

## FOIA Functional Equivalent Test

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### Issue

What factors determine whether a private entity is subject to the Freedom of Information Act (FOIA)? Summarize relevant Connecticut Supreme Court and Appellate Court decisions.

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### Summary

Among other things, FOIA requires state and municipal public agencies, with limited exceptions, to (1) make their records and files available to the public for inspection and copying, (2) post their meeting agendas and minutes, and (3) allow the public to attend their meetings ([CGS §§ 1-210 & 1-225](#)). Under FOIA, a public agency includes any person to the extent the person is deemed to be the functional equivalent of a public agency ([CGS § 1-200\(1\)\(B\)](#)).

To determine whether a person is the “functional equivalent” of a public agency, courts and the Freedom of Information Commission (FOIC) apply a four-part test established by the Connecticut Supreme Court in *Board of Trustees of Woodstock Academy v. FOI Commission*, 181 Conn. 544 (1980). The test consists of the following factors:

1. whether the entity performs a governmental function,
2. the level of government funding,
3. the extent of government involvement or regulation, and
4. whether the entity was created by government.

When it established the test, the Supreme Court stated that these criteria should be applied on a case-by-case basis. In a later case, the court held that an entity need not meet all four of the criteria in order to be held to be a functional equivalent. Rather, “[a]ll relevant factors are to be considered cumulatively, with no single factor being essential or conclusive” (*Connecticut Humane Society v. FOI Commission*, 218 Conn. 757, 761 (1991)).

These two decisions and three Appellate Court decisions form the basis for Connecticut’s functional equivalent test jurisprudence. Taken together, they establish both broad requirements (e.g., the requirement to consider each factor cumulatively) and specific requirements (e.g., what is required to satisfy each factor). This report summarizes the relevant portions of each of these decisions and lists key holdings for each specific factor.

## **Supreme Court Cases**

### ***Woodstock Academy (1980)***

Woodstock Academy, located in the town of Woodstock, was established by the legislature in 1802 through a special corporate charter. Among other things, the academy serves as the designated high school for the town’s students, since the town has no public high school of its own.

As found by the trial court, the academy’s property and affairs were controlled by a privately elected board of trustees. However, the town of Woodstock relied on the academy to fulfill the constitutional mandate that a free public secondary education be available to all children in the state. The town paid the entire tuition costs for students who live in Woodstock and attend the academy. Further, the court found that more than 95% of the academy’s operating expenses were paid by the towns of Woodstock, Pomfret, and Eastford.

In this case, a group of town residents requested but was denied the academy’s past and present financial records. After FOIC and the Court of Common Pleas ruled for the residents, the academy appealed to the Connecticut Supreme Court, claiming that it was not a public agency for FOIA purposes. (At the time of the case, FOIA did not explicitly reference a “functional equivalent” of a public agency.)

In its analysis, the court looked to the federal FOIA for guidance and noted that, like state law, it was also silent on its applicability to hybrid public/private entities. However, federal courts had developed a four-part “functional equivalent test” to determine whether hybrid entities are public agencies for purposes of FOIA. (This is the four-part test described in the summary.)

The court applied this test to Woodstock Academy and affirmed that the academy was a public agency for FOIA purposes, holding that it met all four factors. In doing so, the court rejected the academy's argument that its status as a private nonstock corporation was determinative of the matter:

[A]ny general definition (of any agency) can be of only limited utility to a court confronted with one of the myriad organizational arrangements for getting the business of the government done... The unavoidable fact is that each new arrangement must be examined anew and in its own context. (*Woodstock*, quoting *Washington Research Project, Inc. v. Department of Health, Education & Welfare*, 504 F.2d 238 (D.C. Cir.) 245-46)

The court concluded its opinion with the following:

A case by case application of the factors noted above is best suited to ensure that the general rule of disclosure underlying this state's FOIA is not undermined by nominal appellations which obscure functional realities... On the other hand, the criteria we have utilized should also ensure that a truly private entity would not be subject to disclosures which were unintended by our FOIA. (*Woodstock*, *supra* at 555-556)

### ***Humane Society (1991)***

In this case, a member of the public filed a complaint with FOIC that claimed the Connecticut Humane Society violated FOIA's meeting requirements (e.g., that it did not file a meeting schedule with the secretary of the state). FOIC ruled that the society was a public agency for FOIA purposes to the extent that it performed activities authorized by various state statutes. The Superior Court reversed this decision, ruling that (1) because the society did not receive government funding, it was not a public agency under FOIA, and (2) even if government funding is not essential for meeting the test's requirements, the society nonetheless was still not a public agency.

The Supreme Court agreed with FOIC that the trial court erred in concluding that government funding is an essential prong of the functional equivalence test. The court reiterated its holding in *Woodstock* that a functional equivalence determination requires "a balanced case-by-case consideration of various factors." It also held that all relevant factors should be considered cumulatively, and no single factor's presence or absence is determinative of the result (*Humane Society*, *supra* at 761).

However, the Supreme Court affirmed the determination that the Humane Society was not a public agency. The court noted that although the society was chartered by the legislature in 1881, it was

common practice at that time for the legislature to incorporate private institutions. Thus, the mere presence of this charter does not compel a conclusion that the society was a public agency.

Further, the court noted that although the society performed some governmental functions (e.g., certain law enforcement functions involving cruelty to animals), it was not required to do so by statute. Additionally, the court noted that the state played the predominant role in preventing the cruel and inhuman treatment of animals (*Id* at 764-65). Thus, the society did not perform a governmental function for purposes of the functional equivalent test.

## **Appellate Court Cases**

While the Supreme Court established the functional equivalent test and the requirement to consider each factor cumulatively, specific requirements associated with these factors were established primarily by the Appellate Court. Collectively, the three cases described below articulated standards for three of the four factors that courts and FOIC continue to apply today. (The Supreme Court's *Humane Society* decision is generally the most-cited case with respect to the fourth factor, creation by government.)

### ***Hallas v. Freedom of Information Commission (1989)***

In this case, the plaintiffs argued that a law firm, when acting as bond counsel for a municipality, was a public agency for FOIA purposes. They argued that (1) bond counsel are subject to numerous state and federal laws, and (2) these laws constitute the level of regulation necessary to meet the functional equivalent test's government regulation factor.

FOIC dismissed the complaint, and the trial court denied the plaintiffs' appeal. In affirming the trial court's decision, the Appellate Court agreed that the test's regulation prong applies to specific government regulation of an agency's function, not the general regulation of a profession. Further, to satisfy the regulation prong, there must be evidence of "direct, pervasive, continuous regulatory control" (*Hallas v. Freedom of Information Commission* (18 Conn. App. 291 (1989))).

The court also held that the functional equivalent test required that all four prongs be met. As noted above, however, the Supreme Court's *Humane Society* opinion in 1991 made clear that this interpretation was not correct.

### ***Domestic Violence Services of Greater New Haven, Inc. v. Freedom of Information Commission (1998)***

In this case, the plaintiff sought certain records from a nonprofit domestic violence services organization that received some government funding as a judicial branch subcontractor. FOIC concluded that the organization was a public agency for FOIA purposes, but the trial court reversed this decision, and the Appellate Court affirmed the reversal (*Domestic Violence Services of Greater New Haven, Inc. v. Freedom of Information Commission* 47 Conn. App. 466 (1998)).

With respect to the first prong, the Appellate Court held that although governmental functions included providing services to victims of domestic violence, performing these functions under a contract does not make an entity a public agency for FOIA purposes: "The key to determining whether an entity is a government agency or merely a contractor with the government is whether the government is really involved in the core of the program." Further, courts have held that an entity that is the functional equivalent of a public agency has the authority to govern, regulate, or make decisions affecting government. In this case, the entity had none of these powers and provided advocacy services to domestic violence victims only under its contractual obligation (*Id* at 475).

With respect to the level of government funding, the court similarly held that although the entity received a significant amount of public funding, it did so under contracts to provide certain services. Thus, the amount of funding an entity receives from the government, or even the proportion of an entity's budget funded by public sources, is not determinative of whether it meets the test's funding prong.

### ***Envirotest v. Freedom of Information Commission (2000)***

Envirotest Systems Corporation was a private company that the state contracted with to administer its motor vehicle emissions inspection program. After FOIC ruled that Envirotest was a public agency for FOIA purposes, the trial court reversed this determination, and the Appellate Court affirmed the reversal (*Envirotest v. Freedom of Information Commission*, 59 Conn. App. 753 (2000)).

With respect to the first and second prongs of the functional equivalent test, the court's analysis was similar to its analysis in the *Domestic Violence Services of Greater New Haven* case. Specifically, although Envirotest performed a governmental function and received millions of dollars in funding from the state, its performance and payment were by virtue of a contract. Thus, it met neither of the first two prongs.

The court's analysis of the third prong, extent of governmental involvement or regulation, highlights the need for "direct, pervasive, or continuous regulatory control" in order for this prong to be met. As the court noted, the Department of Motor Vehicles maintained offices at many of Envirotest's emissions testing stations and conducted periodic site visits to the remaining stations. However, the court found that this was to evaluate, rather than control, Envirotest's activities. It thus held that the third prong was not met because the government did not "control the day-to-day activity of the plaintiff's business."

## Test Factors

Table 1 below lists key aspects of each functional equivalent test factor, as articulated by the Appellate Court and Supreme Court.

**Table 1: Functional Equivalent Test Factors**

| <i>Factor</i>   | <i>Requirement</i>   | <i>Case</i>  |
|---|--|--|
| <b>Factor 1: Performance of a Governmental Function</b> | "Performing a government service pursuant to contract does not make an entity a public agency subject to [FOIA]."  | <i>Domestic Violence Services of Greater New Haven</i> |
|   | "The key to determining whether an entity is a government agency or merely a contractor with the government is whether the government is really involved in the core of the program."  | <i>Domestic Violence Services of Greater New Haven</i> |
|   | "While we agree that the plaintiff performs a governmental function in that it provides automobile emissions inspections for the public, we note that the plaintiff is not required to undertake this activity by statute... Therefore, while the plaintiff may perform a governmental function, it does so pursuant to its contractual relationship with the state and otherwise would have no obligation to provide emission inspections." | <i>Envirotest</i>                                      |
| <b>Factor 2: Level of Government Funding</b>            | "Although the plaintiff receives a significant amount of funding from various government sources, the funds are consideration for providing certain services to victims of family violence, as set forth in grants and contracts. Therefore, the second prong is not met."   | <i>Domestic Violence Services of Greater New Haven</i> |
|   | "The court found that the amount of money received by the plaintiff reflects the amount of business that is done pursuant to the contract and not an allotment of government funds. We agree with the court."  | <i>Envirotest</i>                                      |
|   | "In this case, as in <i>Domestic Violence Services of Greater New Haven, Inc.</i> , the payment made to the plaintiff was consideration for the services it provided pursuant to a contract for the administration of the emissions inspection program."   | <i>Envirotest</i>                                      |

**Table 1 (continued)**

| <i>Factor</i>   | <i>Requirement</i>   | <i>Case</i>           |
|---|--|-----------------------|
| <b>Factor 3: Extent of Government Involvement or Regulation</b> | "The record does not indicate that the department exerts direct, pervasive or continuous regulatory control over the plaintiff's business. The plaintiff is a private corporation doing business nationwide, and its employees are not government employees. The department maintains offices at many of the defendant's emissions stations and conducts periodic site visits to evaluate rather than control the plaintiff's activity."                                     | <i>Envirotest</i>     |
|   | "We conclude that [CGS] § 7-373 does not regulate the function of bond counsel. The mere mention of bond counsel in the statute does not rise to the level of government regulation found to satisfy the third facet of the test in... <i>Board of Trustees v. Freedom of Information Commission</i> ... Because bond counsel do not operate under direct, pervasive or continuous regulatory control, they do not constitute the functional equivalent of a public agency." | <i>Hallas</i>         |
| <b>Factor 4: Creation by Government</b>                         | "The mere presence of a government charter does not compel the conclusion that the society is a public agency."  | <i>Humane Society</i> |

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