

## **Foliage, Frost, Frozen Ponds And The FOIA (Part Two): Can You See My Notes (And Calendar)?**

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### **Education Law Notes**

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For those who still cannot get enough after my latest post on the Freedom of Information Act [“FOIA”], here are more nuggets from the Freedom of Information Commission [“FOIC”]. Today, we focus on written notes and calendar entries.

#### ***When are personal notes FOIA-able?***

Generally, but not always, one’s own personal notes may be exempt from disclosure under the “preliminary drafts or notes” exception, provided that the notes are truly preliminary, as opposed to the actual finished product. In *Aronow v. Executive Vice President, University of Connecticut Health Center*, #FIC 2015-277 (December 16, 2015), a request was made for, *inter alia*, personal notes of an investigator assigned to conduct a labor relations investigation; the public agency declined to provide the notes. To be fair, both parties raised valid public policy arguments. The public agency claimed that disclosure of notes would lead to investigators limiting what they write down and thus compromising the effectiveness of investigations; on the other hand, the complainant asserted that it is important for the public to see such notes to ensure that all relevant allegations were actually investigated.

The FOIC agreed with the agency that the notes were exempt from disclosure. The FOIC noted that the notes at issue (some typed and others handwritten) were not completed documents but rather contemporaneous notations of steps that had been or were being taken during an investigation. Specifically, these notes reflected the investigator’s attempt to keep track of witness statements (including concerns and impressions of credibility) and possible next steps. The FOIC also ruled that the agency did not err in determining that the public interest in withholding the documents outweighed the public interest in disclosure (as is a necessary prerequisite under the FOIA’s “preliminary drafts or notes” exception). The FOIC found that the notes were solely for the personal use of the investigator, in order to recall relevant details when the final investigative report was eventually written, and the agency understandably feared that investigators would be too circumspect in note taking if they knew that their notes would eventually be disclosed.

Ironically, in the same case, the FOIC rejected the agency’s attempt to assert the “preliminary draft or notes” exception for certain other documents, namely, communications that were not “preliminary” but rather completed communications between the investigators and other individuals. Unlike the notes discussed

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above, these communications were not for personal use but rather circulated with other individuals; in addition, many of these communications dealt with scheduling issues (as opposed to substantive issues), thus diminishing any public interest in withholding the documents.

**Lessons?** I indicated previously that the “preliminary drafts or notes” exception is often misunderstood. *Understanding the Connecticut Freedom of Information Act and Access to Public Meetings and Records*, by Mark J. Sommaruga (4<sup>th</sup> Edition, 2013), p. 53. The *Aronow* decision is useful in providing some context to the exception. Generally speaking, notes that are both personal and preliminary (and are used to help create a final document but are not the final document) can likely be withheld. As one can see, whether the notes are handwritten or typed is irrelevant for the FOIC’s determination as to whether a document is exempt from disclosure.

### ***Is your calendar a public record?***

*Brown v. Comptroller, State of Connecticut*, #FIC 2015-055 (December 16, 2015) is a sprawling case that dealt with a plethora of issues. However, what intrigued me most about this case was a request for access to the professional appointments/meetings listed in an employee’s Outlook calendar. The FOIC ruled that certain entries did not relate to the employee’s professional appointments, and thus could be redacted. The FOIC also found that other calendar entries did pertain to professional appointments, and had to be disclosed.

**Lessons?** The FOIC did not expressly deal with the issue of the privacy rights of the employees, and did not explain in detail as to when a “personal” entry becomes a public record/public information. However, in a tertiary way, this case does touch upon the fact that sometimes public employees and agency members will list personal appointments in their official Outlook calendars, or use e-mail with respect to personal matters. While there is somewhat inconsistent FOIC guidance; *Sommaruga*, at pp. 41-43; generally, minor usage of public equipment for personal purposes by public agency employees does not necessarily concern the public, and therefore records relating to such use do not constitute “public records.” However, at some point, where the usage is inappropriate (for example, due to a significant volume of usage) or displays an inappropriate mixing of one’s professional and private life, then it becomes a matter of public concern and subject to disclosure.

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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