after wending their way through committees, including another attempt to provide greater access to the state's courts (HB 6340, see below) and a bill that would have codified the definition of invasion of privacy (SB 1152, see below). Two of the bills that became Public Acts are a testament to behind-the-scenes work by FOIC staff. Public Act 09-106, concerning OSHA investigations, and Public Act 09-165, concerning regional planning initiatives, initially contained either poorly worded or unnecessary exemptions that ultimately, through negotiation, were revised or eliminated.

As has been the case in previous sessions, several individuals tried to help advance the cause of open government and limit unacceptable revisions and changes to the FOI Act.

Thanks to several diligent lawmakers and FOI advocates, including Representative James Spallone, D-Deep River, the House chairman of the Government Administration and Elections (GAE) Committee; Senator Gayle Slossberg, D-Milford, the Senate chairman of the (GAE) Committee; Deputy Speaker Robert Godfrey, D-Danbury; Representative David McCluskey, D-West Hartford, Representative Andrew Fleischmann, D-West Hartford, and CCFOI lobbyist Chris VanDeHoef, we were able to advance some positive measures or block or revise others that, if passed, could have been a major step backward for FOI.

During the five-month session, we monitored a total of 110 bills. A total of 66 received public hearings and FOIC staff prepared statements and/or testified about 22 of those bills. A total of 16 of the 110 bills passed either the House or the Senate with seven of those passing both houses and becoming public acts. Once again this year, we were challenged to keep track of bills, even after they apparently died in committee. More than one bill died in committee only to be resurrected in the form of an amendment to other pieces of legislation.

A brief summary of the bills of note follows:

FAVORABLE RESULTS – BILLS PASSED

1) HB 6466, P-A 09-165. AN ACT CONCERNING PROJECTS OF REGIONAL SIGNIFICANCE.

As an apparent move toward greater regionalization in the state, this law calls for regional planning agencies to establish a voluntary preapplication process for applicants seeking work on projects of regional significance. The original raised bill contained an exemption to disclosure unacceptable to the FOIC. The exemption, offered without explanation by any of the bill's proponents, said that "information provided by an applicant or a local, regional or state agency as part of a process established by a regional planning organization under this section shall not be subject to disclosure under the Freedom of Information Act, as defined in section 1-200 of the general statutes." Despite our immediate objections, the proposed bill passed through three committees unchanged. However, several legislators, including Deputy Speaker Godfrey and GAE House Chair Spallone, heard our concerns and worked to have the objectionable exemption removed from the bill. The final version which passed both the House and Senate contains no confidentiality language.

2) HB 6186, P-A 09-106. AN ACT PROTECTING THE INTEGRITY OF CONN-OHSA INVESTIGATIONS.

This new law grants a state or local public employee whose name is not part of an original OSHA complaint notice, but who at any time provides information regarding the potential violation to state officials, to ask and have his or her name removed from any record published, released, or made available about the complaint. The FOIC testified before the Labor Committee on the bill, acknowledging acceptance of the basic intent of the proposal, but pointing out several flaws in the way the original bill was crafted which could have created confusion and ambiguities in the law. Staff members then met with John McCarthy from the Labor Department and crafted language acceptable to all parties.

FAVORABLE RESULTS – BILLS DEFEATED

1) HB 6709. AN ACT CONCERNING THE DEPARTMENT OF CORRECTION.

As outlined above, this bill became a major legislative battleground for the FOIC and advocates of open government during the session. In addition to the language creating a blanket exemption from inmates for all DOC personnel records, DOC's proposal also included language exempting other records from release that DOC believes would be a serious security risk if not withheld. Discussions with DOC staff about the proposed language of their bill began shortly after the session got underway. FOIC staff acknowledged the legitimate safety concerns of DOC during those discussions, but attempted, time and time again, to assure DOC that exemptions already in place that allowed requests to be viewed on a case by case basis were more than adequate to address those concerns and not trample the public's right to know.

FOIC staff even worked out compromise language acceptable to all parties specifying that drawings, specifications, plans, and aerial depictions related to the physical plant, infrastructure, or site conditions of correction institutions or facilities, could be exempt from disclosure. The hope was that with that compromise in hand, DOC would soften its stance on the release of personnel records. This did not occur. Although we testified and lobbied against the proposed legislation, it cleared the Judiciary and GAE committees without much discussion. Then, portions of another bill we strongly opposed (HB 6670, see next entry) became part of an amendment to the DOC bill offered by Judiciary Chair Lawlor.

The amendment focused on allowing victims of crime to halt the release of records. We found ourselves battling the original bill and the amendment. With our legislative allies lobbying against the bill and the amendment, we were able to keep both from being called until the last week of the session. We also were able to limit discussion about yet another concern with the DOC proposal: that once DOC workers got this special blanket exemption for their personnel records, then other departments would demand one too. That concern surfaced in the last week when Rep. Lawlor offered another amendment to the DOC bill granting the special exemption to workers from DMHAS (Department of Mental Health and Addiction Services). That amendment seemed to trigger action on the bill. Although we scored one success in that the crime victims' amendment was never called, the day before the session ended, Lawlor brought out the underlying DOC bill and the DMHAS amendment and it passed easily, 143-4. Expecting the worst, we spent most of the session's last day trying to convince Senators to vote against HB 6709. But whether that effort was successful won't ever be known. The bill was never called by the Senate and died on the Senate calendar without a vote. As the special session begins, we remain on watch for the bill to be revived, even though it would be a stretch to link it to budgetary items.

4) HB 6670. AN ACT CONCERNING THE RIGHTS OF CRIME VICTIMS AND THE DUTIES OF THE OFFICE OF VICTIMS ADVOCATE.

This bill grew from the workings of a task force convened by the Office of the Victims Advocate (OVA) more than a year ago. FOIC staff was at the task force meetings, but it became clear that the agenda of the OVA ultimately was to remove from public access significant numbers of public records and documents in the name of shielding victims of crimes and their families from further hurt and discomfort. The issue and, later the bill, stirred passionate debate. It also put advocates for an open government in the uncomfortable position of appearing to argue against protection for the victims of crime and their families. But the problem was and remains that the proposed legislation would, in essence, eliminate much public access to most crime records. The bill would have given victims the right to invoke an invasion of privacy standard before the release of records, much the way employees can invoke invasion of privacy before release of their personnel records.

In testifying against the bill, the FOIC called it “a misplaced attempt to protect crime victims, by making sweeping changes to what has been a narrow exemption in the FOI Act.” “If enacted, these changes could severely erode the well-established right guaranteeing public access to public records, but they will not give victims of crime the sense of privacy they seek,” the FOIC said. The FOIC noted that the proposed change to the statute would broaden the types of records covered by the invasion of privacy exemption and “alter language that has been in the FOI Act for more than 30 years -- language that has been time-tested and relied upon, both by people who utilize the FOI law and public officials who have to follow it.”

The FOIC pointed out that there would be huge costs involved to municipalities and state agencies as they would have to evaluate many records for potential privacy issues and make determinations about whether to withhold records. The bill also ignored the fact that there are protections in place for victims when it comes to records of crime. The bill passed unanimously out of the Judiciary Committee, but was sent to the Appropriations Committee. Appropriations declined to take action on the bill and it was allowed to die there. Round Two of the OVA debate occurred when Judiciary Chair Lawlor offered an amendment to the DOC bill (see HB 6709 above) calling for a codification of the long-standing definition of invasion of privacy and creating a right for crime victims to object to the release of certain records as an invasion of their privacy. We argued against that amendment as we had against the original bill. The amendment was never called.

3) HB 6511. AN ACT CONCERNING TRANSPARENCY AND OVERSIGHT OF GASOLINE MARKETS.

The casual observer would think that a bill with the word transparency in its title would not be a cause for concern for advocates of open government. Nonetheless, this proposal was problematic because it ordered the collection, by the state Department of Consumer Protection, of much data about gasoline prices from distributors, wholesalers and retailers in the name of transparency, but then declared that all data would be “confidential” and non-disclosable. We argued that this made for less transparency, not more and also pointed out that some trade secrets exemptions could apply to the data that was collected, making the language about confidentiality in the proposed law entirely unnecessary. The bill actually cleared four committees, but died on the House calendar.

4) HB 6518. AN ACT CONCERNING THE FAIR PRICING OF GASOLINE.

Much like HB 6511 (above), the title of this bill would not ordinarily set off flares about access to government. This bill would have required the keeping of records about gasoline pricing by gasoline resellers and gave both the Department of Consumer Protection and Attorney General access to those records. The bill also included a clause labeling them “confidential,” even though once in the hands of public agencies they would become public records. We argued that this language flew in the face of the FOI law and, as we did with HB 6511, that existing trade secrets exemptions could apply to the data that was collected, making the language about confidentiality in the proposed law entirely unnecessary. This bill cleared two committees and died on the House calendar.

UNFAVORABLE RESULTS – BILLS DEFEATED

1) HB 6340. AN ACT CONCERNING JUDICIAL BRANCH OPENNESS.

Once again, the FOIC and CCFOI worked toward crafting legislation aimed at producing a more open and accessible court system and once again, those efforts fell short. Earlier this decade, on an annual basis, CCFOI, had offered a constitutional amendment about court openness which was heard, but not acted upon by the Legislature. In 2006, after a controversial state Supreme Court decision in *Clerk v. FOIC*, momentum seemed to be gathering for some kind of a “legislative fix” to the problem of greater Judicial Branch openness. But, even with a full head of steam, legislation proposed in both 2007 and 2008 fell short, each time blocked in the 11th hour by the Judicial Branch. With each year, the strength of the legislation was diluted as, apparently, was the enthusiasm of legislators, who in 2006 clamored long and loud for

more Judicial Branch transparency in the wake of the *Clerk* decision. In that well-known case, the Supreme Court determined that basic docketing information contained on the court's computer system could not be accessed pursuant to the FOI Act. The court ruled that the docketing information was not "administrative" and therefore not part of the records of the administrative functions of the court, which would make them subject to the FOI Act. Each court openness bill since 2006 has included language to codify a definition of administrative functions that would make the court dockets subject to FOI and the 2009 version did the same. The bill was passed by the Judiciary and Appropriations committees but languished without action for more than a month on the House calendar and died there.

2) SB 1152. AN ACT CONCERNING THE DISCLOSURE OF CERTAIN REPORTS AND THE DEFINITION OF INVASION OF PRIVACY UNDER THE FREEDOM OF INFORMATION ACT.

This bill dealt primarily with auditors' reports and their accessibility. The FOIC had no difficulties with the sections dealing with auditors' reports. In fact, the proposed language actually offered more access to those reports than current law by making them available to a whistleblower whose information prompted the investigation and subsequent report. More importantly, the FOIC supported a section of the bill which codified the long-standing definition of the invasion of privacy adopted from the 1983 state Supreme Court case, *Perkins v. FOIC*. The FOIC has used the Perkins standard for invasion of personal privacy in hundreds of cases since the ruling was handed down. The proposal in SB 1152 would have codified the definition as follows: invasion of privacy means "the public disclosure of any matter that (A) would be highly offensive to a reasonable person, and (B) is not of legitimate concern to the public." Over the years, the state Supreme Court has made occasional reference to revisiting and perhaps altering the Perkins standard. The FOIC would welcome the codification of the law to reduce the chances of the state Supreme Court revisiting Perkins and unraveling decades of well-reasoned case law. The bill cleared the GAE and Judiciary Committees by May 1, but died on the Senate calendar.

NEUTRAL RESULT – BILL DEFEATED

1) SB 772. AN ACT CONCERNING THE POSTING OF PUBLIC AGENCY MINUTES UNDER THE FREEDOM OF INFORMATION ACT.

This proposed bill was the offshoot of a well-intentioned law enacted during the 2008 special legislative session that set off a firestorm of protest, especially in Connecticut's municipalities. The law requires, as of October 1, 2008, public agencies to post some meeting notices and all minutes on their websites. Many towns protested that the lack of funds, the lack of manpower and the lack of technical skills would make it impossible for them to comply with the new law. The towns claimed that this new requirement was yet another unfunded state mandate. More than a dozen towns shut down their websites, claiming that their inability to comply put them in jeopardy of violating the FOI act. The towns apparently complained to their legislators because when the session began, there were no fewer than 14 different proposals aimed at either delaying or eliminating or modifying the new website law. Of those, one, SB 772, became the vehicle for modification of the web posting law. The FOIC had no real role in creating the law, but, because it would be given the sole responsibility of enforcing it, found itself squarely in the middle of the debate about any changes. FOIC staff worked cooperatively with legislators and representatives of towns and cities, trying to find acceptable compromise language. Several ideas were floated. One eventually championed by key legislators included towns taking a series of steps (filling out waivers, getting a vote allowing non-compliance from a town governing board) to legally waive their obligation to comply. That proposal essentially would push back the compliance requirement until January 1, 2011. While willing to accept the new effective date of the law, the FOIC objected to several incarnations of the proposed "mandate relief" because they did not relieve the commission of its obligation to hold formal hearings on alleged website violations even in cases where a waiver had been granted. Finally, toward session's end, the FOIC learned that the language would be changed to meet our concerns. Even though the bill cleared both the GAE and Planning and Development Committees by late April, it died on the Senate calendar. The FOIC has received strong signals that it could be included in a mandate relief package as part of a larger budget bill brought forward during the special session. As a footnote, language opposed by CCFOI that would allow municipalities to print their legal notices on town websites rather than in newspapers with a general circulation in their towns was included in several amendments tacked on to this bill during the session. It remains uncertain how Senators truly felt about this concept because the bill and, therefore, the amendment were never called. It is interesting that the legal notice provision also was being advertised as mandate relief. This begged the question which many asked: If it is too burdensome to post minutes and agendas on town websites, how could posting legal notices on the same sites generate a cost savings? Just as the website issue could resurface as mandate relief in a budget bill, so too could the legal notice issue.