



REID AND RIEGE, P.C.

COUNSELLORS AT LAW

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# REID AND RIEGE, P.C.

NONPROFIT ORGANIZATION REPORT – SPRING 2013

## **FIGHTING FOIA WITH FOIA**

### **THE FREEDOM OF INFORMATION COMMISSION RENDS THE SAFETY NET**

We have written before about the unbalanced relationship between social service nonprofits and the state government agencies that fund them under fee for services contracts. People familiar with the industry know it is a bit of a misnomer to refer to state funding documents as “contracts” because in a contractual relationship there is typically some bargaining – whereas in these arrangements the reality is that the state dictates terms on a take it or leave it basis. The one-sidedness is partly a manifestation of the “golden rule” (he who has the gold rules), and the power that accretes to the people holding the purse strings. However, the imbalance creates two problems. First, on a macro level it blurs the distinction between nonprofit providers and the state – diluting the operational benefits that cause the state to contract out the delivery of services in the first place.<sup>1</sup> Second, on a micro level, too much time is absorbed by contractual and regulatory tangles that detract from the mission and cause nonprofit managers to feel like marionettes on someone else’s stage.

In this Report we would like to discuss a somewhat nuanced issue which presents itself in this context, namely, the use of the Connecticut Freedom of Information Act (“FOIA”) and the Connecticut Freedom of Information Commission (“FOIC,” the agency that enforces FOIA) to compel nonprofits to comply with state open records and open meeting requirements. While this newsletter addresses the way the noose has tightened in Connecticut, the subject matter is a national issue, and nonprofits should check the laws of the locations in which they operate.

### **WHY WE ARE WRITING ABOUT THIS ISSUE – AN ACTUAL CASE IN POINT**

We have always believed that it would be a disaster if nonprofits were subject to FOIA. Think about how open meeting and public disclosure requirements would affect management practices and board meetings; and worse, FOIA principles were developed in the context of the rules governing political and public entities and are often at odds with the corporate law principles that apply to nonprofits (such as the board members’ fiduciary duty of confidentiality).<sup>2</sup> However, we decided to write about this topic now because of a recent nonprofit FOIA case we handled that is too tasty a morsel not to pass around for readers to savor. The case demonstrates the point we started with – how governmental agencies (in this case the FOIC) can sometimes lose sight of the fact that nonprofits are their friends – they do not have stockholders getting a share of any “profit” and exist to maintain the

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<sup>1</sup> There is a formal term for the decentralization principle that gives rise to the benefits: *subsidiarity*. It means that a central authority (state government) should have a subsidiary function and perform only those tasks which cannot be performed effectively at the local level. This principle brings several benefits in the social services space, such as: management’s skills are sharpened from being on the front lines with clients; volunteers with community roots populate the governing boards (think of the cost if you had to pay for their talent); and management and board members are focused because they have skin in the game (the blame if things go wrong).

<sup>2</sup> See the Summer 2012 (*Is Transparency the Best Medicine?*), and the Spring 2012 (*Defending the Charitable Deduction*) editions of this Report. Nonprofits are private (not public) corporations and are subject to legal rules that evolved as part of the law of corporations and not the law of public/political bodies.

safety net for the benefit of the state. In specific, at a hearing in this case, the FOIC hearing officer displayed a degree of bias and unfairness that we want to vet in the daylight that this newsletter provides.

Also, we (in our name as members of the public) decided to give the FOIC a taste of its own medicine (nonprofits fear retribution and cannot do this as easily). It occurred to us that the FOIC is subject to the same laws it enforces, so we decided to send it a FOIA request asking for copies of any code of conduct it uses to guide the behavior of its presiding officers at Commission hearings. There are no codes – and while the law does not require that there be a code of this type, we would feel better if there were some fixed written principles to follow at contested FOIA hearings. However, before discussing the case we need to provide some background.

### **WHAT IS THE FREEDOM OF INFORMATION ACT?**

Freedom of information legislation requires most (not all) meetings and records of public agencies to be open to the public. A hypothetical: assume John Doe walks in the front door of the state Department of Perpetual Motion (DPM) and asks for copies of certain records, and the request is denied. Mr. Doe could then file a complaint with the FOIC – which would then hold a hearing (a mini-trial) to decide the dispute. The commission’s hearing officer has authority similar to that of a judge in a civil case – to take oaths and evidence, to issue subpoenas, and the like. If Mr. Doe loses his case at the hearing, he can take an appeal to the courts. While the courts have the power to overturn the decision of the hearing officer, they will not re-try the case and will rely on the factual record (the evidence) established at the hearing.

### **WHY FOIA IS RELEVANT – COURT CASES AND FRONT DOOR REQUESTS FOR DOCUMENTS**

At first glance, readers may wonder why nonprofits (which are private tax-exempt corporations) need to be concerned about this. The reason for concern is the “functional equivalent” of a public agency test. This test was adopted in Connecticut in a 1980 court case involving a nonprofit operating a regional school (Woodstock Academy) and local taxpayers who requested that the Academy provide them with copies of its budget. The taxpayers were turned away by the Academy, and they filed a complaint with the FOIC – which then convened a hearing and agreed with the taxpayers. The Academy appealed to the court, and the court agreed with the FOIC because, in the court’s opinion, the Academy was the “functional equivalent” of a public agency in that: (a) it was created by special act of the legislature to create a school for the inhabitants in its vicinity; (b) the towns in the region paid for their residents to attend; (c) the Academy fulfilled the state’s constitutional mandate to provide a free public education to its residents; and (d) the Academy’s teachers participated in the state retirement fund.

To provide some perspective on the margins of this issue, let’s look at a second nonprofit case, decided in 1998. A member of the public directly asked Domestic Violence Services of New Haven, Inc., to turn over copies of its annual report, by-laws and budget. The request was refused, and at a hearing the FOIC concluded that Domestic Violence Services was the “functional equivalent” of a public agency and ordered it to turn over these documents. Domestic Violence Services appealed to the court, which reversed the FOIC’s ruling. The court concluded that Domestic Violence Services was *not* the functional equivalent of a public agency, and that its relationship with the state was *contractual* (hence the importance of not blurring the line between nonprofits and governmental/political entities) in that it was hired to perform services on a bargained fee for services basis (even though governmental funding accounted for 66% of its budget).

### **THE FOIA COMMISSION OPENS THE BACK DOOR**

People who lose in court often try to have the law changed to their liking, and this is what the FOIC did after courtroom losses in *Domestic Violence Services* and another case involving a for-profit which contracted to run the state vehicle emissions program. The change took the form of 2001 amendments to FOIA to create a “back door” through which the public can obtain records of state contractors in certain circumstances. Under this approach, instead of requesting documents through the front door (directly from a contracting organization and having to deal with the court-created “functional equivalent” standard), a person could make the request to the state agency on the other side of the contract – and the agency would then be required to obtain the documents from the contractor and give them to the person who requested them. The 2001 legislation requires that all contracts with the state in excess of \$2,500,000 for the performance of a *governmental function* must state (a) that the contracting party (for example, a nonprofit) will provide to the state (for example, the Department of Developmental Services (DDS)) copies of its (the nonprofit’s) records and files *related to the performance* of the governmental function, and (b) indicate that such records and files are subject to FOIA and may be disclosed by the public agency (DDS) under FOIA. Nonprofits doing business with Connecticut will find this language in Part II, Section E, Paragraph 16 of their “contracts.”

### **OUR CASE**

Our case involved a social service nonprofit which receives funding under state contracts. A member of the public had a bone to pick with the nonprofit (he claimed he was owed money), and he filed a FOIA request through the front door (directly with the nonprofit) asking for copies of a plethora of records (including meeting lists, handwritten and typed notes, emails, faxes and audiotapes) in an attempt to extract payment. We advised the nonprofit to deny the request, and this person filed a complaint with the FOIC, which then scheduled a hearing. Our thoughts going into the hearing were as follows:

First, because the request was made directly to the nonprofit (through the front door), it had to be evaluated under the legal standard articulated in court decisions such as *Domestic Violence Services*. Under these standards, it was clear that our client was a *contractor* with the state and not the *functional equivalent of a state agency*. Accordingly, our opinion was that we should win at the hearing “hands down” and that our client nonprofit could spend its time and money on other matters.

Second, while we thought we would not have to deal with it, even if the request had been made through the back door (if this person had filed his request with the state agency on the other side of the contract) our client would still have no obligation to turn over documents (through the state agency) because (a) the nonprofit’s activities did not even come close to the back door definition of “*government function*” (which is not the same as the court created “functional equivalent” standard); and (b) the back door term “*records related to the performance of a government function*” is too vague to be enforceable (and in any event would not give this person a right to the extensive documentary fishing expedition he requested).

### **OUR HEARING AT THE COMMISSION**

The hearing officer did one thing right – he told our antagonist that because his document request had been made through the front door it would fail because of the legal standards established in the

*Domestic Violence Services* court ruling. The matter should have ended there. If it had, we would be writing about different topics.

But what happened next is what set us back. The hearing officer (and remember the hearing officer acts like a judge and must act without bias) subsequently gave our opponent a tutorial in the law and acted almost like his lawyer – telling him to withdraw the complaint and to file a new one using the back door statute, saying (and we quote from the recording of the hearing) “[i]f you walk in the steps of the statute you’re going to get some records instead of spinning wheels.” He then went on to say (and here we are paraphrasing) that *the FOIC had an interest in the case and wanted to be fair to our opponent, that he, on behalf of the Commission, is basically telling our opponent to turn around and get back into the system and try again, and that when he re-files he should request to go to the top of the list and request that the same hearing officer hear the case, etc.*

These comments speak for themselves and are very troublesome to us. Given the fact that the FOIC hearing officer has an obligation to be fair and unbiased (a basic component of due process of law), what about the interests of our nonprofit which had to spend time and money (on legal fees) to deal with this issue? How would you feel if you were in a lawsuit and the judge told your opponent that he (the judge) had an interest in the issue and that even though your opponent had made a procedural error, if the opponent followed the judge’s instructions and re-filed that the judge would take the case?

As we close we want to point out a footnote in the *Domestic Violence Services* case that strikes us as uncomfortably relevant. The footnote explains that (we assume to avoid litigation costs) the nonprofit entity (Domestic Violence Services of New Haven, Inc.) voluntarily turned over the requested documents without admitting that it had an obligation to do so – but that the FOIC decided to hold a hearing on the matter anyway – and decided against the nonprofit at that hearing (we presume to set up a court case that the FOIC wanted litigated)! As we know, Domestic Violence Services took the appeal to the court and the court reversed the FOIC.

We want to give the FOIC the benefit of the doubt, and want to assume that nonprofits are not being used as guinea pigs to advance cases that the FOIC has an interest in advancing. Nonprofits have a myriad of challenges these days and officials at state agencies should not cause nonprofit managers to be distracted by sideshows of someone else’s making.

*The Reid and Riege Nonprofit Organization Report is a quarterly publication of Reid and Riege, P.C. It is designed to provide nonprofit clients and others with a summary of state and federal legal developments which may be of interest or helpful to them.*

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