

Foliage, Frost, Frozen Ponds and The FOIA (Part Three): Trying To Do The Right Thing Is A Good Thing Under The FOIA

Education Law Notes

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By Mark Sommaruga

In our latest posting on the Freedom of Information Act [“FOIA”], we confirm that the Freedom of Information Commission [“FOIC”] has a heart, and may sometimes forgive technical non-compliance by public agencies and their employees.

Honesty and good faith = highly moral and good FOIA strategy

I often preach that honesty, common sense and an ounce of contrition are not bad strategies when defending a FOIC complaint. A recent case provides affirmation of these axioms. In *Treat-Perry v. Superintendent of School, East Haddam Public Schools*, #2015-226 (November 18, 2015), a request was made for a school district’s records concerning the Common Core/testing “opt out” issue. The school district dutifully responded to the request, but the complainant persisted with a FOIC complaint, asserting that the district had failed to produce all responsive records. The school district was able to show that, with the exception of one record, it had provided everything it possessed. Indeed, the FOIC specifically noted that the school district had been highly responsive to the request, and attempted in good faith to satisfy the FOIA requirements. The district admittedly did not turn over one document, which was an attachment to an e-mail received by the superintendent of schools. The FOIC noted that the district had searched through many thousands of computer records using relevant search terms, but the search had failed to identify this one attachment to an e-mail that addressed the “opt out” issue. The FOIC noted that the attachment was a public record under the FOIA, and that the district “technically” violated the FOIA by not providing a single requested record. However, in light of the district’s good faith actions, the FOIC did **not** issue **ANY** orders in this case.

Lessons? Usually, a *mea culpa* may cause the FOIC to order a public agency to “henceforth strictly adhere” to the FOIA and 2) disclose any remaining records at issue, but will likely avoid the imposition of any further/severe penalty. Sometimes, it is difficult for an agency to make this confession, for political reasons. However, honesty and contrition will not only help you avoid getting fined by the FOIC, but it may cause the FOIC to realize that there is not a need for any orders.

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“Everyone knew what we meant” as a defense to a claim of vague agendas and motions.

Continuing this common sense theme, in *Frenave v. Board of Selectmen, Town of Suffield*, #FIC 2015-050 (October 14, 2015), a board of selectmen needed to fill a vacancy on its membership. At a regularly scheduled meeting, there was an agenda item for “Selectman’s update: Open Positions.” At the start of the meeting, the First Selectman indicated that the Board would be adding an executive session item to the agenda in order to discuss what the Board had “heard from any and all parties” interested in the in the open selectman’s position. Thereafter, a member moved to amend the agenda “to add an Executive Session,” without any statement of its purpose, which passed. At the same meeting, the candidates for the selectman’s position were present and provided with an opportunity to address the Board and the public gathered at the meeting. Subsequently, the First Selectman then made a simple “motion to enter executive session”, again without any statement of the purpose of the session. Notwithstanding the fact that neither the new agenda item nor the motion to enter executive session on its face complied with the FOIA’s requirements of a) specific agenda items, and b) specific statements of the purpose of executive sessions, the FOIC viewed these deficits to be “technical oversights” not rising to the level of a violation of the FOIA. The FOIC noted that when the agenda item was added at the meeting (and the motion to enter executive session was made), it was “abundantly clear” to the public as to what was the purpose of the added item and executive session in light of the earlier comments made by the First Selectman in public at the meeting.

Lessons? I was reluctant to discuss this case in light of a fear of fostering bad habits and encourage an over-confident or lackadaisical approach to FOIA compliance. It is still essential that agenda items be sufficiently specific, and that the public be given some notice as to the reason for an executive session. <http://schoolaw.pullcomblog.com/archives/attorneys-are-not-so-special-after-all-the-foia-and-the-need-for-specific-agenda-items/>. However, the FOIC does not view life to be the equivalent of the game show *Jeopardy* and sometimes will not let form trump substance. In *Frenave*, the Board did provide an adequate description of the added agenda item and the executive session before it made the motions; as such, the “mere” fact that the proper language did not get into the actual motions was not determined to be fatal, since the public was informed of the subject of the meeting.

FINAL THOUGHTS

An overarching theme from these cases is that while it is very important to comply with the FOIA, the FOIC has maintained a modicum of common sense. Agencies should do whatever is necessary to ensure that their personnel (and agency/board members) are properly trained in the FOIA’s requirements. If you do not do so, you face the risk of violating the FOIA and the possibility that a) the FOIC may then order training, b) the FOIC may declare an agency action to be null and void, and/or c) the FOIC ordering responsible persons to pay a fine. On the other hand, the FOIC seems to have remembered that public agency members and employees are human beings, who by nature are not infallible. While ignorance is

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not an excuse to continually (and repeatedly) violate the FOIA, those who make serious efforts to comply with the law will likely be in a good position to avoid a harsh FOIC sanction.

These and other types of issues are discussed in more detail in *Understanding the Connecticut Freedom of Information Act and Access to Public Meetings and Records*, by Mark J. Sommaruga, Esq. To order a copy of this book, please [click here](#).

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