

FINAL REPORT
PUBLIC ACCESS AND ACCOUNTABILITY LEGISLATION
CONNECTICUT GENERAL ASSEMBLY
2011 REGULAR SESSION

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The 2011 legislative session produced several pieces of legislation that negatively impact the cause of open and accessible government in Connecticut and are the cause of deep concern for supporters of the state's good government operations.

Certain bills proposed this session that were challenged by the Freedom of Information Commission (FOIC) related to the nondisclosure of records of the Division of Public Defender Services and its attorneys and employees (SB 38 and HB 6650), privileged communications (SB 943 and HB 6603), residential addresses (SB 1234), electronic recordings of custodial interrogations (SB 954), and autopsy reports (SB 1054). Arguably, most of these bills were *unnecessary* given that existing laws already provide adequate protection. Three of these seven bills passed.

The most significant challenge this session, and unfortunately, the greatest setback for good and open government in recent years resulted in the consolidation of the three main "watchdog agencies" (FOIC, Office of State Ethics (OSE) and the State Elections Enforcement Commission (SEEC)) with six other state agencies (Judicial Review Council (JRC), Judicial Selection Commission (JSC), Board of Firearms Permit Examiners (BFPE), Office of the Child Advocate (OCA), Office of the Victim Advocate (OVA), and State Contracting Standards Board (SCSB)) into the Office of Governmental Accountability (OGA). Given Connecticut's current economic crisis, many legislative proposals were understandably aimed at balancing the state budget. In an effort to balance the budget, the administration proposed a number of bills to consolidate state agencies and resources, including the creation of the OGA.

The original bill proposed by the Governor's Office, SB 1009, An Act Creating the Office of Governmental Accountability, proposed to consolidate five agencies – the FOIC, OSE, SEEC, JRC and the SCSB – with a gubernatorial appointee at its head. The FOIC viewed it, as testified to at the public hearing, as a grand scale mechanism that would change the entire structure and legal work of the agencies involved and create many conflicts. As proposed in SB 1009, the consolidation would not save money and was simply bad public policy.

Throughout the session, there were many attempts by representatives from FOIC, OSE, SEEC and CCFOI to stop SB 1009. These efforts included multiple meetings with various committee members of the Government Administration and Elections (GAE) Committee, Judiciary Committee and/or Appropriations Committee as well as with the Speaker of the House, Senate President and/or representatives from the Governor's Office. FOIC, OSE and SEEC expressed their commitment to sharing in the collective responsibilities to make financial

sacrifices during these difficult fiscal times. The agencies also conveyed that they could achieve savings without having to unnecessarily consolidate the agencies into OGA, which would result in the loss of the agencies' independence, cause inevitable conflicts among the agencies, hurt the public's trust in the actions and decisions of the agencies, and not achieve the savings sought. The FOIC, OSE and SEEC offered several alternate proposals for consideration by the General Assembly, including, but not limited to, the agencies coming together and executing a memorandum of understanding to consolidate "back office" functions without a statutory mandate. Legislators appeared to understand the agencies' concerns. However, with the passage of Public Act 11-48, An Act Implementing Provisions of the Budget Concerning General Government, which has been signed by the Governor, the nine state agencies (referenced above) were consolidated into the OGA. The structure of the new OGA, established by Public Act 11-48, differs from the structure proposed in SB 1009, but the concerns regarding the loss of the agencies' independence and the public's trust as well as the inevitable conflicts remain.

We would like to provide special recognition to Claude Albert, Jim Smith, Morgan McGinley, Mitchell Pearlman and Chris VanDeHoef with CCFOI for their tireless efforts during the legislative session to advocate for freedom of information and good government. We also thank the following individuals for their assistance: Representative Russ Morin (D-28th Assembly District, Chair, GAE), Senator Gayle Slossberg (D-14th District, Chair, GAE), Senator Michael McLachlan (R-24th District, Ranking Member, GAE), Senator John Fonfara (D-1st District) and Senator Rob Kane (R-28th District).

During this legislative session, we monitored a total of 138 bills. A total of 90 received public hearings and FOIC staff prepared statements for and/or testified about 12 of those bills. A total of 21 passed both houses and 14 became public acts (*as of June 28, 2011*).

Below is a brief summary of the bills of note:

FAVORABLE RESULTS – BILLS PASSED

This session, the General Assembly did not pass a bill that would have a positive impact on freedom of information.

UNFAVORABLE RESULTS – BILLS PASSED

1. SB 38. AN ACT CONCERNING THE FREEDOM OF INFORMATION ACT AND DIVISION OF PUBLIC DEFENDER SERVICES.

SB 38 in its original form was deeply troubling. The original bill exempted from disclosure *any* documents pertaining to the legal representation of an indigent client; exempted from disclosure the personnel or medical files of employees of the Division of Public Defender Services (“Public Defenders”); and exempted any member of the Public Defenders or special assistant public defender from paying copying fees if the records pertain to the member’s or attorney’s duties. The FOIC argued that this proposal swept too broadly and would hide from public view most records of the Public Defenders. In addition, the criminal case files of clients are already protected from disclosure because they are adjudicative records and part of the Judicial Branch. The original proposal also barred disclosure of many administrative records (e.g., activities relating to budget, personnel, facilities and physical operations) of the Public Defenders that are now accessible to the public.

Following the public hearing, the GAE Committee drafted a committee bill narrowing the scope of exempt records *only* to the personnel, medical, or similar files of current or former employees of the Public Defenders to people under the custody of the Department of Correction (DOC) custody. (A similar bill, Public Act 10-58, was passed in the 2010 legislative session prohibiting the disclosure of the personnel or medical or similar files of the employees of the DOC, Department of Mental Health and Addiction Services and Board of Pardons and Paroles to inmates). The committee bill also clarified that, for purposes of the FOI Act, the Public Defenders is considered to be a “judicial office,” thereby clarifying that the administrative records of the Public Defenders remain subject to disclosure.

The committee bill made it out of the GAE and Judiciary Committees with five of the fifteen GAE members objecting. When the Senate took up the bill, an amendment (for which there was no public hearing) was adopted exempting the disclosure of secret ballots used for the election of officers of volunteer fire departments. The bill, as amended, unanimously passed the Senate, and although not unanimous, the bill also passed the House.

2. SB 954; P.A. 11-174. AN ACT CONCERNING THE ELECTRONIC RECORDING OF CUSTODIAL INTERROGATIONS.

This is the second year in a row that the bill has come before the legislature. As was our position last year, the FOIC did not oppose the stated purpose of the bill - to improve the reliability of confessions by providing that statements made by a person during a custodial interrogation at a place of detention are presumed inadmissible unless the custodial interrogation is electronically recorded. However, the FOIC did object to the bill's provisions, as written, because the bill would forever exclude the recorded statements from disclosure. The FOIC testified at the public hearing, arguing that permanently excluding the videotapes from the public decreases government transparency and further erodes the state's FOI Act and the public's confidence in law enforcement. In addition, the FOIC argued that this bill is repetitive and unnecessary because law enforcement agencies already have the ability to permissively withhold the electronic recordings, in appropriate circumstances.

During the 2010 legislative session, the General Assembly did not take any further action beyond the public hearing. This year, however, it passed both the House and Senate. It appears that due to the potential cost to law enforcement agencies (including, recording equipment and software, transcription fees, and staff training), the General Assembly postponed the effective date to January 1, 2014.

3. HB 6650; P.A. 11-51. AN ACT IMPLEMENTING THE PROVISIONS OF THE BUDGET CONCERNING THE JUDICIAL BRANCH, CHILD PROTECTION, CRIMINAL JUSTICE, WEIGH STATIONS AND CERTAIN STATE AGENCY CONSOLIDATIONS.

Section 12 of this budget implementer provides that in any civil or criminal case or proceeding, as well as in any legislative or administrative proceeding, all confidential communications between a public defender and a person the public defender has been appointed to provide legal representation ("represented person") are privileged and cannot be disclosed by the public defender unless the represented person provides informed consent to waive the privilege. The bill defines "confidential communications" as all oral and written communications transmitted in confidence between a public defender and the represented person relating to legal advice sought by the person and all records prepared by the public defender in furtherance of providing such legal advice. The bill applies to public defenders; assigned counsel to the Division of Public Defenders; and employees of the Public Defenders.

Arguably, this is an unnecessary prohibition against the disclosure of certain records of the Public Defenders. The FOI Act already contains exemptions for communications privileged by the attorney-client relationship. In addition, the criminal case files of those represented by the Public Defenders (as discussed above in SB 38) are already protected from disclosure because they are adjudicative records and part of the Judicial Branch. The Office of Legislative Research in its bill analysis also recognized that the bill is "consistent with existing law."

4. HB 6651; P.A. 11-48. AN ACT IMPLEMENTING PROVISIONS OF THE BUDGET CONCERNING GENERAL GOVERNMENT.

As stated above, several consolidation bills were proposed this session including the creation of the OGA. The original OGA proposal was raised in SB 1009 (discussed below), which was never taken up by the House or Senate. A second OGA consolidation proposal appeared in HB 6651, which was passed by the General Assembly. Public Act 11-48 formally consolidates the FOIC, OSE, SEEC, JRC, JSC, SCSB, BFPE, OCA and OVA into the OGA. Below are some key points regarding the organization of the OGA:

Pursuant to Public Act 11-48, the nine agencies within the OGA will retain their independent decision-making authority and budgetary independence. The personnel, payroll, affirmative action, administrative and business office functions of the nine OGA agencies, and the information technology associated with such functions, will be merged and consolidated, and a newly hired executive administrator will be responsible for overseeing such limited functions. The executive administrator will be appointed by the Governor based upon a list of recommendations submitted by the Government Accountability Commission (GAC), a new commission within the OGA. GAC will be made up of the chair or his/her designee of each of the nine agencies within the OGA. The GAC must submit its list of candidates to the Governor by August 1, 2011, and the Governor must select a candidate by September 1, 2011, from this list. One chamber of the legislature must then approve the candidate selected. If the GAC is unable to provide a list of candidates, the Governor will then appoint an acting executive administrator. The executive administrator must ultimately report to the GAC, which can terminate his/her employment, if necessary.

In addition, by November 1, 2011, the executive administrator is required to develop and implement a plan for the OGA to merge and provide the limited functions outlined above. By January 2, 2012, the executive administrator, in conjunction with the heads of the nine agencies, must submit a report to the legislature regarding (1) the status of the merger and (2) any recommendations for further action by the legislature, including recommendations to further consolidate and merge functions performed by the members of the OGA.

The Public Act is effective July 1, 2011.

UNFAVORABLE RESULTS – BILLS DEFEATED

1. HB 5994. AN ACT CONCERNING ELECTRONIC REQUESTS FOR RECORDS UNDER THE FREEDOM OF INFORMATION ACT.

The FOIC supported this bill's purpose, which would add clarity to the requirement that a written request for copies of public records must be answered by public agencies, regardless of the form in which the agency received the request, including mail, hand-delivery, facsimile or email. In an age where electronic communications are common, a written request for copies of public records is valid, whether received by hand delivery, facsimile, regular mail, certified mail,

electronic mail, or other means. Unfortunately, the bill never made it out of the GAE Committee.

FAVORABLE RESULTS – BILLS DEFEATED

1. SB 943. AN ACT CONCERNING PRIVILEGED COMMUNICATIONS AND THE FREEDOM OF INFORMATION ACT.

Although the FOIC did not oppose the intent and purpose of the bill – to exempt certain records containing privileged communications (e.g., marital relationship, clergy-penitent relationship, doctor-patient relationship, therapist-patient relationship) from disclosure – as with other bills proposed this session, the FOIC argued that it was unnecessary given that certain privileged communications are already codified in the General Statutes. The greatest supporter of SB 943 was the Commissioner of the CT Department of Mental Health and Addiction Services who sought to protect records relating to the clinical/patient relationships that occur in state operated settings, including records of individuals who are deceased.

The General Assembly did not take any further action on this specific bill beyond the public hearing. However, this proposed exemption did appear in a separate bill, HB 6603, An Act Concerning Government Administration (discussed below).

2. SB 1009. AN ACT CREATING THE OFFICE OF GOVERNMENTAL ACCOUNTABILITY.

The bill proposed to consolidate the FOIC, OSE, SEEC, SCSB, and the JRC, eliminate their independent agency status, and place them within a new office of governmental accountability. The bill generally maintained the existing law's procedures applicable to these agencies, but it made this new office responsible for administering them. The bill consolidated all functions and services provided by these five agencies, and authorized this office of governmental accountability to: (1) administer and enforce the codes of state ethics, FOI requirements, and campaign and election law requirements; (2) oversee state contracting and procurement processes; (3) resolve complaints regarding state judges, family support magistrates, and workers' compensation commissioners; (4) assume each agency's responsibility for adopting regulations and reporting annually to the governor and General Assembly. "Back office" functions (e.g., personnel) would also be transferred from the FOIC, OSE, SEEC, SCSB, and the JRC to the new office. In addition, the bill would eliminate the executive directors of such agencies. Most of their duties and responsibilities would be assumed by a new gubernatorial appointee. It also eliminated the OSE's general counsel and enforcement officer and SCSB's chief procurement officer.

At the public hearing, many individuals and/or organizations submitted written statements and/or testified in opposition to this bill, including, but not limited to, the FOIC, OSE, SEEC, CCFOI, League of Women Voters of Connecticut, Connecticut Public Interest Research Group,

Common Cause, Connecticut Citizen Action Group, Sierra Club (CT Chapter), and the former executive director of the FOIC. Many had considerable concerns with the potential loss of independence, cost of public perception, and the conflicts among the agencies (given that their primary missions are separate and distinct). Issues were also raised regarding to what extent any savings would be achieved and redundancies eliminated. Notably, the only support for the bill at the hearing was a written statement to the GAE Committee from the Secretary of the State Office of Policy and Management.

When SB 1009 was taken up by the GAE and Judiciary Committees, several legislators, including Senator Gayle Slossberg (D-14th District, Chair, GAE); Representative Russ Morin (D-28th Assembly District, Chair, GAE); Senator Edward Meyer (D-12th District, Vice-Chair, GAE); Representative Matthew Lesser (D-100th Assembly District, Vice-Chair, GAE); Senator Michael McLachlan (R-24th District, Ranking Member, GAE); Representative Tim O'Brien (D-24th Assembly District, Assistant Majority Leader); Representative Mary Fritz (D-90th Assembly District, Assistant Deputy Speaker); and Representative David Baram (D-15th Assembly District), expressed concerns regarding the consolidation as proposed in SB 1009. Both Senator Meyer and Representative Andrew Fleischmann (D- 18th Assembly District) voted against passing the bill out of the GAE Committee.

SB 1009 made it out of the GAE and Judiciary Committees, but never made it out of the Appropriations Committee. Unfortunately, however, as discussed above, Public Act 11-48 created the new OGA.

3. SB 1234. AN ACT CONCERNING NONDISCLOSURE OF RESIDENTIAL ADDRESSES OF CERTAIN PUBLIC OFFICIALS AND EMPLOYEES.

As has been the case every year since the enactment of Public Act 95-163, An Act Exempting the Names and Addresses of Hazardous Duty State Employees from the Freedom of Information Act, a bill was proposed this session to limit the disclosure of the residential addresses of the 11 categories of public officials and employees listed in §1-217, G.S. Specifically, SB 1234 would have made the prohibition against disclosure of the residential addresses of such officials and employees applicable to *all* public records. The FOIC argued that, if enacted, SB 1234 would wreak havoc on transactions that use public lists such as land records, grand lists, vital records, enrollment lists, and voter registries, and would burden municipalities with a costly, but unfunded, mandate. The bill would wipe away long-established and well-founded public policy and would utterly destroy the integrity and reliability of records that have been complete and open to public inspection for centuries. In addition, municipal clerks and assessors would be required to redact thousands of addresses (of current and former state and local employees covered by the bill) at considerable expense of time and resources.

Opposition to this bill came not only from the FOIC but also from the CCFOI, Connecticut Conference of Municipalities, Public Records Administrator of the CT State Library, Connecticut Bar Association, and Connecticut Town Clerks Association. The bill never made it out of the Judiciary Committee.

Less than two weeks after the end of the legislative session, however, the CT Supreme Court has settled the question of whether §1-217, G.S., applies to records such as grand lists, voter rolls, and other records that are required by law to be complete, accurate, and open to public inspection. In Commissioner of Public Safety et al v. Freedom of Information Commission and Peter Sachs (SC 18619), officially released June 28, 2011, the Supreme Court held that §1-217, G.S., *requires* the redaction of residential addresses from the copy of the motor vehicle grand list that is open to the public. Although the Supreme Court case pertained only to the motor vehicle grand list of North Stonington, the FOIC assumes that the decision will apply to *all* public records, including the real estate grand list, all land records, voter enrollment lists, voter registries, dog licenses – in short, even including records that by law must be complete, accurate, and open to public inspection.

4. HB 6603. AN ACT CONCERNING GOVERNMENT ADMINISTRATION.

The bill that came out of the GAE Committee was significantly different than the raised bill pertaining to the reporting requirements for recommendations by the joint standing committees of the General Assembly having cognizance of matters relating to government reorganization. Substitute bill HB 6603 amended a variety of government administration statutes, including, but not limited to, adding an unnecessary exemption to the FOI Act and allowing agencies to respond to FOI requests electronically or by facsimile.

HB 6603, as with SB 943 (discussed above), adds an exemption from disclosure for any communication privileged by the marital relationship, clergy-penitent relationship, doctor-patient relationship, therapist-patient relationship or any other privilege established by the common or state law to the FOI Act. The bill also proposes to have the exemption apply to records, tax returns, reports or communications that actually *pre-date* the establishment of the applicable privilege. Given that certain privileged communications are already codified in the General Statutes this bill is unnecessary.

HB 6603 also requires that the type of copy provided (i.e., paper, electronic, facsimile) in response to a FOI request, to be within the “discretion” of the public agency, unless the requester does not have access to a computer or fax machine, at which point the public agency “shall not send the applicant an electronic or facsimile copy.” The intent by the legislature is to permit agencies in situations where an electronic record exists to offer it to the requester in electronic form rather than in paper form. Similar language appeared in HB 6600, in its amended form, discussed above.

The bill made it out of committee in its original form, but was never taken up by the House or Senate.

NEUTRAL RESULTS – BILLS PASSED

1. HB 6600; P.A. 11-150. AN ACT IMPLEMENTING THE RECOMMENDATIONS OF THE LEGISLATIVE PAPERLESS TASK FORCE AND THE TASK FORCE TO STUDY THE REDUCTION OF STATE AGENCY PAPER AND DUPLICATIVE PROCEDURES.

Public Act 10-179, passed in the 2010 legislative session, required the creation of a task force to study converting legislative documents (e.g., bulletins, house and senate calendars, house and senate journals, daily list of bills and file copies) from paper to electronic form, placing them on the internet, and removing the requirement that such documents be published. Representatives from the FOIC were appointed to the task force which examined the feasibility of producing the electronic documents, the cost of production, and the need to make the documents available to legislators and state libraries. A report was submitted by the task force to the General Assembly prior to the 2011 legislative session which recommendations were taken up by the legislature in HB 6600.

The FOIC generally supports the recommendations of the task force, set forth in HB 6600, as they relate to freedom of information and the public's right to access legislative documents in paper and electronic form. The recommendations address significant concerns that the Commission has regarding the public right to access legislative documents on a daily basis – including promptness and disparity of access. At the hearing, the FOIC argued that limited access to legislative documents in paper form may set up a system where those who do not have ready access to a computer will get less access than those who do. Notably, the FOIC received a complaint during the session (recently settled) alleging the denial of a copy of a list of bills. In addition, shortly after the hearing, kiosks were set up in the Legislative Office Building so that individuals could print paper copies of certain legislative documents that were no longer being printed (e.g., list of bills, loose bills, house and senate calendars and journals on non-session days).

HB 6600 also includes a provision which would add clarity to the requirements that a public agency which maintains public records in a computer system, including electronic legislative records, must, if requested by an individual, provide an electronic copy of the requested record via email. The FOIC testified that, in an age where electronic communications are common, this provision would provide for greater and more prompt access to records.

In addition, in its original form, HB 6600 contained a proposal that would clarify that individuals can receive paper or electronic copies upon request. The original bill specified that agencies may provide records by email in response to an FOIA request and required them to have a “preference” for providing such records electronically unless otherwise requested. The FOIC argued that although this proposal is positive to the extent that it enhances public access, the requirement that an agency have a “preference” for providing electronic copies of records should be deleted because it creates confusion and is unnecessary. When HB 6600 was taken up by the House, legislators adopted amended language (similar to the language in HB 6603, discussed above) stating that the type of copy provided to an individual is within the agency's “discretion” except if the individual requests a “certified copy” or “if the applicant does not have

access to a computer or facsimile machine, the public agency shall not send the applicant an electronic or facsimile copy.”

Notably, the bill also requires the state librarian in consultation with the Office of Policy and Management, Department of Administrative Services, Department of Information Technology, Joint Committee on Legislative Management, and Chief Court Administrator to develop standards and guidelines for preserving and authenticating electronic records.

NEUTRAL RESULTS – BILLS DEFEATED

1. SB 1054. AN ACT CONCERNING THE DISCLOSURE OF AUTOPSY REPORTS.

SB 1054, in its original form, proposed direct changes to the General Statutes governing records of the Office of the Chief Medical Examiner (“Chief Medical Examiner”), to prohibit the Chief Medical Examiner from disclosing the autopsy report, scientific findings and records of its investigation and examination of a child whose death was caused by an apparent homicide, if nondisclosure was requested by a parent or guardian. At the Judiciary Committee hearing on this bill, the FOIC as well as the Chief Medical Examiner himself testified that this bill is unnecessary because there are already adequate safeguards built into current law to prohibit almost all disclosure of medical examiner’s reports and scientific findings. The bill came out of committee in revised form adding to the list of exemptions in the FOI Act for law enforcement records compiled in connection with an investigation to include records of a medical examiner’s investigation and examination (e.g., autopsy reports) in the apparent homicide of a person under 18 years of age. Notably, this proposal would not change the existing safeguards built into the current law. The bill died on the Senate Calendar.

2. SB 1183. AN ACT CONCERNING INMATE REQUESTS FOR PUBLIC RECORDS.

SB 1183 was introduced to provide for a preliminary review of FOI requests made by inmates and to prohibit access by inmates to the list of contributors to a candidate for election to public office.

SB 1183, in part, would require a “preliminary review” by a Judge Trial Referee (“JTR”) of inmate requests for copies of public records to determine the reasonableness of such requests. The FOIC believed that this “preliminary review” by a JTR was unnecessary, and therefore, testified at the hearing that it appreciates the need to manage the volume of requests public agencies receive from inmates, but asked the Judiciary Committee to consider (1) that the FOIC is familiar with unreasonable inmate requests and that it already has an established preliminary review process in which no complaint is docketed without the viability of such complaints being established by the complainant and confirmed by the FOIC staff; and (2) entrusting the “preliminary review” to the FOIC which could perform the review at less cost.

SB 1183 also included another attempt by the General Assembly to limit inmate access to public records. Specifically, the bill proposed to preclude inmates from accessing copies of statements filed by campaign treasurers with the SEEC. FOIC suggested that the proposed language be narrowed to preclude only the disclosure of the address of a contributor to an inmate to address concerns regarding safety and security.

No further action was taken on this bill beyond the public hearing.