

# COMMITTEE ON OPEN GOVERNMENT

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## FOIL AO 19842

February 17, 2023

*By Electronic Mail Only*

*The Committee on Open Government is authorized to issue advisory opinions. The ensuing advisory opinion is based solely upon the information presented in your correspondence unless otherwise indicated.*

Ms. :

We received your request for an advisory opinion addressing whether a poster board displayed by one of the Town Councilpersons during an open meeting of the Town Board is a record subject to disclosure under the Freedom of Information Law (FOIL). In my opinion, the poster board displayed during a public meeting of the Town Board is a record of the Town and must be disclosed in response to a FOIL request.

Public Officers Law § 86(4) defines a "record" as:

any information kept, held, filed, produced or reproduced by, with or for an agency or the state legislature, in any physical form whatsoever including, but not limited to, reports, statements, examinations, memoranda, opinions, folders, files, books, manuals, pamphlets, forms, papers, designs, drawings, maps, photos, letters, microfilms, computer tapes or discs, rules, regulations or codes.

Therefore, a poster board displayed by a councilperson during an open meeting depicting a photo related to a topic being discussed by the board member is clearly a "record."

I also believe that a poster presented at a town meeting must be construed to have been "produced by, with or for an agency." Section 86(3) defines an "agency" as:

any state or municipal department, board, bureau, division, commission, committee, public authority, public corporation, council, office or other governmental entity performing a governmental or proprietary function for the state or any one or more municipalities thereof . . .

Thus, all records created, acquired, or discussed by the boards within a town are records of an agency subject to FOIL.

Additionally, § 103(e) of the Open Meetings Law requires disclosure of records that are scheduled to be discussed at an open meeting.

Agency records available to the public pursuant to article six of this chapter [FOIL], as well as any proposed resolution, law, rule, regulation, policy or any amendment thereto, that is scheduled to be the subject of discussion by a public body during an open meeting shall be made available, upon request therefor, to the extent practicable at least twenty-four hours prior to the meeting during which the records will be discussed. Copies of such records may be made available for a reasonable fee, determined in the same manner as provided therefor in article six of this chapter. If the agency in which a public body functions maintains a regularly and routinely updated website and utilizes a high speed internet connection, such records shall be posted on the website to the extent practicable at least twenty-four hours prior to the meeting. . .

While the correspondence included with the FOIL request suggests that the agenda did not reflect that the councilperson's discussion involving the poster was scheduled to be held during that meeting, I believe that it is reasonable to conclude that the councilperson anticipated raising the discussion and presenting the poster before the meeting because he came prepared with the poster to the meeting. In my opinion, a version of the image subject to discussion should have been included in the Board materials posted before the meeting, and a copy of the poster board must be available after the meeting upon receiving a FOIL request. As you are likely aware, FOIL permits an agency to charge the actual cost of reproduction of any record that is larger than nine by fourteen inches. § 87(1)(b)(iii).

Further, the fact that an individual board member or Councilperson created or used the record and then removed the record from the town offices does not change its accessibility under FOIL. The location of where or how a record is held has no bearing on whether it is a record of the agency or whether it is accessible under FOIL. See FOIL AOs [15049](#), [15072](#), [15893](#), [17490](#).

Finally, you also inquired as to whether the councilperson is required "to state the identity of who took the drone picture, since he has stated he knows who took the photo." FOIL entitles requestors to "records" already in existence, not necessarily to information or to have questions answered. Therefore, if there is a record reflecting who took the photo, it would be a record subject to disclosure if someone requested it. If there is no record reflecting that information, FOIL does not require your agency to create a record or to otherwise respond to questions about the photo.

Thank you for your inquiry.

Sincerely,

*// Christen L. Smith*

Christen L. Smith  
Senior Attorney