CONNECTICUT FOUNDATION FOR OPEN GOVERNMENT

WHITE PAPER

EXECUTIVE BRANCH MEASURES TO ENHANCE PUBLIC ACCESS TO GOVERNMENT INFORMATION IN CONNECTICUT

CONTENTS

EXECUTIVE SUMMARY

The Connecticut Foundation for Open Government (CFOG) is a tax-exempt, not-for-profit corporation, whose mission is to promote the open and accountable government essential in a democratic society.

Because of long-standing holes in our laws regarding public access to government information, legislatures passed so-called Freedom of Information (FOI) Acts. The term "Freedom of Information" generally refers to laws and policies dealing with people's access to government records or information. FOI laws usually consist of an open public records component, which provides the right to access most records of government bodies, and they may also contain an open public meetings component (sometimes called a "Government in the Sunshine" law), which provides the right to attend most meetings of most public bodies. The purpose of all FOI laws is to provide "transparency" in government, so that people can see and understand what their government is doing.

Thus, under all FOI laws, the presumption is that government information is open, unless specifically exempt from disclosure.

Although the power to amend the Connecticut FOI Act in the first instance lies exclusively with the General Assembly, in the absence of legislation, there are measures to enhance public access to government information in Connecticut that the Governor and Executive Branch department and agency heads can take on their own initiative and pursuant to their executive authority.

CFOG has five specific recommendations as to how the Governor can use executive powers to enhance public access to government information in Connecticut.

1. Issue an Executive Order setting forth the administration's policy for enhancing access to government information.

2. Issue an Executive Order directing department and agency heads to implement the administration's policy for enhancing public access to government information.

3. Issue an Executive Order directing department and agency heads to promulgate administrative regulations effectuating the foregoing Executive Orders.

4. Inform department and agency heads and managers that compliance with the Freedom of Information Act and the implementation of the foregoing Executive Orders will constitute a significant part of their performance evaluations.

5. Direct the Secretary of OPM and the Commissioner of DAS to assist the FOI Commission in obtaining needed resources, such as equipment and personnel, within appropriated funds and funds reserved for critical situations.

Educating and training government officials about their responsibilities under access to government information laws is often a difficult and arduous task. But it is a critical one if there is going to be real transparency and a government that is truly accountable to the people it serves.

In the final analysis, however, it requires the active support of government leaders at the highest levels to support and implement our access to government information laws not just with verbal platitudes, but with their concrete actions. Positive legislation is crucial. But so too is the exercise of executive power and authority.

In this respect, the Governor can do much to enhance public access to government information by his own actions and without the need for additional legislation. The recommendations presented in this paper provide a sound and pragmatic basis for enhancing the FOI laws currently on the books.

THE CONNECTICUT FOUNDATION FOR OPEN GOVERNMENT, INC.

The Connecticut Foundation for Open Government, Inc.[1] (CFOG) is a tax-exempt, not-for-profit corporation, whose mission is to promote the open and accountable government essential in a democratic society. It seeks to achieve this by educating policymakers and citizens in general on the need for a free flow of information on all public policy matters.

CFOG's programs are carried out by a volunteer Board of Directors drawn from the media, academe, the law, business and government. CFOG sponsors an annual conference for Connecticut's state and municipal officials on Freedom of Information issues. It has underwritten the costs of surveys of government agencies designed to measure compliance with Connecticut's Freedom of Information laws. It sponsors an annual essay contest for high school students on Right to Know and First Amendment issues. It periodically honors with its Walter Cronkite Award a national figure who embodies Open Government principles. Recipients have included Mr. Cronkite, Louis Boccardi, former president of the Associated Press, Jim Lehrer, former executive editor and anchor of the NewsHour on Public Television, and Seymour Hersh and Bob Woodward, noted journalists and authors.

CFOG also holds public policy symposia, such as the first ever "National Privacy and Public Policy" symposium; "Striking the Balance: Open Government In the Age of Terrorism;" and a symposium on the need for Connecticut to enact a Shield Law. It also publishes public policy papers, such as this one, on topics related to its mission.

CFOG's funding comes from its membership, contributions from the public, fees from its programs and grants from the National Freedom of Information Coalition and the John S. and James L. Knight Foundation.

[1] Visit The Connecticut Foundation for Open Government website at www.ctfog.org.

INTRODUCTION: PUBLIC POLICY AND FREEDOM OF INFORMATION

Historically, the public – including the news media – had very limited rights under the law to gain access to government information – even that which is important for citizens to know in their capacity as electors in a democratic society.[2] Because of these long-standing holes in our laws, the Congress and state legislatures - particularly after the so-called "Watergate" scandals of the 1970s - decided to pass statutes that gave greater rights to the public – including the news media – to gain access to government records and proceedings. In the United States, these laws are called Freedom of Information (FOI) Acts.[3]

The term "Freedom of Information" generally refers to laws and policies dealing with people's access to government records or information. FOI laws usually consist of an open public records component, which provides the right to access most records of government bodies, and they may contain an open public meetings component (sometimes called a "Government in the Sunshine" law), which provides the right to attend most meetings of most public bodies.[4]

The purpose of all FOI laws is to provide "transparency" in government, so that people can see and understand what their government is doing.[5] This purpose was best articulated by James Madison, fourth President of the United States, who wrote:

> "A popular Government without popular information, or the means of acquiring it, is but a Prologue to a Farce or a Tragedy; or perhaps both.... A people who mean to be their own Governor, must arm themselves with the power which knowledge gives." [6]

Simply stated, democratic societies require the accountability of government officials to the people who elect them.

Thus, under all FOI laws, the presumption is that government information is open, unless specifically exempt from disclosure.[7] A necessary corollary to the presumption of openness is that exceptions to public disclosure are to be interpreted narrowly.[8] While some exceptions to disclosure are mandatory by law, and the subject information must be kept confidential, other exemptions to disclosure are merely discretionary.[9] Information that is discretionarily exempt can be disclosed – and should be disclosed – unless there is a good reason not to disclose it.

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[2] Robert Trager, Joseph Russomanno and Susan Dente Ross, *The Law of Journalism and Mass Communication*, 3rd ed. (Washington DC: CQ Press, 2012), 322; Mitchell W. Pearlman, *Piercing the Veil of Secrecy: Lessons in the Fight for Freedom of Information* (New Britain, CT: LawFirst Publishing, 2010), 30.
[3] Trager et al., id. at 348-350; Pearlman, id. at 30.
[4] Pearlman, id. at 9.
[5] Id.
[6] James Madison, Letter to W.T. Barry, August 4, 1822, cited at Pearlman, *Piercing the Veil of Secrecy*, supra at 11.
[7] E.g., *Board of Trustees of Woodstock Academy v. Freedom of Information Commission*, 181 Conn. 544, 550 (1980).
[8] E.g., *Perkins v. Freedom of Information Commission*, 228 Conn. 158, 167 (1993).
[9] Pearlman, supra at 15.

FOI regimes can be categorized as falling into one of three "generations":

- "First Generation" Regimes are those that have established by law a fundamental right of public access to much government information.

- "Second Generation" Regimes are those, whether by initial or amended legislation, that have enhanced the public's rights of access to most government information, and that provide, in addition to a general judicial process, mediation and/or a specialized administrative or judicial process to help vindicate those rights.

- "Third Generation" Regimes are those that have (1) *substantially retreated* from their previous legal commitment to either a fundamental or an enhanced right of public access to government information and/or (2) weakened the existing mediation, administrative or judicial processes or institutions for vindicating such rights.[10]

Obviously, one of the reasons why FOI regimes have moved from First or Second Generation to Third Generation is because government officials shy away from disclosing information that they fear might inadvertently reveal secret or confidential information. And that, of course, is a legitimate concern.

It is equally obvious, however, that government employees – like employees in other sectors – fear that disclosure might reveal embarrassing shortcomings and failures, and even wrongdoing. But in a democracy, citizens need to know not only about government successes, but also about their failures, and about the misfeasance and malfeasance of government officials. In this way, public pressure can be brought to correct, remedy, and, if necessary, punish those responsible for the failures, errors or wrongdoing.

Although the power to amend the Connecticut FOI Act in the first instance lies exclusively with the General Assembly, in the absence of legislation, there are measures to enhance public access to government information in Connecticut that the Governor and Executive Branch department and agency heads can take on their own initiative and pursuant to their executive authority.[11]

This paper will discuss the Connecticut experience with Freedom of Information thus far. It will then discuss some measures within the powers of the Executive Branch to enhance public access to government information. Before concluding, the paper will offer specific recommendations that CFOG believes the Governor and Executive Branch department and agency heads ought to adopt that will help enhance public access to government information in Connecticut.

[10] Mitchell W. Pearlman, *Freedom of Information in the Americas: Where the United States Stands*, The Connecticut Lawyer, vol. 20, no. 1 (New Britain CT: Connecticut Bar Association, July 2009), 28.

[11] Although this paper addresses the steps that can be taken by the Executive Branch only, similar steps can be taken by the leadership of the Legislative and Judicial Branches through rules and internal management policies.

THE CONNECTICUT EXPERIENCE WITH FREEDOM OF INFORMATION

There are four distinct phases in the establishment of an FOI regime: passage of the law, implementation, use, and enforcement.[12] As one knowledgeable observer[13] put it:

> "Though the passage of the law may receive the most consideration, and implementation provides the greatest challenge for government, it is perhaps the enforcement phase that is the most critical for the ultimate success of the right of access to information."[14]

The Connecticut FOI Act was passed by the legislature unanimously and signed into law by Governor Ella Grasso as a signature piece of legislation in 1975.[15] It was a total revision of a previous "Right to Know" law originally enacted in the 1950s.[16]

The rationale behind the law is perhaps best expressed in what was to be the preamble to the act:

> "The legislature finds and declares that secrecy in government is inherently inconsistent with a true democracy, that the people have a right to be fully informed of the action taken by public agencies in order that they may retain control over the instruments they have created; that the people do not yield their sovereignty to the agencies which serve them; that the people in delegating authority do not give their public servants the right to decide what is good for them to know and that it is the intent of the law that actions taken by public agencies be taken openly and their deliberations be conducted openly and that the record of all public agencies be open to the public except in those instances where a superior public interest requires confidentiality."[17]

When Connecticut passed its FOI Act in 1975, certainly most experts would have considered it a Second Generation FOI Regime.[18] Now, many could well believe that it has evolved into a Third Generation FOI Act.[19]

For when the FOI Act was first enacted, it contained just 10 exemptions to disclosure.[20] As of this date, the act now contains more than 25 exemptions.[21] And this does not take into

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[12] Laura Neuman, *Enforcement Models: Content and Context*, Access to Information Working Paper Series (Washington DC: The International Bank for Reconstruction and Development/The World Bank, 2009), 1, found at http://wbi.worldbank.org/wbi/Data/wbi/wbicms/files/drupal-acquia/wbi/Neuman%20-%20ATI%20Enforcement%20Models.pdf .

[13] Laura Neuman is the Access to Information Project Manager and Associate Director of the Americas Program at the Carter Center.

[14] Neuman, supra at 1-2.

[15] P.A. 75-342.

[16] See legislative history of Conn. Gen. Stat. §1-19.

[17] 18 C0NN. S. PROC., Pt. 5, 1975 Sess. 2323-2324 (May 21, 1975) (remarks of Senator Julianelle) 18 CONN. H. R. PROC. Pt. 8, 1975 Sess. 3911 (May 16, 1975) (remarks of Representative Burke).

[18] See p. 5 supra and fn. 10.

[19] Id.

[20] P.A. 75-342, §2(b), Conn. Gen. Stat. §1-19(b).

account the untold number of exclusions and exceptions to public disclosure legislated in other parts of the General Statutes.[22]

In addition to the creation of a multitude of statutory exemptions to the FOI Act, Connecticut – like every other jurisdiction – has a bureaucratic culture of secrecy. All one need do is read how badly government personnel in Connecticut performed in responding to surveys of FOI compliance by state and municipal agencies.[23] And the results of these surveys generally agree with other surveys and audits conducted elsewhere in the country.[24]

It is in the enforcement aspect of FOI, however, that Connecticut remains a world leader with the creation of its first-of-a-kind Freedom of Information Commission.[25]

There was nothing particularly unique about the access to information provisions of Connecticut's FOI Act when it was enacted in 1975.[26] What was unique about the law was that it for the first time established an independent administrative tribunal, comprised of citizen-commissioners, and empowered that tribunal to issue orders enforcing disclosure of government information.[27] The commission then organized itself so that it could be used by average people, without lawyers, to provide a relatively speedy and inexpensive mechanism to resolve FOI disputes.[28]

According to its web site:

> "The FOI Commission hears complaints from persons who have been denied access to the records or meetings of public agencies in Connecticut. Any person denied the right to inspect, or to get a copy of a public record, or denied access to a meeting of a public agency, may file a complaint against the public agency within 30 days of the denial. The FOI Commission will conduct a hearing on the complaint, which hearing is attended by the complainant and the public agency. A decision is then rendered by the FOI Commission finding the public agency either in violation of the FOI Act or dismissing the complaint if the public agency is found not to have violated the FOI Act. If the public agency has violated the FOI Act, the FOI Commission can order the disclosure of public records, null and void a decision reached during a public meeting, or impose other appropriate relief. In many instances, a hearing is not necessary as the parties are

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[21] Conn. Gen. Stat. §1-210(b)(2) et seq. See Appendix A for a partial list of subsequent exemptions to public disclosure.
[22] E.g., the legislature specifically exempted the University of Connecticut Foundation from the disclosure provisions of the FOI Act. See Conn. Gen. Stat. §4-37f (9).
[23] See "Access to Public Records In Connecticut: A Survey of Compliance by State Agencies with the Freedom of Information Act" (2001) and "Access to Public Records In Connecticut: A Survey of Compliance by Local Agencies with the Freedom of Information Act" (1999) found at http://ctfog.org/Publications.htm.
[24] See National Freedom of Information Coalition web site, http://www.nfoic.org/search/node (enter keyword: "audits").
[25] Mitchell W. Pearlman, *Connecticut and the World of FOI*, The Connecticut Lawyer, vol.14, no. 3, p. 22 (New Britain CT: Connecticut Bar Association, November 2003).
[26] Id.
[27] Id.
[28] Id.

> able to resolve their differences with the assistance of an FOI staff attorney, who acts as an ombudsman.
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> The FOI Commission also conducts educational workshops and speaking engagements for public agencies throughout the State of Connecticut [and the] ... Commission's legal staff is authorized to represent the Commission in all matters affecting the Commission, and to defend Commission decisions that are appealed, in the superior and appellate courts."[29]

While many officials do not like the idea of having such an independent oversight body to redress secrecy in government, the public and their advocates have embraced this approach and the work of the commission.[30] Over time, government officials and the news media throughout the United States became aware of the Connecticut experience.[31] And where other jurisdictions' systems to guarantee FOI rights failed because such systems were essentially illusory, politically-based, or too expensive and time-consuming, Connecticut was held up as the model of a successful open government regime because of its enforcement agency, the FOI Commission.[32]

Unfortunately, in recent years the commission has seen a reduction in its budget in real terms. For example,[33] in Fiscal Year 2010-2011, the commission had an authorized staff of 23 and was permitted by the Office of Policy and Management (OPM) to spend $2,236,867 of its authorized $2,306,883 appropriation. In Fiscal Year 2011-2012, the commission had an authorized staff of just 15[34] and was permitted by OPM to spend only $1,738,896 of its authorized $1,792,690 appropriation. And in the current fiscal year, the commission still has an authorized staff of just 15 and is permitted by OPM to spend just $1,697,599 of its authorized $1,712,235 appropriation. In addition, one vacant attorney position – an authorized senior position with multiple legal and administrative responsibilities – remains unfilled.

These reductions have led directly to backlogs in processing complaints, mediating disputes, and hearing and deciding cases. They have also led to a significant reduction in the commission's vital public education and training programs.

If this trend is not reversed – or otherwise ameliorated – the critical enforcement phase of the public's rights under the Connecticut FOI Act will become another political illusion and exist in name only.

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[29] See http://www.ct.gov/foi/cwp/view.asp?a=3171&q=488272 .
[30] Pearlman, *Connecticut and the World of FOI,* supra.
[31] Id.
[32] Id.
[33] The following numbers come from the Office of Policy and Management budget document B-1 covering the fiscal years cited.
[34] The staff reduction included the transfer of business office and administrative personnel to the newly created Office of Governmental Accountability. It also included the loss of the commission's legislative liaison, a paralegal specialist and two other positions. In a small agency such as the FOI Commission, those staff members performed important legal and administrative, as well as coverage, functions within the FOI Commission and are no longer available to perform those necessary assignments.

EXECUTIVE POWERS TO ENHANCE PUBLIC ACCESS TO GOVERNMENT INFORMATION

On his very first day in office as President of the United States, Barack Obama wrote these words:

> "The Government should not keep information confidential merely because public officials might be embarrassed by disclosure, because errors and failures might be revealed, or because of speculative or abstract fears. Nondisclosure should never be based on an effort to protect the personal interests of Government officials at the expense of those they are supposed to serve. In responding to requests under the FOIA, executive branch agencies (agencies) should act promptly and in a spirit of cooperation, recognizing that such agencies are servants of the public."[35]

President Obama also ordered the Attorney General to issue new guidelines governing the Federal FOI Act to the heads of executive departments and agencies, reaffirming the commitment to accountability and transparency.[36]

There are three basic types of statements commonly labeled as "Executive Orders" and a single Executive Order may combine elements from each type. The three basic types are:

> "General Policy Statements. An executive order may be a general policy statement made by the Governor. The order does not have the force and effect of law. The purpose of such an order is to persuade or encourage persons, both within and without government, to accomplish the Governor's policy set out in the order.
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> "Directives. An executive order may be a directive from the Governor to state agencies, communicating to those agencies what the Governor wants the agency to accomplish. The order does not have the force and effect of law. However, compliance by state agency heads who serve at the pleasure of the Governor is normally expected. If such an agency head does not comply with the Governor's policy enunciated in the order, the Governor may decide to remove the agency head from office.
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> "Operative Effect. An executive order issued by the Governor may require that certain actions be taken. Such an order has the force and effect of law and serves as a source of authority for actions taken in response to the order."[37]

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[35] Barack Obama Memorandum to Heads of Executive Departments and Agencies Re Freedom of Information Act, January 21, 2009 found at http://www.whitehouse.gov/the_press_office/FreedomofInformationAct; also Appendix B, infra.

[36] Id.

[37] Opinion of the Washington State Attorney General, Attorney General Opinion 1991 No. 21, 2 (June 11, 1991) found at http://www.atg.wa.gov/AGOOpinions/Opinion.aspx?section=archive&id=7672 .

President Obama issued his memorandum on his own initiative and under his executive authority, without congressional approval or action. It falls within the first category of executive order – i.e., a general policy directive.[38] But in that memorandum, he also ordered the Attorney General to issue new guidelines governing the Federal FOI Act to the heads of executive departments and agencies.[39]

Following that order, Attorney General Eric H. Holder, Jr. then issued his own memorandum implementing President Obama's policy.[40] This is the functional equivalent of the second category of an executive order – i.e., a directive. In that directive, Attorney General Holder wrote:

> "First, an agency should not withhold information simply because it may do so legally. I strongly encourage agencies to make discretionary disclosures of information. An agency should not withhold records merely because it can demonstrate, as a technical matter that the records fall within the scope of a FOIA exemption."
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> ". . . [T]he Department of Justice will defend a denial of a FOIA request only if (1) the agency reasonably foresees that disclosure would harm an interest protected by one of the statutory exemptions, or (2) is prohibited by law."[41]

In essence, Attorney General Holder was stating that government agencies should apply what in FOI parlance is called a "Public Interest Override" based on a "Foreseeable Harms" Test before withholding any records that agencies have discretion to either disclose or withhold. He was also stating that the administration would not defend an agency decision to withhold information if it did not reasonably adhere to the Foreseeable Harms Test.

The Public Interest Override and the Foreseeable Harms Test were developed to counter the all-too-common phenomenon of government officials deciding not to disclose information precisely because of some vague or ill-defined notion that disclosure might be harmful to the government, society or particular persons.[42]

The Foreseeable Harms Test has three parts:

1. Whether there is a foreseeable harm to the government, society or particular persons in disclosing the information

[38] See fn. 11, supra.
[39] Id.
[40] Attorney General Memorandum for Heads of Executive Departments and Agencies Re the Freedom of Information Act (FOIA), March 19, 2009 found at http://www.justice.gov/ag/foia-memo-march2009.pdf; also Appendix C, infra.
[41] Id.
[42] Mitchell W. Pearlman, "*Proactive Disclosure of Government Information: Principles and Practice*," found at http://www.nfoic.org/proactive-disclosure-of-government-information.

2. If there may be such a harm, whether it can be clearly articulated and supported by facts – not just speculation or general fears and

3. If parts 1 and 2 are met, whether there nonetheless is an overriding benefit to society as a whole in the disclosure of the information[43]

This test contemplates not only a rigorous analysis, but also a balancing of real – not imagined – harm against a perhaps greater public interest in the proactive disclosure of the information in question.[44]

It should also be noted that in his policy memorandum to heads of executive departments and agencies, President Obama made another key point that is applicable to Connecticut as well. He wrote:

> "The presumption of disclosure also means that agencies should take affirmative steps to make information public. They should not wait for specific requests from the public. All agencies should use modern technology to inform citizens about what is known and done by their Government. Disclosure should be timely."[45]

Although no clear directive came from the President as to what kinds of information should be proactively disseminated on the government's own initiative, he made clear that proactive disclosure of government information using modern technology (presumably including government web sites) is the policy of his administration.

When Dannel Malloy assumed office as Governor of the State of Connecticut, he too insisted that his administration would be dedicated to transparency in government and included a statement to this effect in announcing his first three executive orders.[46]

As in the case of the President, it is certainly within the power of the Governor to issue Executive Orders, policy statements and directives to Executive Branch department and agency heads.[47]

Finally, a word in regard to the resources committed to the FOI Commission in assisting it in performing its important mission to enforce the state's FOI Act.

Clearly the appropriation of funds for the commission to do its job as intended in the FOI Act starts with the legislature. But this too is an area where the gubernatorial administration can

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[43] Id.
[44] Id.
[45] See fn. 35, supra.
[46] See, for example, statement concerning transparency in a news release concerning Governor Malloy's first three executive orders found at http://www.governor.ct.gov/malloy/cwp/view.asp?A=4010&Q=471464 .
[47] Although the Connecticut constitution does not grant the Governor express authority to issue Executive Orders, the Connecticut Attorney General has concluded that the Governor's constitutional authority set forth in Article Fourth, §12 of the Connecticut Constitution to "take care that the laws be faithfully executed" vests the Governor with implied authority to issue Executive Orders to carry out this duty. See Connecticut Attorney General Opinion No. 2005-019 (July 28, 2005).

assist in very pragmatic ways. For example, the Governor can see to it that OPM and the Department of Administrative Services (DAS) assist the commission in obtaining needed resources, such as equipment and authorized personnel with meaningful job classifications, within appropriated funds and other funds reserved for emergencies.

RECOMMENDATIONS

CFOG has five specific recommendations as to how the Governor can use his executive powers to enhance public access to government information in Connecticut.

1. Issue an Executive Order Setting Forth The Administration's Policy for Enhancing Access to Government Information

The Executive Order should stress the public policy statements set forth in President Obama's January 21, 2009 memorandum, particularly in the first four paragraphs, to wit:

> "A democracy requires accountability, and accountability requires transparency. As Justice Louis Brandeis wrote, "sunlight is said to be the best of disinfectants." In our democracy, the Freedom of Information Act (FOIA), which encourages accountability through transparency, is the most prominent expression of a profound national commitment to ensuring an open Government. At the heart of that commitment is the idea that accountability is in the interest of the Government and the citizenry alike.
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> "The Freedom of Information Act should be administered with a clear presumption: In the face of doubt, openness prevails. The Government should not keep information confidential merely because public officials might be embarrassed by disclosure, because errors and failures might be revealed, or because of speculative or abstract fears. Nondisclosure should never be based on an effort to protect the personal interests of Government officials at the expense of those they are supposed to serve. In responding to requests under the FOIA, executive branch agencies (agencies) should act promptly and in a spirit of cooperation, recognizing that such agencies are servants of the public.
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> "All agencies should adopt a presumption in favor of disclosure, in order to renew their commitment to the principles embodied in FOIA, and to usher in a new era of open Government. The presumption of disclosure should be applied to all decisions involving FOIA.
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> "The presumption of disclosure also means that agencies should take affirmative steps to make information public. They should not wait for specific requests from the public. All agencies should use modern technology to inform citizens about what is known and done by their Government. Disclosure should be timely."[48]

2. Issue an Executive Order Directing Department and Agency Heads to Implement the Administration's Policy for Enhancing Public Access to Government Information

In the Federal system of government, the Attorney General is appointed by the President and serves at the President's pleasure. Under the Connecticut system of Government, however,

[48] See Appendix B, infra.

the State Attorney General is an independent constitutional officer, elected directly by the electorate;[49] and, by statute, represents state agencies in most litigation.[50] Consequently, the State Attorney General lacks the authority to issue a directive of the sort U.S. Attorney General Holder issued in his March 9, 2009 memorandum.[51] That authority resides exclusively within the executive power of the Governor.

As mentioned above, although a "directive" Executive Order lacks the force and effect of law, compliance by state department and agency heads who serve at the pleasure of the Governor is normally expected because if they do not comply with the Governor's directive, the Governor may decide to remove them from office.[52]

Therefore CFOG recommends that the Governor issue an Executive Order directing the implementation of the policy for enhancing public access to government information. The Executive Order should include a directive to all department and agency heads:

- Not to withhold information simply because they can demonstrate, as a technical matter, that the records fall within the scope of a FOI Act exemption. Rather where they have discretion whether or not to disclose information, they must disclose the information in the public interest, unless they can articulate a foreseeable harm under the following test:

    1. Whether there is a foreseeable harm to the government, society or particular persons in disclosing the information

    2. If there may be such a harm, whether it can be clearly articulated and supported by facts – not just speculation or general fears and

    3. If parts 1 and 2 are met, whether there nonetheless is an overriding benefit to society as a whole in the disclosure of the information

- Not to appeal any adverse ruling by the FOI Commission or the courts, unless it is in the public interest because of a foreseeable harm to the government, society or particular persons

- To proactively disclose government information in print and on-line based on the following considerations:

    - Is proactive disclosure required by law, regulation or policy?

    - Is there an interest in the information by a significant number of people?

    - Will the proactive disclosure likely prevent numerous individual requests for the same information?

[49] Article One of the Amendments to the Connecticut Constitution.
[50] Conn. Gen. Stat. §3-125.
[51] See Conn. Gen. Stat. Chapter 35.
[52] See supra at 9.

- Is there a governmental or societal interest in the proactive disclosure of the information?

- Is there any foreseeable harm to the government, society or particular persons in proactively disclosing the information?

- If there is a foreseeable harm, is there nonetheless a greater benefit to society as a whole in the proactive disclosure of the information?

- If a portion of a record or collection of information is exempt from disclosure, can that portion simply be redacted?

3. Issue an Executive Order Directing Department and Agency Heads to Promulgate Administrative Regulations Effectuating the Foregoing Executive Orders

Because policy directives in Executive Orders do not have the full force and effect of law, it is important that the Governor's policy directives recommended herein have the full force and effect of law so that they can be enforced through legal channels. This can be accomplished within the Executive Branch by having the various departments and agencies promulgate administrative regulations in accordance with the State's Uniform Administrative Procedure Act.[53] The promulgation process also has the advantage of providing the opportunity for the public to comment on the proposed regulations before they become effective.[54]

4. Inform Department and Agency Heads and Managers That Compliance with the Freedom of Information Act and The Implementation of the Foregoing Executive Orders Will Constitute a Significant Part of their Performance Evaluations

Compliance with the FOI Act and implementation of the recommended Executive Orders are not only the responsibility of government information personnel, they need to be strongly supported by government leaders at all levels – not just with words, but in concrete ways.

Undoubtedly one of the best ways to institute an aggressive – if not enthusiastic – compliance and implementation regime is by tying it directly to job retention and promotion and salary increases. Having the Governor inform department and agency heads and managers that their job performance will be measured in significant part by how well their departments and agencies comport themselves with regard to the FOI Act and the Governor's policy statements and directives will go a long way toward ensuring the success of these initiatives.

The administration, working with the FOI Commission, can easily create a matrix of objective and quantifiable assessment measures for department and agency heads and managers. For example, such an assessment can quantify on an annual basis the number of requests for

[53] Conn. Gen. Stat. Chapter 54.
[54] See Conn. Gen. Stat. §4-168.

government information a department or agency receives and the number and percentage of such requests granted in whole and in part. Likewise, an assessment can include the number and general description of information proactively disclosed in print or on-line. It can also cite the number and substance of implementing regulations promulgated or in the process of being promulgated. And it can include the number of appeals taken from the department's or agency's denial of access to public information and the number of such appeals sustained or overturned.

5. Direct the Secretary of OPM and the Commissioner of DAS To Assist the FOI Commission in Obtaining Needed Resources, Such as Equipment and Personnel within Appropriated Funds And Funds Reserved for Critical Situations

The confluence of two sets of legislative enactments has led to a severe diminution in the FOI Commission's ability to perform its mission effectively in a meaningful time frame. For information is often time-sensitive and delays in obtaining information frequently render the information less valuable – if not useless—to the requestor. As the old adage goes, dead fish are wrapped in yesterday's newspapers.

The two sets of legislation were the appropriations bills for state agencies for Fiscal Years 2011-2012 and 2012-2013, which continued a general austerity policy imposed by the state's economic conditions, and the bill that created the Office of Governmental Accountability.[55]

As a small agency, the FOI Commission must operate with a highly trained staff that performs a variety of agency-specific functions. To the extent that it has lost through legislation trained personnel and important staff positions, the commission has become extremely hard-pressed to process and adjudicate even a majority of its caseload within its statutorily-mandatory one year time period,[56] let alone offer advice and mediation services, defend its decisions in court and undertake many of its popular training and education programs.

Nevertheless, the Governor has resources available to ameliorate the current situation that threatens the commission as an effective and credible FOI enforcement agency. Those resources are generally located within OPM and DAS. Therefore it would be extremely helpful if the Governor directed the Secretary of OPM and the Commissioner of DAS to work with and assist the FOI Commission in obtaining needed resources, such as equipment and personnel, within appropriated funds and funds reserved for critical situations.

[55] P.A. 11-48.
[56] Conn. Gen. Stat. §1-206 (b) (1).

CONCLUSION

Many government officials today shy away from disclosing information under our FOI laws because they fear they might inadvertently reveal secret or confidential information. And that, of course, is a legitimate concern.

But in most instances, these fears have proven to be ill-conceived, speculative and unfounded, if not outright disingenuous. That is why officials have to be constantly reminded of their duty to abide by the guiding principles underlying all access to government information regimes – that is, there is an overriding presumption that all government information is open to the public, unless specifically exempt from disclosure.

Consequently, exceptions to the disclosure of government information are supposed to be interpreted narrowly to maximize public disclosure – not broadly to minimize it. And while some exceptions to disclosure are mandatory by law – and the subject information must be kept confidential – other exemptions to disclosure are merely discretionary, in which case the information may be disclosed – and should be disclosed – unless there is a good reason (e.g., a "foreseeable harm") not to disclose it.

Educating and training government officials about their responsibilities under access to government information laws is often a difficult and arduous task. But it is a critical one if there is going to be real transparency and a government that is truly accountable to the people it serves.

In the final analysis, however, it requires the active support of government leaders at the highest levels to support and implement our access to government information laws not just with verbal platitudes, but with concrete and meaningful actions. Positive legislation is crucial. But so too is the exercise of executive power and authority.

In this respect, the Governor can do much to enhance public access to government information by his own actions and without the need for additional legislation. The recommendations presented in this paper provide a sound and pragmatic basis for enhancing the FOI laws currently on the books.

APPENDIX A

PARTIAL LIST OF LEGISLATIVE EXEMPTIONS ADDED TO THE CONNECTICUT FREEDOM OF INFORMATION ACT SINCE PASSAGE

Sec. 1-210 (b). Nothing in the Freedom of Information Act shall be construed to require disclosure of:

- Communications privileged by the marital relationship, clergy-penitent relationship, doctor-patient relationship, therapist-patient relationship or any other privilege established by the common law or the general statutes, including any such communications that were created or made prior to the establishment of the applicable privilege under the common law or the general statutes

- Any information obtained by the use of illegal means

- Records of an investigation under the state's "Whistleblowing" laws

- Records, the disclosure of which the Commissioner of Correction has reasonable grounds to believe may result in a disorder in a correctional institution or facility

- Responses to any request for proposals or bid solicitation issued by a public agency or any record or file made by a public agency in connection with the contract award process, until such contract is executed or negotiations for the award of such contract have ended, whichever occurs earlier, provided the chief executive officer of such public agency certifies that the public interest in the disclosure of such responses, record or file is outweighed by the public interest in the confidentiality of such responses, record or file

- The name of any person enrolled in any senior center program or any member of a senior center administered or sponsored by any public agency.

Sec. 1-217 (a). No public agency may disclose, under the Freedom of Information Act, the residential address of any of the following persons:

- A firefighter

- An employee of the Department of Children and Families

- An employee of the judicial branch

- An employee of the Department of Mental Health and Addiction Services who provides direct care to patients

- A member or employee of the Commission on Human Rights and Opportunities

APPENDIX B

MEMORANDUM FOR THE HEADS OF EXECUTIVE DEPARTMENTS AND AGENCIES

SUBJECT: Freedom of Information Act January 21, 2009

A democracy requires accountability, and accountability requires transparency. As Justice Louis Brandeis wrote, "sunlight is said to be the best of disinfectants." In our democracy, the Freedom of Information Act (FOIA), which encourages accountability through transparency, is the most prominent expression of a profound national commitment to ensuring an open Government. At the heart of that commitment is the idea that accountability is in the interest of the Government and the citizenry alike.

The Freedom of Information Act should be administered with a clear presumption: In the face of doubt, openness prevails. The Government should not keep information confidential merely because public officials might be embarrassed by disclosure, because errors and failures might be revealed, or because of speculative or abstract fears. Nondisclosure should never be based on an effort to protect the personal interests of Government officials at the expense of those they are supposed to serve. In responding to requests under the FOIA, executive branch agencies (agencies) should act promptly and in a spirit of cooperation, recognizing that such agencies are servants of the public.

All agencies should adopt a presumption in favor of disclosure, in order to renew their commitment to the principles embodied in FOIA, and to usher in a new era of open Government. The presumption of disclosure should be applied to all decisions involving FOIA.

The presumption of disclosure also means that agencies should take affirmative steps to make information public. They should not wait for specific requests from the public. All agencies should use modern technology to inform citizens about what is known and done by their Government. Disclosure should be timely.

I direct the Attorney General to issue new guidelines governing the FOIA to the heads of executive departments and agencies, reaffirming the commitment to accountability and transparency, and to publish such guidelines in the *Federal Register*. In doing so, the Attorney General should review FOIA reports produced by the agencies under Executive Order 13392 of December 14, 2005. I also direct the Director of the Office of Management and Budget to update guidance to the agencies to increase and improve information dissemination to the public, including through the use of new technologies, and to publish such guidance in the *Federal Register*.

This memorandum does not create any right or benefit, substantive or procedural, enforceable at law or in equity by any party against the United States, its departments, agencies, or entities, its officers, employees, or agents, or any other person.

The Director of the Office of Management and Budget is hereby authorized and directed to publish this memorandum in the *Federal Register*.

BARACK OBAMA

APPENDIX C

MEMORANDUM FOR HEADS OF EXECUTIVE DEPARTMENTS AND AGENCIES

March 19, 2009

FROM: THE ATTORNEY GENERAL

SUBJECT: The Freedom of Information Act (FOIA)

The freedom of Information Act (FOIA), 5 U.S.C. § 552, reflects our nation's fundamental commitment to open government. This memorandum is meant to underscore that commitment and to ensure that it is realized in practice.

A Presumption of Openness

As President Obama instructed in his January 21 FOIA Memorandum, "The Freedom of Information Act should be administered with a clear presumption: In the face of doubt, openness prevails." This presumption has two important implications.

First, an agency should not withhold information simply because it may do so legally. I strongly encourage agencies to make discretionary disclosures of information. An agency should not withhold records merely because it can demonstrate, as a technical matter, that the records fall within the scope of a FOIA exemption.

Second, whenever an agency determines that it cannot make full disclosure of a requested record, it must consider whether it can make partial disclosure. Agencies should always be mindful that the FOIA requires them to take reasonable steps to segregate and release nonexempt information. Even if some parts of a record must be withheld, other parts either may not be covered by a statutory exemption, or may be covered only in a technical sense unrelated to the actual impact of disclosure.

At the same time, the disclosure obligation under the FOIA is not absolute. The Act provides exemptions to protect, for example, national security, personal privacy, privileged records, and law enforcement interests. But as the president stated in his memorandum, "The Government should not keep information confidential merely because public officials might be embarrassed by disclosure, because errors and failures might be revealed, or because of speculative or abstract fears."

Pursuant to the President's directive that I issue new FOIA guidelines, I hereby rescind the Attorney General FOIA Memorandum of October 12, 2001, which stated that the Department of Justice would defend decisions to withhold records "unless they lack a sound legal basis or present an unwarranted risk of adverse impact on the ability of other agencies to protect other important records."

Instead, the Department of Justice will defend a denial of a FOIA request only if (1) the agency reasonably foresees that disclosure would harm an interest protected by one of the statutory exemptions, or (2) disclosure is prohibited by law. With regard to litigation pending on the date of

the issuance of this memorandum, this guidance should be taken into account and applied if practicable when, in the judgment of the Department of justice lawyers handling the matter and the relevant agency defendants, there is a substantial likelihood that application of the guidance would result in a material disclosure of additional information.

FOIA Is Everyone's Responsibility

Application of the proper disclosure standard is only one part of ensuring transparency. Open government requires not just a presumption of disclosure, but also an effective system for responding to FOIA requests. Each agency must be fully accountable for its administration of the FOIA.

I would like to emphasize that responsibility for effective FOIA administration belongs to all of us – it is not merely a task assigned to an agency's FOIA staff. We all must do our part to ensure open government. In recent reports to the Attorney General, agencies have noted that competing agency priorities and insufficient technological support have hindered their ability to implement fully the FOIA Improvement Plans that they prepared pursuant to Executive Order 13392 of December 14, 2005. To improve FOIA performance, agencies must address the key roles played by a broad spectrum of agency personnel who work with agency FOIA professionals in responding to requests.

Improving FOIA performance requires the active participation of agency Chief FOIA Officers. Each agency is required by law to designate a senior official at the assistant Secretary level or its equivalent who has direct responsibility for ensuring that the agency efficiently and appropriately complies with the FOIA. That official must recommend adjustments to agency practices, personnel, and funding as may be necessary.

Equally important, of course, are the FOIA professionals in the agency who directly interact with FOIA requesters and are responsible for the day-to-day implementation of the Act. I ask that you transmit this memorandum to all such personnel. Those professionals deserve the full support of the agency's Chief FOIA Officer to ensure that they have the tools they need to respond promptly and efficiently to FOIA requests. FOIA professionals should be mindful of their obligation to work "in a spirit of cooperation" with FOIA requesters, as President Obama has directed. Unnecessary bureaucratic hurdles have no place in the "new era of open Government" that the President has proclaimed.

Working Proactively and Promptly

Open government requires agencies to work proactively and respond to requests promptly. The President's memorandum instructs agencies to "use modern technology to inform citizens what is known and done by their Government." Accordingly, agencies should readily and systematically post information online in advance of any public request. Providing more information online reduces the need for individualized requests and may help reduce existing backlogs. When information not previously disclosed is requested, agencies should make it a priority to respond in a timely manner. Timely disclosure of information is an essential component of transparency. Long delays should not be viewed as an inevitable and insurmountable consequence of high demand.

In that regard, I would like to remind you of a new requirement that went into effect on December 31, 2008, pursuant to Section 7 of the OPEN Government Act of 2007, Pub. L. No. 110-175. For all requests filed on or after that date, agencies must assign an individualized tracking number to requests that will take longer than ten days to process, and provide that tracking number to the requester. In addition, agencies must establish a telephone line or Internet service that requesters can use to inquire about the status of their requests using the request's assigned tracking number, including the date on which the agency received the request and an estimated date on which the agency will complete action on the request. Further information on these requirements is available on the Department of Justice's website at www.usdoj.gov/oip/foiapost/2008foiapost30.htm.

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Agency Chief FOIA Officers should review all aspects of their agencies' FOIA administration, with particular focus on the concerns highlighted in this memorandum, and report to the Department of Justice each year on the steps that have been taken to improve FOIA operations and facilitate information disclosure at their agencies. The Department of Justice's Office of Information Policy (OIP) will offer specific guidance on the content and timing of such reports.

I encourage agencies to take advantage of Department of Justice FOIA resources. OIP will provide training and additional guidance on implementing these guidelines. In addition, agencies should feel free to consult with OIP when making difficult FOIA decisions. With regard to specific FOIA litigation, agencies should consult with the relevant Civil Division, Tax Division, or U.S. Attorney's Office lawyer assigned to the case.

This memorandum is not intended to, and does not, create any right or benefit, substantive or procedural, enforceable at law or equity by any party against the United States, its departments, agencies, instrumentalities or entities, its officers, employees, agents, or any other person.