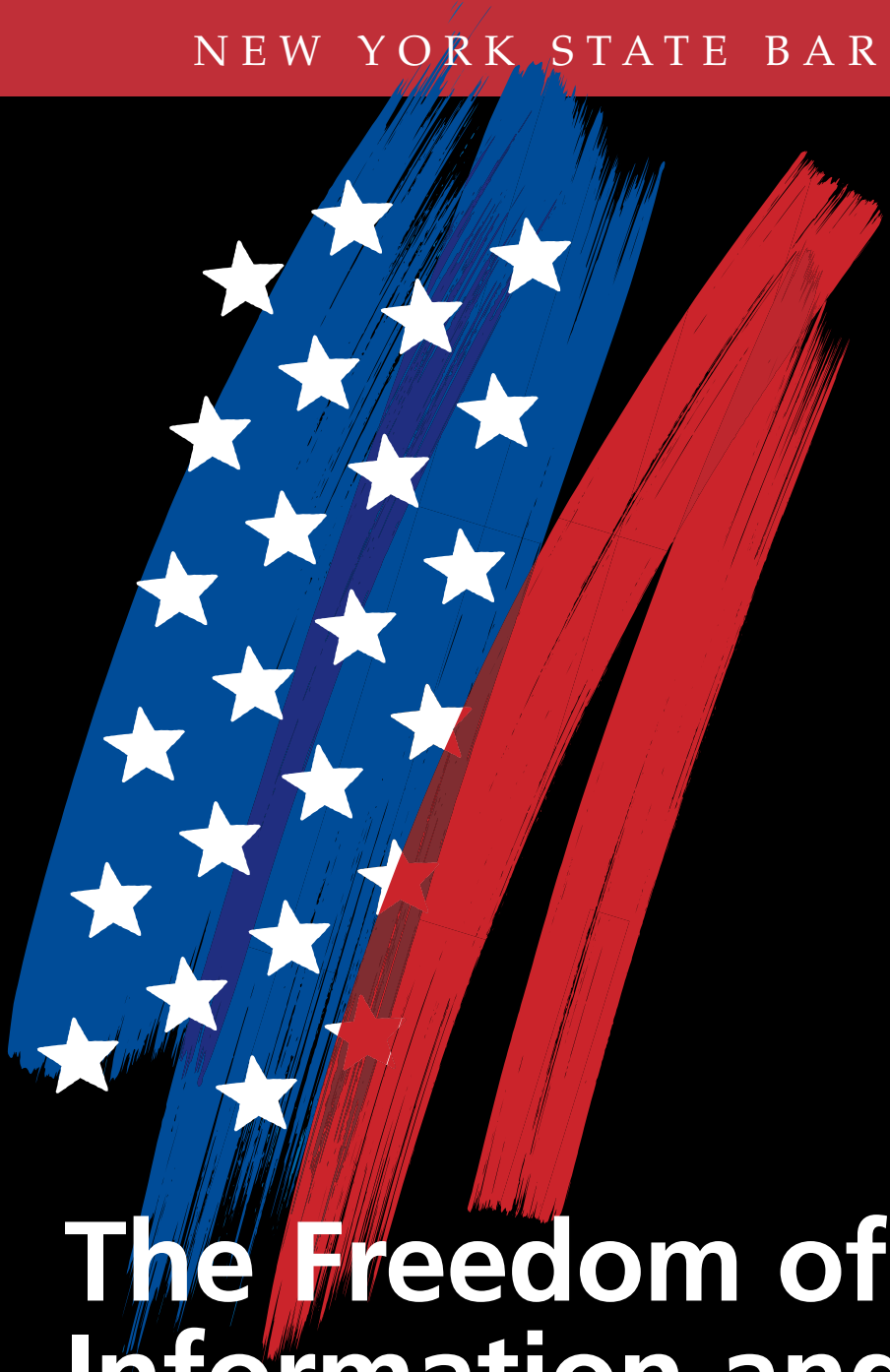

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The Freedom of Information and the Open Meetings Law CLE Program

NYSBA Co-Sponsors:

Committee on Continuing Legal Education

General Practice Section

Local & State Government Law Section

NYSBA

The Freedom of Information Act and the Open Meetings Law

Thursday, September 13, 2018
Albany

Friday, September 14, 2018
New York City

Program time is from 9:00 a.m. – 12:00 p.m. at all participating locations.

3.0 MCLE Credits: 2.5 Areas of Professional Practice; 0.5 Ethics

Sponsored by the General Practice Section, the Local and State Government Law Section, and the Committee on Continuing Legal Education of the New York State Bar Association

This program is offered for educational purposes.

The views and opinions of the faculty expressed during this program are those of the presenters and authors of the materials. Further, the statements made by the faculty during this program do not constitute legal advice.

Program Description

The New York State Bar Association is pleased to present The Freedom of Information Act and the Open Meetings Law. This popular, recurring program will review current hot topics and trends in the Freedom of Information and Open Meetings Laws, with a focus on recent statutory amendments and recent New York Court of Appeals decisions, and on issues relating to information technology. Ongoing, high-profile issues, such as dealing with a public body's "Executive Session," notice requirements, email and the generation or extraction of information maintained electronically, and grounds for denials of FOIL requests, will be addressed.

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The New York State Bar Association has issued a Preamble, Scope and Comments to accompany these Rules. They are not enacted with this Part, and where a conflict exists between a Rule and the Preamble, Scope or a Comment, the Rule controls.

This unofficial compilation of the Rules provided for informational purposes only. The official version of Part 1200 is published by the New York State Department of State. An unofficial on-line version is available at www.dos.ny.gov/info/nycrr.html (Title 22 [Judiciary]; Subtitle B Courts; Chapter IV Supreme Court; Subchapter E All Departments; Part 1200 Rules of Professional Conduct; § 1200.0 Rules of Professional Conduct).

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The Freedom of Information and the Open Meetings Law CLE Program

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Albany | Thursday, September 13 | New York State Bar Association | One Elk Street | Albany, NY 12207

New York City | Friday, September 14 | CFA Society New York | 1540 Broadway | Suite 1010 | New York, NY 10036

3.0 MCLE Credits: 2.5 Areas of Professional Practice; 0.5 Ethics

Sponsored by the General Practice Section, the Local and State Government Law Section, and the Committee on Continuing Legal Education of the New York State Bar Association.

Program Faculty

Anthony J. Fasano, Esq. | Guercio & Guercio, LLP | Farmingdale

Robert J. Freeman, Esq. | NYS Committee on Open Government | Albany

Cory H. Morris, Esq. | Law Office of Cory H. Morris | Huntington

www.nysba.org/FOIL2018

Agenda

8:30 a.m. - Registration

9:00 a.m. - Introductions

9:10 a.m. - **I. Freedom of Information Law**

- What is an Agency?
- What is a Record?

- Making Requests for Records
- Timelines for FOIL Responses
- Responding to FOIL Requests
- Fees for Production
- Preventing Abuse and Ethical Considerations in FOIL Requests
- Certification Requirements
- Exemptions

1.0 Areas of Professional Practice; 0.5 Ethics

10:25 a.m. Break

10:35 a.m. **II. Article 78 for FOIL**

- Burden of Proof
- Attorney's Fees
- No Reasonable Basis for Denial
- Substantially Prevailed

0.5 Areas of Professional Practice

11:00 a.m. **III. Open Meetings Law**

- Definition of a "Meeting"
- Noticing a Meeting
- Definition of a "Public Body"
- Executive Session
- Exemptions
- Minutes of a Meeting
- Enforcement Procedures

1.0 Areas of Professional Practice

11:50 a.m. Closing Remarks

12:00 p.m. Adjournment

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The Freedom of Information Act and the Open Meetings Law 2018

THE FREEDOM OF INFORMATION AND THE OPEN MEETINGS LAW

By: Anthony J. Fasano, Esq. / Guercio & Guercio, LLP / Farmingdale
Robert J. Freeman, Esq. / NYS Committee on Open Government / Albany
Cory H. Morris, Esq. / Law Offices of Cory H. Morris / Huntington

Thursday, September 13, 2018

New York State Bar Center
1 Elk Street
Albany, New York 12207

Friday, September 14, 2018

CFA Society of New York
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New York, New York 10036

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I. FREEDOM OF INFORMATION LAW

A. Basics

The Freedom of Information Law ("FOIL"), codified in Article 6 of the Public Officers Law, establishes a mechanism for the public to hold the government accountable (POL § 84).

FOIL affirms your right to know how your government operates. It provides rights of access to records reflective of governmental decisions and policies that affect the lives of every New Yorker. The law continues the existence of the Committee on Open Government, which was created by enactment of the original Freedom of Information Law in 1974.

FOIL is based on the principle that "[o]pen and accessible government is a hallmark of a free society, engendering public understanding and participation" (Russo v. Nassau Community College, 81 N.Y.2d 690, 697 [1993])). The courts have consistently recognized that" 'the public is vested with an inherent right to know and that official secrecy is anathematic to our form of government,' "(Capital Newspapers v. Whalen, 69 N.Y.2d 246, 252 [1987])(quoting Fink v. Lefkowitz, 47 N.Y.2d 567, 571 [1979]), and that the Legislature enacted FOIL to: "achieve[ ] a more informed electorate and a more responsible and responsive [government]" (Westchester Rockland Newspapers, Inc. v. Kimball, 50 N.Y.2d 575, 579 [1980])(in accord Buffalo News, Inc. v. Buffalo Enterprise Dev. Corp., 84 N.Y.2d 488, 492 [1994] ("to assure accountability and to thwart secrecy."]).

i. Agencies

All agencies are subject to the Freedom of Information Law, and FOIL defines "agency" to include all units of state and local government in New York State, including state agencies, public corporations and authorities, as well as any other governmental entities performing a governmental function for the state or for one or more units of local government in the state (POL §86(3)).

The term "agency" does not include the State Legislature or the courts. For purposes of clarity, "agency" will be used hereinafter to include all entities of government in New York, except the State Legislature and the courts.

A "fire company" is an "agency" subject to FOIL (FOIL-AO-19197).

A "housing authority" is an "agency" subject to FOIL (FOIL-AO-19195).

New York State Public High School Athletic Association is an "agency" subject to FOIL (FOIL-AO-19004)

Local municipalities, school districts, police, village fire departments, are subject to FOIL including the New York City Police Department.

The Port Authority is subject to neither FOIL nor FOIA (Ryan v. Port Authority of New York, Index No. 1354/2015 [Sup Ct, New York County 2015]). It does, however, have its own policies with respect to accessing records.

SUNY's Health Science Center is subject to FOIL (Citizens for Alternatives to Animal Labs, Inc. v Bd. of Trustees of State Univ. of New York, 92 NY2d 357, 359 [1998]).

The Nassau County Traffic and Parking Violations Agency, at least in part, is subject to FOIL (Law Offices of Cory H. Morris v. County of Nassau, 158 AD3d 630 [2d Dept 2018]).

Private investigator hired by an 18-B attorney in a criminal matter is not an agency subject to FOIL (McBride v. Franklin, 288 AD2d 130 [1st Dept 2001]).

Southern Tier Economic Development, Inc. ("STEAD") is not an agency subject to FOIL (Ervin v. Southern Tier Economic Development, Inc., 5 Misc3d 632 (Sup Ct, Chemung County 2004), aff'd 26 AD3d 633 [3d Dept 2006]). In affirming the lower court, the Third Department found:

> Respondent here was created by private business persons, has a nine-member board which is comprised of six private individuals and three ex officio government officials, none of whom exercise any financial control over respondent, the City does not control or oversee the management of First Arena and respondent does not hold itself out as an agent of the City or administer loan programs or disburse funds on behalf of the City. Lastly, EDA is a private company and the audit of its financial records was retained by respondent and has not been made a part of any public record. Thus, although respondent is performing a governmental function by fostering the economic development of the City, it is not an agency of the City for purposes of FOIL.

ii. What is a Record?

All records are subject to the FOIL, and the law defines "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 (POL § 86 [4]).

It is clear that items such as audio or visual recordings, data maintained electronically, and paper

records fall within the definition of "record."

An agency is not required to create a new record or provide information in response to questions to comply with the law; however, the courts have held that an agency must provide records in the form requested if it has the ability to do so. For instance, if the agency can transfer data into a requested format, the agency must do so upon payment of the proper fee.

As agencies progressively moved to maintain more and more information in electronic formats, however, the line between locating and retrieving an electronic record and creating an entirely new record comprising information maintained by the agency became increasingly blurred. The Court of Appeals addressed this issue in its 2007 decision in Matter of Data Tree, LLC v Romaine (9 NY3d 454 [2007]). In that case, the Court stated that "if [agency] records are maintained electronically . . . and are retrievable with reasonable effort, that agency is required to disclose the information." The Court reasoned that, "[i]n such a situation, the agency is merely retrieving the electronic data that it has already compiled and copying it onto another electronic medium." "A simple manipulation of the computer necessary to transfer existing records should not, if it does not involve significant time or expense, be treated as creation of a new document."

In the year after Matter of Data Tree was decided, the Legislature amended Public Officers Law (see L 2008, ch 223, § 6). The Legislature added provisions which stated that "[w]hen an agency has the ability to retrieve or extract a record or data maintained in a computer storage system with reasonable effort, it shall be required to do so." "Any programming necessary to retrieve a record maintained in a computer storage system and to transfer that record to the medium requested by a person or to allow the transferred record to be read or printed shall not be deemed to be the preparation or creation of a new record" (Weslowski v. Vanderhoef, 98 A.D.3d 1123, 1126 [2d Dept 2012]).

It is the nature of the public information that should determine whether or the extent to which it must be disclosed, not the ease or difficulty of obtaining the information (FOIL-AO-11176).

There is no requirement that a "record" "evince some governmental purpose" (Capital Newspapers, Div. of Hearst Corp. v. Whalen, 69 NY2d 246 [1987]).

A computer software application is not a record (Miller v. New York State Div. of Human Rights, 122 AD3d 431 [1st Dept 2014]).

Filmstrips used by a professor in a course given in a public college constitute records subject to FOIL (Russo v. Nassau County Comm. College, 81 NY2d 690 [1993]).

Videotaped news broadcasts retained by the District Attorney's office constituted a record under FOIL (Pennington v. Clark, 16 AD3d 1049 [4th Dept 2005]).

Personal or unofficial documents which are intermingled with official government files and are being “kept” or “held” by a governmental entity are “records” subject to possible disclosure (Capital Newspapers, Div. of Hearst Corp. v. Whalen, 69 NY2d 246 [1987]).

Physical evidence, namely “articles of clothing and alleged weapons”, does not fall within the statutory definition of a “record” that may be disclosed under the Freedom of Information Law (Sideri v Off. of Dist. Atty., New York County, 243 AD2d 423, 423 [1st Dept 1997]).

An agency is not required to create a record in response to a FOIL request (see, e.g., Weslowski v. Vanderhoef, 98 AD3d 1123, 1126 [2d Dept 2012]; NYCLU v. Nassau County Sheriff’s Dep’t, Index No. 7763/2015 [Sup. Ct., Nassau County 2015]; see also FOIL-AO-18795 [“FOIL pertains to existing records and states, in general, that an agency need not create a record in response to a request for information; it may choose to do so, but is not required to do so. Similarly, nothing in FOIL requires and agency to supply information in response to questions.”]). Although this may seem clear, agencies often inadvertently create a record in response to a FOIL request and do not realize it. Furthermore, with respect to electronic records, what constitutes a record is becoming more complex.

This is a common situation that frequently occurs in agencies: Applicant seeks a record in response to an issue. The Records Access Officer then sends several e-mails to individuals within the agency to see if there is a record that is responsive to the request. In the subsequent back-and-forth e-mails, a record (the e-mail response or another document) is now created that is responsive to the FOIL request. That request must be disclosed (absent an exemption).

iii. Requests for Records

An agency may ask you to make your request in writing. The law requires you to "reasonably describe" the record in which you are interested (POL § 89(3)(a)). Whether a request reasonably describes records often relates to the nature of an agency’s filing or recordkeeping system. If records are kept alphabetically, a request for records involving an event occurring on a certain date might not reasonably describe the records. Locating the records in that situation might involve a search for the needle in the haystack, and an agency is not required to engage in that degree of effort. The responsibility of identifying and locating records sought rests to an extent upon the agency. If possible, you should supply dates, titles, file designations, or any other information that will help agency staff to locate requested records, and it may be worthwhile to find out how an agency keeps the records of your interest (e.g., alphabetically, chronologically or by location) so that a proper request can be made.

An agency has to establish that “the descriptions were insufficient for purposes of locating and identifying the document sought.” Konigsberg v. Coughlin, 68 NY2d 245,249 (1986); see Bader v. Bove, 273 A.D.2d 466, 467, 710 N.Y.S.2d 379, 379 (2000); cf. Stein v. New York State Dep't of Transp., 25 A.D.3d 846, 848, 807 N.Y.S.2d 208, 210 (3d Dep't. 2006)("the administrative burden of reviewing this correspondence for relevance fails to establish that the request is

insufficiently descriptive.").

For instance, records were properly denied where "petitioner failed to provide dates of birth, addresses, or other identifiable information for these persons to distinguish their records from the records of other people." Roque v. Kings Cty. Dist. Attorney's Office, 12 A.D.3d 374, 375, 784 N.Y.S.2d 155, 156 (2d Dept 2004)

However, the request does not need to be as detailed as a discovery demand pursuant to the CPLR (Farbman & Sons v. New York City Health & Hosps. Corp, 62 NY2d 75, 82-83 [1984]). The CPLR objections of overbroad, unduly burdensome, use of any and all, etc, are not appropriate or are subject to different standards.

A request for information (e.g., asking a question) does not reasonably describe a record (Newman v. Dinallo, 69 AD3d 636 [2d Dept 2010]).

A request is overbroad, and therefore does not reasonably describe a record, when the request would require the agency to search over 500,000 records and the parameters set by the search would not allow the agency to meaningfully search those records (Asian Am. Legal Defense and Educ. Fund v New York City Police Dept., 125 AD3d 531 [1st Dept 2015]).

The failure by a requestor to reasonably describe the sought-after records is grounds for denial of the request (Kongsberg v. Coughlin, 68 NY2d 245, 251 [1986]).

“The petitioner failed to provide dates of birth, addresses, or other identifiable information for these persons to distinguish their records from the records of other people. Further, transcripts of court proceedings are not agency records, and are not subject to FOIL disclosure” (Roque v Kings County Dist. Attorney's Off., 12 AD3d 374, 375 [2d Dept 2004]).

Requests for “unusual occurrence addendums” and “scratch sheets” do not reasonably describe the records sought (Brown v. DiFiore, 139 AD3d 1048, 1050 [2d Dept 2016]).

The First Department recently upheld the denial of a FOIL request for “reasons of overbreadth.” The decisions states:

> Petitioners failed to meet their “burden . . . to reasonably describe the documents requested so that they can be located.” Parts of the request sought documents relating to NYPD intelligence operations concerning unreasonably broad categories, such as any New York City businesses “frequented” by Middle Eastern, South Asian, or Muslim persons. Respondents also submitted an affidavit of an NYPD intelligence expert noting that a complete response to the request would entail searching more than 500,000 documents which, though mostly electronic, are not necessarily searchable by ethnicity, race, or religion. Thus, NYPD met its burden to establish that some of the descriptions in

the FOIL request "were insufficient for purposes of locating and identifying the documents sought before denying a FOIL request for reasons of overbreadth"

(Asian Am. Legal Defense and Educ. Fund v New York City Police Dept., 125 AD3d 531 [1st Dept 2015])(external quotation marks omitted).

The law also provides that agencies must accept requests and transmit records requested via email when they have the ability to do so.

There is no specific format for making written requests, nor may agencies require one (FOIL-AO-16607). The use of an agency's form, however, may be beneficial for the requestor because it may be easier for the agency to process, may provide a set of directions for the request (e.g., where and how to send the request to the agency), and may allow you to get a faster response. For instance, New York City has a website that allows you to send FOIL requests to most of its agencies.

A sample FOIL request can be found on the Committee's website at:
https://www.dos.ny.gov/coog/Right_to_know.html#requestsample

The request should then be sent to the Records Access Officer. Under the Committee's regulations, each agency must appoint one or more persons as records access officer. The records access officer has the duty of coordinating an agency's response to public requests for records in a timely fashion. In addition, the records access officer is responsible for ensuring that agency personnel assist in identifying records sought, make the records promptly available or deny access in writing, provide copies of records or permit you to make copies, certifying that a copy is a true copy and, if the records cannot be found, certify either that the agency does not have possession of the requested records or that the agency does have the records, but they cannot be found after diligent search. The regulations also state that the public shall continue to have access to records through officials who have been authorized previously to make information available.

Practice Point: When making a request under FOIL, know what they have and know what you can get. Agencies are required to keep a "subject matter list" that outlines the lists of subjects or file categories under which records are kept. It is a useful tool to utilize in crafting your request. Also, have the legal research done for the types of records you are requesting and whether they are disclosable. This will assist you in crafting an appropriate FOIL request.

Know what you can and cannot get. If you are seeking multiple items, you may want to split your requests. You can have those clear cut items in one FOIL request, and then do a separate FOIL request for other items (i.e. your longshots). This will assist you if you end up seeking attorney's fees in determining whether or not you "substantially prevailed".

iv. Timelines for FOIL Responses

"[T]he FOIL statute creates a three-step process. An agency that initially denies a request is not required to specify a reason for the denial. Upon the second step, the administrative appeal, the agency is required to "fully explain in writing ... the reasons for further denial". The third step is a CPLR article 78 proceeding, in which the agency "shall have the burden of proving that such record falls within the provisions of" a statutory exception (Competitive Enter. Inst. v Attorney Gen. of New York, 161 AD3d 1283 [3d Dept 2018] [citations omitted]).

Initial Response

The timelines and obligations concerning the initial response from an agency are found in POL § 89(3)(a), and state:

> Each entity subject to the provisions of this article, within five business days of the receipt of a written request for a record reasonably described, shall make such record available to the person requesting it, deny such request in writing or furnish a written acknowledgement of the receipt of such request and a statement of the approximate date, which shall be reasonable under the circumstances of the request, when such request will be granted or denied, including, where appropriate, a statement that access to the record will be determined in accordance with subdivision five of this section.
>
> ***
>
> If an agency determines to grant a request in whole or in part, and if circumstances prevent disclosure to the person requesting the record or records within twenty business days from the date of the acknowledgement of the receipt of the request, the agency shall state, in writing, both the reason for the inability to grant the request within twenty business days and a date certain within a reasonable period, depending on the circumstances, when the request will be granted in whole or in part.

Thus, the first statutory requirement for the response is to set forth a response within five business days of the receipt of the written request. See POL § 89 (3)(a). The four types of responses are:

1. Grant the request and provide the records requested (should be done in writing);

2. Deny the request in writing (this one must be done in writing);

3. If more than five business days is needed, which is typically the case, acknowledge receipt of the request in writing within five business days and provide an approximate date within 20 business days of when the request will be granted or denied;

4. If more than five business days is needed and the agency cannot provide the records within 20 business days, the agency must acknowledge receipt of the request in writing and inform the applicant of the reason for the delay beyond 20 business days and provide a "date certain," a self-imposed deadline, indicating a promised date by which access will be granted in whole or in part. This date must be reasonable based on attendant facts and circumstances;

Oftentimes, the initial response will be a combination of these types. For example, you can grant in part and deny in part a request within the first five business days. Also, you can grant a portion of the request within five business days, and provide a further response within 20 business days. As FOIL Advisory Opinion 19372 states, however, "there is no provision in the statute for repeated extensions. The agency must, however, indicate the date by which it will respond, based on what is reasonable in consideration of attendant circumstances."

Extending Time to Respond

An agency must have a reasonable basis for not granting or denying access to a record within 20 business days of the date of acknowledgement of receipt. The Committee has provided factors to be used by agencies to assist in determining a reasonable time to provide access. As stated by the Committee in 21 NYCRR 1401.5(d):

> In determining a reasonable time for granting or denying a request under the circumstances of a request, agency personnel shall consider the volume of a request, the ease or difficulty in locating, retrieving or generating records, the complexity of the request, the need to review records to determine the extent to which they must be disclosed, the number of requests received by the agency, and similar factors that bear on an agency's ability to grant access to records promptly and within a reasonable time.

Id.

These factors, if applicable, must be provided in the agency's response extending its time to respond. For larger agencies, "the number of requests received by the agency" reason is often provided. For smaller agencies, finding and reviewing the requested records is typically the issue because of a limited staff. Do not be surprised, however, when an agency, regardless of its size, provides all of the above factors in its reasons for not being able to provide a response within 20 business days.

An important factor to consider when drafting your request is the "complexity of the request." If you need one record in particular by a set date, you may want to consider having that request separated from a request in which you are requesting multiple documents.

Agencies, however, may not continue to extend their time to respond indefinitely. Rather, their requests for extensions must also be "reasonable." Determining what is reasonable is always a case-by-case basis. The below caselaw outlines some differing views on this issue:

Seven months of extensions was found not to be constructively denied (Huseman v. NYC Dep't of Educ., Index No. 15109/2016, 2016 NY Slip Op 30959(U) [Sup Ct, NY County 2016])

"In the rare situation in which it is found that more than twenty additional business days are needed, the agency may do so, with an explanation of the reason for the delay and an indication of a 'date certain,' a self-imposed deadline by which it will grant access to the records in whole or in part" (FOIL-AO-18,008 [2010], citing 21 NYCRR § 1401.5). Notably, "[t]here is no provision that permits agencies to indicate extension after extension" (id. [emphasis added]). Such conduct is considered a constructive denial of access and may appropriately be appealed (id.).

v. Denial of Access and Appeal

Denial by Records Access Officer -

Unless a denial of a request occurs due to a failure to respond in a timely manner (i.e., constructive denial), a denial of access must be in writing, should state the reason for the denial and advising you of your right to appeal to the head or governing body of the agency or the person designated to determine appeals by the head or governing body of the agency. You may appeal within 30 days of a denial.

Denial by Appeals Officer -

Upon receipt of the appeal, the agency head, governing body or appeals officer has 10 business days to fully explain in writing the reasons for further denial of access or to provide access to the records. Copies of appeals and the determinations thereon must be sent by the agency to the Committee on Open Government (§89(4)(a)). A failure to determine an appeal within 10 business days of its receipt is considered a denial of the appeal.

An Article 78 is then utilized to appeal the agency's final decision (discussed later).

Practice Point: Agencies will (or at least should) have internal regulations outlining where appeals go to, and how they should be addressed. The internal regulations should always be reviewed prior to filing an appeal. Additionally, some internal regulations provide a shorter time span for an appeals officer to respond, which may mean an appeal is constructively denied sooner.

vi. Fees for Production

Copies of records must be made available on request. Except when a different fee is prescribed by statute (an act of the State Legislature), an agency may not charge for inspection, certification or search for records, or charge in excess of 25 cents per photocopy up to 9 by 14 inches (§87(1)(b)(iii)). Fees for copies of other records may be charged based upon the actual cost of reproduction. There may be no basis to charge for copies of records that are transmitted electronically; however, when requesting electronic data, there are occasions when the agency can charge for employee time spent preparing the electronic data.

When records are maintained electronically, an agency may charge a fee based on the "actual cost of reproduction," and §87(1)(c) provides that:

"In determining the actual cost of reproducing a record, an agency may include only:

1. An amount equal to the hourly salary attributed to the lowest paid agency employee who has the necessary skill required to prepare a copy of the requested record;

2. The actual cost of the storage devices or media provided to the person making the request in complying with such request;

3. The actual cost to the agency of engaging an outside professional service to prepare a copy of a record, but only when an agency's information technology equipment is inadequate to prepare a copy, if such service is used to prepare the copy; and

4. Preparing a copy shall not include search time or administrative costs, and no fee shall be charged unless at least two hours of agency employee time is needed to prepare a copy of the record requested. A person requesting a record shall be informed of the estimated cost of preparing a copy of the record if more than two hours of an agency employee's time is needed, or if an outside professional service would be retained to prepare a copy of the record."

Practice Tip: Rather than incur the charge of $0.25 per record, request that the records be scanned and e-mailed to you. Assuming the agency has the ability to do so, this will avoid the expense (FOIL-AO-18620).

vii. Preventing Abuse

Agencies are not without protection from those that file inappropriate requests pursuant to FOIL. Individuals need to ensure that their FOIL requests are not done to "harass, annoy or embarrass another." This is especially so for attorneys making FOIL requests, as they can and should be held to a higher standard.

The Second Department has upheld the injunction against a pro se applicant with respect to litigation relating to FOIL requests. In Robert v O'Meara, 28 AD3d 567, 568 (2d Dept 2006), the court held:

> Further, although public policy generally mandates free access to the courts (see Matter of Shreve v. Shreve, 229 A.D.2d 1005, 645 N.Y.S.2d 198; Sassower v. Signorelli, 99 A.D.2d 358, 359, 472 N.Y.S.2d 702), courts have imposed injunctions barring parties from commencing any further litigation where those parties have engaged in continuous and vexatious litigation (see Melnitzky v. Apple Bank for Sav., 19 A.D.3d 252, 797 N.Y.S.2d 470; Miller v. Lanzisera, 273 A.D.2d 866, 868, 709 N.Y.S.2d 286). Given the petitioner's past litigation history with the DOH, as well as with other State agencies, and

given his stated intention to continue filing FOIL requests, the Supreme Court properly issued such an injunction (see Harbas v. Gilmore, 244 A.D.2d 218, 219, 664 N.Y.S.2d 921).

Although not a FOIL case, a Queens County Supreme Court recently made a similar analysis in prohibiting further litigation. In Avezbakiyev v. Moulana, P.E., 2017 WL 2265451 (Sup Ct, Queens County Apr. 18, 2017), the court stated:

> Courts in this state have barred or restricted pro se litigants from further litigation where that party has engaged in continuous and vexatious litigation motivated by ill will or spite, and intended to harass, annoy or embarrass another. (see Scholar v Timinsky, 87 AD3d 577 [2d Dept 2011][affirming order enjoining pro se litigant from bringing further motions in the action without permission of the court]; Vogelgesang v Vogelgesang, 71 AD3d 1132, 1134 [2d Dept 2010][affirming order enjoining pro se litigant from filing further actions or motions without prior written approval]; Matter of Robert v O'Meara, 28 AD3d 567, 568 [2d Dept 2006][affirming order enjoining petitioner from commencing further actions or proceedings under Freedom of Information Law].
>
> These cases are especially important for attorneys who are submitting FOIL requests.

viii. Certification Where no Records Exist

"Upon payment of, or offer to pay, the fee prescribed therefor, the entity shall provide a copy of such record and certify to the correctness of such copy if so requested, or as the case may be, shall certify that it does not have possession of such record or that such record cannot be found after diligent search" (Pub. Off. Law § 89[3][a]).

Even if records are produced are known not to be accurate (e.g., scrivener's error on an internal memorandum), certification is still required (FOIL-AO-18781).

"The statute does not specify the manner in which an agency must certify that documents cannot be located. Neither a detailed description of the search nor a personal statement from the person who actually conducted the search is required. Here, the Department satisfied the certification requirement by averring that all responsive documents had been disclosed and that it had conducted a diligent search for the documents it could not locate" (Rattley v New York City Police Dept., 96 NY2d 873, 875 [2001]).

"[T]here is no legal authority to allow a petitioner or independent third party to conduct a search of an agency's records to locate responsive documents; indeed, such a search would be improper because it would inevitably permit the person to view agency records that were not responsive or that were exempt from disclosure" (Gartner v New York State Attorney Gen.'s Off., 160 AD3d 1087, 1089 [3d Dept 2018]).

The case of Legal Aid Soc. v. New York State Dep't of Corr. & Cmty. Supervision, 105 A.D.3d 1120, 1121-22 (3d Dept 2013), illustrates why it is important to always request a certification if no records exist. In that case, the petitioner was found to substantially prevail where the only relief it was provided was a certification after the commencement of litigation.

B. Statutory Exemptions

As a general matter, the Freedom of Information Law is based upon a presumption of access. Stated differently, all records of an agency are available, except to the extent that records or portions thereof fall within one or more grounds for denial appearing in §87(2) of the Law. These exemptions were the Legislature's recognition that certain records needed to remain withheld or confidential.

To ensure maximum access to government records, the 'exemptions are to be narrowly construed, with the burden resting on the agency to demonstrate that the requested material indeed qualifies for exemption' (Matter of Hanig v. State of New York Dept. of Motor Vehicles, 79 N.Y.2d 106, 109, 580 N.Y.S.2d 715, 588 N.E.2d 750 see, Public Officers Law § 89[4][b]). As this Court has stated, '[o]nly where the material requested falls squarely within the ambit of one of these statutory exemptions may disclosure be withheld' (Matter of Fink v. Lefkowitz, 47 N.Y.2d, 567, 571, 419 N.Y.S.2d 467, 393 N.E.2d 463)" (id., 275).

The general rule is that agencies are required to redact portions of a record to remove those portions of the record that are properly withheld. The Committee summarizes the requirement aptly:

> It cannot be overemphasized that the introductory language of §87(2) refers to the authority to withhold "records or portions thereof" that fall within the scope of the exceptions that follow. In my view, the phrase quoted in the preceding sentence evidences a recognition on the part of the Legislature that a single record or report, for example, might include portions that are available under the statute, as well as portions that might justifiably be withheld. That being so, I believe that it also imposes an obligation on an agency to review records sought, in their entirety, to determine which portions, if any, might properly be withheld or deleted prior to disclosing the remainder.

(FOIL-AO-16663). Thus, for example, if a portion of a record is properly exempted under one of the possible exemptions, then that portion should be redacted and the remainder of the record disclosed.

One case found that redactions were required to be done in a method that allowed the applicant to know what was actually being redacted: "Additionally, any material that needs to be redacted shall be done in the manner requested by petitioner, 'utilizing black marks, or other similar type of marking that is customarily used and can be seen on documents' "(Guercio & Guercio, LLP Index No. 9251/2015 [Sup Ct, Nassau County 2015]).

The use of a "Glomar" response is permissible under New York caselaw, but its use is analyzed on a case-by-case basis and appears to be limited (Abdur-Rashid v New York City Police Dept., 31 NY3d 217, 239 [2018] ["Under the circumstances presented here, where necessary to give full effect to the law enforcement and public safety statutory exemptions, the NYPD's response neither confirming nor denying the existence of the investigative or surveillance records sought is compatible with FOIL . . . ."]).

i. Records Exempted by Statute

Public Officers Law § 87(2)(a) exempts from disclosure those records that "are specifically exempted from disclosure by state or federal statute." This exemption generally requires that records be withheld in their entirety unless the statute only mandates the withholding of certain information contained in the record (See, e.g., MacKenzie v. Seiden, 106 A.D.3d 1140, 1143 [3d Dep't 2013] ["As such, if a document is protected by Civil Rights Law § 50–b, a state statute, it would be categorically excluded in its entirety and not subject to redaction or deletion."]).

The withholding must be done pursuant to state or federal statutes; local laws or regulations are not "statutes" that qualify (Morris v. Martin, 55 N.Y.2d 1026, 1028 [1982]; FOIL-AO-7609 [1993]), although local laws may be authorized by the Legislature, providing the requisite legal authority for the exemption (see Mitchell v. Borakove, 225 A.D.2d 435, 440 [1st Dep't 1996] [Tom, J. concurring] ["Accordingly, a city's power to adopt a new charter, or amend an existing one, has been codified by the Legislature."]).

There is no legal requirement that a statute expressly state that a record or portion thereof must be withheld. Instead, agencies may look to the legislative intent of a statute in determining whether the statute requires the withholding of certain records. However, there must be a "showing of clear legislative intent to establish" confidentiality of the records (Capital Newspapers Div. of Hearst Corp. v. Burns, 67 N.Y.2d 562, 567 [1986]). Stated differently, the "statute must be clear" (FOIL-AO-19187 [2014]).

Where a statute expressly provides that a record is exempted in its entirety, an agency may withhold a record in its entirety and is not required to redact portions of it (see, e.g., MacKenzie v Seiden, 128 AD3d 1291, 1292 [3d Dept 2015] ["Even if it were possible to redact the identifying information, this course of action is not appropriate given that such documents are categorically excluded from disclosure…."]). Interestingly, courts have begun expanding this precedent to cases where agencies had previously been required to redact: "For had it been considered an educational record [i.e. protected by FERPA], it would have been entirely exempt from disclosure under FOIL" (Jacobson v. Ithaca City Sch. Dist., 2016 WL 5719710 [Sup Ct, Tompkins County 2016]). This is oftentimes done as an incorrect expansion of the protections afforded under Civil Rights Law 50-b (discussed later).

County Law § 308(4) states that "Records, in whatever form they may be kept, of calls made to a

municipality's E911 system shall not be made available to or obtained by any entity or person, other than that municipality's public safety agency, another government agency or body, or a private entity or a person providing medical, ambulance or other emergency services, and shall not be utilized for any commercial purpose other than the provision of emergency services" (Newsday LLC v Nassau County Police Dept., 42 Misc 3d 1215(A) [Sup Ct 2014]).

Under Family Educational Rights and Privacy Act (FERPA), education records are defined as materials that contain information directly related to a student and are maintained by an educational agency or institution or by a person acting for such agency or institution; and FERPA forbids the release of education records, or personally identifiable information contained in the records of students without the written consent of their parents to any individual, agency, or organization. Friends of Playground 89 v. N.Y.C. Dept. of Educ., 2014 WL 1806450 (Sup Ct, New York County 2014).

Records may be protected by attorney-client privilege (CPLR 4503).

Certain records concerning investigations and prevention programs in hospitals (Pub. Health Law § 2805-m).

Public welfare records are protected by statute (Social Services Law § 136).

We conclude that, once electronic ballot images have been preserved in accordance with the procedures set forth in Election Law § 3–222(1), there is no statutory impediment to disclosure and they may be obtained through a FOIL request (Kosmider v Whitney, 160 AD3d 1151, 1151 [3d Dept 2018]).

a. Civil Rights Law 50-a

Civil Rights Law 50-a provides that "all personnel records used to evaluate performance toward continued employment or promotion" of police officers (and other types of peace officers and firefighters) "shall be considered confidential and not subject to inspection or review." The term "personnel records" is not defined by section 50-a. Rather, the statute simply says "that such records must be under the control of the particular agency or department and be used to evaluate performance toward continued employment or promotion" (Prisoners' Legal Services of New York v. New York State Dept. of Correctional Services, 73 N.Y.2d 26, 31 [1988]). The record does not actually have to be maintained in the employee's personnel file to be considered a personnel record (*id.*). "The threshold criterion, therefore, is whether the document is 'of significance to a superior in considering continued employment or promotion.' " (Luongo v.

Records Access Officer, Civilian Complaint Review Bd., 150 A.D.3d 13, 19 (1st Dep't 2017), lv to appeal denied, 30 N.Y.3d 908 (2017) (citing Prisoners' Legal Services of New York, 73 N.Y.2d at 32)).

Under FOIL, the individual making the request for the records has no bearing on whether disclosure is proper. Although the legislative history evinces the desire to prevent criminal defense attorneys from acquiring such records to possibly harass the protected employees, this was not the sole goal. Additionally, as the protections of section 50-a expanded to employees other than police officers (e.g., correctional officers and firefighters), this evidenced a legislative intent to shield these records from more than just criminal defense attorneys. This intent includes news-gathering organizations, which is consistent with general FOIL caselaw that does not consider the person making the FOIL request to be a factor in determining accessibility (Daily Gazette Co. v. City of Schenectady, 93 N.Y.2d 145, 154-59 [1999]), absent limited exceptions--the Court of Appeals in Daily Gazette left open the idea that an applicant's status and purpose could have some bearing "in determining the risk of oppressive utilization of the materials sought" (Id. at 159).

Nor does the specific purpose for the FOIL request have any bearing in determining whether section 50-a applies as an exemption. The Legislature sought to protect the potential use of the records to harass, embarrass, degrade, or impeach the protected employee or his/her family (Newsday, LLC v. Nassau County Police Dep't, 136 A.D.3d 828, 830 (2d Dep't 2016]). Whether litigation is currently pending against the protected employee is also of no consequence in determining whether the record is disclosable (Daily Gazette, 93 N.Y.2d at 156-57). However, a limited exception may apply if the disclosure was for a use "that would not undermine the protective legislative objectives" (id. at 159). The Court in Daily Gazette also suggested that redactions may be used to protect against attacks of the protected employees. And courts have subsequently upheld the disclosure of redacted personnel records. See, e.g., Cook v. Nassau County Police Dep't, 110 A.D.3d 718, 720 (2d Dep't 2013) ("That portion of the internal investigation report, as redacted, does not "contain any invidious implications capable facially of harassment or degradation of the officer in a courtroom" (quoting Daily Gazette Co., 93 N.Y.2d at 158)); New York Civ. Liberties Union v. New York City Police Dep't, 74 A.D.3d 632 (1st Dep't 2010).

Specific Case Examples

Records protected by this statute may be withheld in their entirety and do not need to be redacted. New York Civil Liberties Union v. New York City Police Dept., 148 AD3d 642 (1st Dept 2017).

A police officer's "Lost Time Report" is disclosable. Capital Newspapers Div. of Hearst Corp. v.

Burns, 67 N.Y.2d 562 (1986)

Inmates' grievances and agency decisions pertaining to a particular correction officer at Fishkill were deemed confidential and not disclosable. Prisoners' Legal Services of New York v. New York State Dept. of Correctional Services, 73 N.Y.2d 26 (1988).

Civilian complaints are protected. Luongo v. Records Access Officer, Civilian Complaint Review Bd., 150 A.D.3d 13 (1st Dep't 2017), lv to appeal denied 30 N.Y.3d 908 (2017).

The fact that NYPD disciplinary trials are open to the public does not remove the resulting decisions from the protective cloak of Civil Rights Law § 50-a. New York Civil Liberties Union v. New York City Police Dep't, 148 A.D.3d 642, 643 (1st Dep't 2017).

Complaints made to internal affairs were "clearly" confidential. Gannett Co. v. James, 86 A.D.2d 744 (4th Dept 1982), lv to appeal denied 56 N.Y.2d 502 (1982).

Unredacted "gun tags" do not constitute "personnel records" where the police chief's conclusory affidavit failed to show that they were used to "evaluate performance toward continued employment or promotion." Capital Newspapers Div. of Hearst Corp. v City of Albany, 15 N.Y.3d 759 (2010).

Police departments who investigate persons who are no longer their employees are not conducting investigations of "personnel" within the meaning of Civil Rights Law § 50–a (1). Hearst Corp. v. New York State Police, 132 A.D3d 1128 (3d Dep't 2015).

A police officer's personnel records continue to be exempt from disclosure after he or she departs from public service. Columbia-Greene Beauty Sch., Inc. v. City of Albany, 121 A.D.3d 1369 (3d Dept 2014).

Videotape footage of an incident between an inmate and a correctional officer was not protected. The court found the video to be a "mixed use material, meaning it could be used for several purposes including that of an officer(s) evaluation." Green v. Annucci, Index No. 2156/2017, 2017 WL 8229475 (Sup. Ct. Albany County 2017).

A settlement agreement involving an officer's separation from service that did not evaluate the officer's performance or contemplate his continued employment was disclosable under FOIL. Village of Brockport v. Calandra, 191 Misc.2d 718 (Sup. Ct. Monroe County 2002).

b. Civil Rights Law 50-b

Civil Rights Law 50-b makes certain records pertaining sex offense victims confidential. Specifically, the 50-b(1) states that the:

> identity of any victim of a sex offense, as defined in article one hundred thirty or section 255.25, 255.26 or 255.27 of the penal law, or of an offense involving the alleged transmission of the human immunodeficiency virus, shall be confidential. No report, paper, picture, photograph, court file or other documents, in the custody or possession of any public officer or employee, which identifies such a victim shall be made available for public inspection. No such public officer or employee shall disclose any portion of any police report, court file, or other document, which tends to identify such a victim except as provided in subdivision two of this section.

Although this is a broad exemption, it is not absolute. This statute "does not justify a blanket denial of a request for any documents relating to a sex crime. If a requested document does not contain information that tends to identify the victim of a sex crime, . . . the document must be disclosed" (*Mazza v. Village of Croton-on-Hudson*, 140 A.D.3d 878, 880 [2d Dep't 2016] [quoting *Fappiano v. New York City Police Dep't*, 95 N.Y.2d 738, 748 [2001]]). Conversely, any record that does contain "identifying information" is "categorically excluded in its entirety and not subject to redaction or deletion" (Id. at 880).

Civil Rights Law 50-b(2) provides a carve-out for certain types of information.

Courts have also held that the voluntary disclosure of such information by the victim constitutes a waiver of the right to non-disclosure under § 50-b (*Feeney v. City of New York*, 255 A.D.3d 483, 484 [2d Dep't 1998]). However, knowing the identity of the victim or knowing what may be contained in such records does not justify disclosure (Fappiano, 95 N.Y.2d at 748).

Putting aside the obvious need to keep such information confidential, agencies need to ensure to keep such information confidential as a private right of action does exist for violating 50-b. Civil Rights Law § 50-c states:

> If the identity of the victim of an offense defined in subdivision one of section fifty-b of this article is disclosed in violation of such section, any person injured by such disclosure may bring an action to recover damages suffered by reason of such wrongful disclosure. In any action brought under this section, the court may award reasonable attorney's fees to a prevailing plaintiff.

As such, FOIL requests made that may concern confidential information under § 50-b should be expected to be heavily contested by the agency.

Specific Case Examples

Petitioners who have already been convicted of a crime do not fall within § 50-b(2)(a)'s exception for those "charged" with the commission of an offense. Fappiano v. New York City Police Dep't, 95 N.Y.2d 738 (2001).

Where charges of rape were dropped prior to prosecution and the victim testified that she was not raped, the protections of § 50-b(1) were no longer available. Brown v. New York City Police Dep't, 264 A.D.2d 558 (1st Dep't 1999).

In-camera inspection should have been conducted to determine whether an entire case file was properly withheld pursuant to § 50-b(1). Mazza v. Village of Croton-on-Hudson, 140 A.D.3d 878 (2d Dep't 2016).

A FOIL request for copies of a bill of particulars, DD5s, and UF-61s was properly denied on the grounds that such records contained information protected by § 50-b(1). Velez v. Dennehy, 55 Misc.3d 1205(A) (Sup. Ct. Kings County 2017).

ii. Unwarranted Invasion of Personal Privacy

An agency may deny a record or portion thereof if disclosure would constitute an unwarranted invasion of privacy (POL 87[2][b]). Public Officers Law 89 (2)(b), however, defines what constitutes an unwarranted invasion of privacy, which is:

> An unwarranted invasion of personal privacy includes, but shall not be limited to:
>
> i. disclosure of employment, medical or credit histories or personal references of applicants for employment;
>
> ii. disclosure of items involving the medical or personal records of a client or patient in a medical facility;
>
> iii. sale or release of lists of names and addresses if such lists would be used for solicitation or fund-raising purposes;
>
> iv. disclosure of information of a personal nature when disclosure would result in economic or personal hardship to the subject party and such information is not relevant to the work of the agency requesting or maintaining it;
>
> v. disclosure of information of a personal nature reported in confidence to an agency and not relevant to the ordinary work of such agency;
>
> vi. information of a personal nature contained in a workers' compensation record, except

as provided by section one hundred ten-a of the workers' compensation law; or

vii. disclosure of electronic contact information, such as an e-mail address or a social network username, that has been collected from a taxpayer under section one hundred four of the real property tax law.

Where none of the delineated issues are present, courts determine whether disclosure would constitute an unwarranted invasion of personal privacy "by balancing the privacy interests at stake against the public interest in disclosure of the information," whether any invasion of privacy is unwarranted (Sell v. N.Y.C. Dept. of Educ., 135 AD3d 594, 595 [1st Dept 2016]).

The Court of Appeals has also held that a standard for determining when disclosure would constitute an unwarranted invasion of personal privacy involves the reasonable person of ordinary sensibilities, and whether a reasonable person would consider an item to be intimate or sensitive (FOIL-AO-17794).

Practitioners may find trouble FOILing their own clients' records due to this provision. To alleviate this issue, include with the FOIL request a signed release from the client. You may also seek signed releases from third parties when making a FOIL request.

Privacy and Public Employees and Personnel Files

It is emphasized that there is no exception for "personnel matters" in the Freedom of Information Law, and the term "personnel" appears nowhere in that statute. The nature and content of so-called personnel records may differ from one agency to another, and from one employee to another. In any case, neither the characterization of documents as "personnel records" nor their placement in personnel files would necessarily render those documents "confidential" or deniable under the Freedom of Information Law (see Steinmetz v. Board of Education, East Moriches, Sup. Ct., Suffolk Cty., NYLJ, Oct. 30, 1980). On the contrary, the contents of those documents serve as the relevant factors in determining the extent to which they are available or deniable under the Freedom of Information Law" (FOIL-AO-16530).

Based on judicial decisions, it is clear that public officers and employees enjoy a lesser degree of privacy than others, for it has been found in various contexts that those individuals are required to be more accountable than others. The courts have found that, as a general rule, records that are relevant to the performance of the official duties of a public officer or employee are available, for disclosure in such instances would result in a permissible rather than an unwarranted invasion of personal privacy. Conversely, to the extent that items relating to public officers or employees are irrelevant to the performance of their official duties, it has been found that disclosure would indeed constitute an unwarranted invasion of personal privacy" (*id.*).

Under the CPLR, an employee's personnel files may not be obtainable, at least not in its entirety (see, e.g., Pecile v. Titan Capital Group, LLC, 113 AD3d 526, 526-27 [1st Dept. 2014]; Gutierrez v. Trillium USA, LLC, 111 AD3d 669, 672 [2d Dept 2013]). However, this does not hold true under FOIL. You can FOIL a municipal employee's personnel file, even if you do not intend on commencing an action against the municipality. This is an advantage many practitioners overlook when demanding a public employee's personnel file through discovery.

Agencies will sometimes redact signatures from produced records and claim that such production would constitute an unwarranted invasion of privacy or have negative economic impact on the person who signed the document. Although signatures may be properly redacted under certain factual scenarios, those scenarios must be adequately supported. If not, then the signatures should be disclosed (Jaronczyk v Mangano, 121 AD3d 995, 996 [2d Dept 2014]).

iii. Impair present or imminent contract awards or collective bargaining negotiations

This exemption allows an agency to deny access to records which if disclosed would impair present or imminent contract awards or collective bargaining negotiations (POL 87[2][c]).

FOIL-AO-19286 - In the exception referenced above, §87(2)(c), the key word is "impair", and the question under that provision involves whether or the extent to which disclosure would "impair" the contracting process by diminishing the ability of the government to reach an optimal agreement on behalf of the taxpayers.

As we understand its application, §87(2)(c) generally encompasses situations in which an agency or a party to negotiations maintains records that have not been made available to others. For example, if an agency seeking bids or proposals has received a number of bids, but the deadline for their submission has not been reached, premature disclosure of those bids to another possible submitter might provide that person or firm with an unfair advantage vis a vis those who already submitted bids. Further, disclosure of the identities of bidders or the number of bidders might enable another potential bidder to tailor a bid in a manner that provides him with an unfair advantage in the bidding process. In such a situation, harm or "impairment" would likely be the result, and the records could justifiably be denied.

However, it was held that after the deadline for submission of bids or proposals has been reached and a contract has been awarded, "the successful bidder had no reasonable expectation of not having its bid open to the public"

FOIL-AO-18882 - As a general matter, it is our view that the purpose of §87(2)(c) in the context of collective bargaining is to avoid placing a government agency at a disadvantage when engaging in a negotiation process.

When both parties have the same records, the bargaining table is balanced, and neither party would benefit or be impaired via disclosure. On the other hand, when records are kept and known by only one party to the negotiations, the result would likely be different. If, for instance, an internal memo known only to agency officials detailed the agency's strategy in negotiations, disclosure to the other party to the negotiations would result in disadvantage to the agency and a cost that would likely be borne by taxpayers.

iv. Trade Secrets

This exemption allows an agency to withhold or redact records that "are [1] trade secrets or [2] are submitted to an agency by a commercial enterprise or derived from information obtained from a commercial enterprise and which if disclosed would cause substantial injury to the competitive position of the subject enterprise" (POL 87[2][d]).

This exemption needs to be split into two parts due to the words "substantial injury" appearing towards the latter part of the text. In the past, both sections of this statute required a substantial injury to be shown if records were disclosed (see, e.g., FOIL-AO-19237). However, the first part of the text--trade secrets--was later held to not require substantial injury to be shown (Verizon N.Y., Inc. v. New York State Pub. Serv. Comm, 137 A.D.3d 66, 72-73 [3d Dept. 2016]). The Committee took aim at the underlying supreme court decision in FOIL-AO-19221, which is worth a read.

In determining whether records are trade secrets, courts initially consider whether the material is "a formula, pattern, device or compilation of information" the commercial entity uses to its competitive advantage. Id at 72 (quoting *New York Telephone Co. v. Public Serv. Comm. Of the State of New York*, 52 N.Y.2d 213, 219 n.3 (1982)). If so, courts next consider various additional factors, including

> (1) the extent to which the information is known outside of [the] business; (2) the extent to which it is known by employees and others involved in [the] business; (3) the extent of measures taken by [the business] to guard the secrecy of the information; (4) the value of the information to [the business] and [its] competitors; (5) the amount of effort or money expended by [the business] in developing the information; [and] (6) the ease or difficulty with which the information could be properly acquired or duplicated by others.
>
> *Schroeder v. Pinterest Inc.*, 133 A.D.3d 12, 27 (1st Dep't 2015) (in commercial dispute involving alleged misappropriation of trade secrets; Crawford v New York City Dept. of Info. Tech., 2017 NY Slip Op 30982[U], 28 [Sup Ct, New York County 2017]).

v. Records Compiled for Law Enforcement Purposes

For this exception, the record must be compiled for law enforcement purpose and, if disclosed, would:

> i. interfere with law enforcement investigations or judicial proceedings;
>
> ii. deprive a person of a right to a fair trial or impartial adjudication;
>
> iii. identify a confidential source or disclose confidential information relating to a criminal investigation; or
>
> iv. reveal criminal investigative techniques or procedures, except routine techniques and procedures;

Not every document in a law enforcement agency's criminal case file is automatically exempt from disclosure simply because kept there. The agency must identify the generic kinds of documents for which the exemption is claimed, and the generic risks posed by disclosure of these categories of documents. Put slightly differently, the agency must still fulfill its burden under Public Officers Law § 89(4)(b) to articulate a factual basis for the exemption (Lesher v. Hynes, 19 NY3d 57 [2012]).

The agency claiming this exemption does not need to be a law enforcement agency (e.g., police department). Rather, the agency must be compiling the records for a "law enforcement purpose" (Madeiros v. New York State Educ. Dept., 30 N.Y.3d 67, 75 [2017]). As held by the Court of Appeals in Madeiros:

> To that end, "law enforcement" is generally defined by Black's Law Dictionary as "[t]he detection and punishment of violations of the law" (Black's Law Dictionary [10th ed. 2014], law enforcement). It is undisputed that the Department lacks jurisdiction to punish criminal violations of the law. However, as the dictionary further provides, the term "law enforcement" is "not limited to the enforcement of criminal laws" (Black's Law Dictionary [10th ed. 2014], law enforcement).

Thus, even the New York State Education Department may properly invoke this exemption.

Even assuming, arguendo, that the documents requested by petitioner under FOIL exist, including the requested "Confidential Informant(s) Sheet(s)" and "cooperative agreement(s)," we note that records concerning confidential informants and cooperation agreements are expressly exempted from disclosure under FOIL. (Cobado v Searles, 162 AD3d 1577 [4th Dept 2018]).

There is no blanket exemption for witness identifications and statements under the "confidential" prong (Friedman v Rice, 30 NY3d 461, 478 [2017]).

vi. Inter / Intra Agency

This exception exempts records that are inter-agency or intra-agency materials which are not:

i. statistical or factual tabulations or data;

ii. instructions to staff that affect the public;

iii. final agency policy or determinations;

iv. external audits, including but not limited to audits performed by the comptroller and the federal government.

Important note: "Inter" - between; among. "Intra" - on the inside; within.

"It is noted that the language quoted above contains what in effect is a double negative. While inter-agency or intra-agency materials may be withheld, portions of such materials consisting of statistical or factual information, instructions to staff that affect the public, final agency policy or determinations or external audits must be made available, unless a different ground for denial could appropriately be asserted." - These words are consistently found in COOG's advisory opinions concerning this exception.

The Court of Appeals has held that §87(2)(g) is intended to protect the "deliberative process". In its consideration of the matter, the Court found that:

> "the purpose underlying the intra-agency exemption, is 'to protect the deliberative process of the government by ensuring that persons in an advisory role [will] be able to express their opinions freely to agency decision makers' (Matter of Xerox Corp. v. Town of Webster, 65 NY2d 131, 132 [quoting Matter of Sea Crest Constr. Corp. v. Stubing, 82 AD2d 546, 549]). Consistent with this limited aim to safeguard internal government consultations and deliberations…" [Gould v. New York City, 89 NY2d 267, 276 (1996)].

i. statistical or factual tabulations or data;

"[f]actual data ... simply means objective information, in contrast to opinions, ideas, or advice exchanged as part of the consultative or deliberative process of government decision making" (The New York Times Co. v City of New York Fire Dept., 4 NY3d 477, 487 [2005]).

ii. instructions to staff that affect the public;

"There is little decisional law that deals directly with subparagraph (ii). Typically, agency guidelines, procedures, staff manuals and the like provide direction to an agency's employees regarding the means by which they must perform their duties. Some may be "internal", in that they deal solely with the relationship between an agency and its staff. Others may provide direction in terms of the manner in which staff performs its duties in relation to or that affects the public, which would ordinarily be accessible. To be distinguished would be advice, opinions or recommendations that may be accepted or rejected. An instruction to staff, a policy or a determination, each would represent a matter that is mandatory or directory in nature that would in our view be accessible pursuant to §87(2)(g)(ii)" (FOIL-AO-18986).

iii. final agency policy or determinations;

"An initial question is whether those portions deleted reflect a determination upon which the District relies, or merely opinions of the reviewers. If they are reflective of decisions, which appears to be so, I believe that they are accessible to the public, for subparagraph (iii) of §87(2)(g) requires the disclosure of final agency determinations. On the other hand, to the extent that the comments withheld reflect the opinions of the administrator and the other District employee, the redaction would, in my view, be consistent with law" (FOIL-AO-16486).

iv. external audits, including but not limited to audits performed by the comptroller and the federal government.

"Neither the legislative history nor the case law supports respondents' contention that the internal audit is wholly exempt from disclosure where such reports contain statistical or factual tabulations" (Gannett Co., Inc. v Rochester City School Dist., 179 Misc 2d 502, 506 [Sup Ct 1998], affd sub nom. Matter of Gannett Co., Inc. v Rochester City School Dist., 267 AD2d 964 [4th Dept 1999]).

Communications between an agency and a private official are not exempted under this exemption, although they may be protected under another exemption. For example, a petitioner sought "certain email messages sent from or received by any government email accounts assigned to the Office of the Mayor to or from Cathleen Black, at the time she was a nominee for the position of New York City School Chancellor." First Department held that inter-agency /

intra-agency exemption did not apply because, at that time, Ms. Black was still a private citizen (Hernandez v. Office of Mayor of City of New York, 100 A.D.3d 555 [1st Dep't. 2012]).

Materials prepared by outside consultants may be shielded from disclosure pursuant to the inter-agency or intra-agency exemption (*see, e.g.*, Xerox Corp. v Town of Webster, 65 NY2d 131, 133 [1985] ["In connection with their deliberative process agencies may at times require opinions and recommendations from outside consultants. It would make little sense to protect the deliberative process when such reports are prepared by agency employees yet deny this protection when reports are prepared for the same purpose by outside consultants retained by agencies. Accordingly, we hold that records may be considered 'intra-agency material' even though prepared by an outside consultant at the behest of an agency as part of the agency's deliberative process."]).

See also Tuck-It-Away Assoc., L.P. v Empire State Dev. Corp., 54 AD3d 154, 163 [1st Dept 2008], affd sub nom. W. Harlem Bus. Group v Empire State Dev. Corp., 13 NY3d 882 [2009] ["Thus, such communications lose their exemption if there is reason to believe that the consultant is communicating with the agency in its own interest or on behalf of another client whose interests might be affected by the agency action addressed by the consultant"]).

It is well settled that for communications between a governmental agency and an outside consultant to fall under the agency exemption, the outside consultant must be retained by the governmental agency (Rauh v de Blasio, 161 AD3d 120, 125 [1st Dept 2018]).

C. Article 78

An applicant may commence a proceeding to review an appeal officer's denial of a records request through an Article 78 proceeding (POL § 89[5][d]). There is a four-month statute of limitations to commence the action (CPLR 217[1]).

"It is well settled that the Statute of Limitations period does not begin to run until a petitioner receives notice of the final administrative determination, and not upon the issuance thereof. The burden of proving the applicability of the affirmative defense of statute of limitations rest upon the party asserting it, here the respondents. In the case at bar respondents make no effort to demonstrate when petitioner received the August 15, 2013, FOIL appeal determination" (Yuson v. Boll, Index No. 337/2014 [Sup Ct, Franklin County 2015]).

Venue is proper in the county where the agency is located (CPLR 506[b] ["A proceeding against a body or officer shall be commenced in any county within the judicial district where the respondent made the determination complained of or refused to perform the duty specifically enjoined upon him by law, or where the proceedings were brought or taken in the course of which the matter sought to be restrained originated, or where the material events otherwise took place, or where the principal office of the respondent is located . . . ."]).

i. Service

Service Upon the State CPLR 307

1. Personal service upon the state shall be made by delivering the summons to an assistant attorney-general at an office of the attorney-general or to the attorney-general within the state.

2. Personal service on a state officer sued solely in an official capacity or state agency, which shall be required to obtain personal jurisdiction over such an officer or agency, shall be made by (1) delivering the summons to such officer or to the chief executive officer of such agency or to a person designated by such chief executive officer to receive service, or (2) by mailing the summons by certified mail, return receipt requested, to such officer or to the chief executive officer of such agency, and by personal service upon the state in the manner provided by subdivision one of this section. Service by certified mail shall not be complete until the summons is received in a principal office of the agency and until personal service upon the state in the manner provided by subdivision one of this section is completed. For purposes of this subdivision, the term "principal office of the agency" shall mean the location at which the office of the chief executive officer of the agency is generally located. Service by certified mail shall not be effective unless the front of the envelope bears the legend "URGENT LEGAL MAIL" in capital letters. The chief executive officer of every such agency shall designate at least one person, in addition to himself or herself, to accept personal service on behalf of the agency. For purposes of this subdivision the term state agency shall be deemed to refer to any agency, board, bureau, commission, division, tribunal or other entity which constitutes the state for purposes of service under subdivision one of this section.

Personal Service upon a Corporation or Governmental Subdivision CPLR 311

(a) Personal service upon a corporation or governmental subdivision shall be made by delivering the summons as follows:

1. upon any domestic or foreign corporation, to an officer, director, managing or general agent, or cashier or assistant cashier or to any other agent authorized by appointment or by law to receive service. A business corporation may also be served pursuant to section three hundred six or three hundred seven of the business corporation law. A not-for-profit corporation may also be served pursuant to section three hundred six or three hundred seven of the not-for-profit corporation law;

2. upon the city of New York, to the corporation counsel or to any person designated to receive process in a writing filed in the office of the clerk of New York county;

3. upon any other city, to the mayor, comptroller, treasurer, counsel or clerk; or, if the city lacks such officers, to an officer performing a corresponding function under another name;

4. upon a county, to the chair or clerk of the board of supervisors, clerk, attorney or treasurer;

5. upon a town, to the supervisor or the clerk;

6. upon a village, to the mayor, clerk, or any trustee;

7. upon a school district, to a school officer, as defined in the education law; and

8. upon a park, sewage or other district, to the clerk, any trustee or any member of the board.

(b) If service upon a domestic or foreign corporation within the one hundred twenty days allowed by section three hundred six-b of this article is impracticable under paragraph one of subdivision (a) of this section or any other law, service upon the corporation may be made in such manner, and proof of service may take such form, as the court, upon motion without notice, directs.

CPLR 306-b requirements:

Service of the summons and complaint, summons with notice, third-party summons and complaint, or petition with a notice of petition or order to show cause shall be made within one hundred twenty days after the commencement of the action or proceeding, provided that in an action or proceeding, except a proceeding commenced under the election law, where the applicable statute of limitations is four months or less, service shall be made not later than fifteen days after the date on which the applicable statute of limitations expires. If service is not made upon a defendant within the time provided in this section, the court, upon motion, shall dismiss the action without prejudice as to that defendant, or upon good cause shown or in the interest of justice, extend the time for service.

Make sure to properly serve the Attorney General's office if the action is against a state agency: "In the case of a proceeding pursuant to this article against a state body or officers, or against members of a state body or officers whose terms have expired as authorized by subdivision (b) of section 7802 of this chapter, commenced either by order to show cause or notice of petition, in addition to the service thereof provided in this section, the order to show cause or notice of petition must be served upon the attorney general by delivery of such order or notice to an assistant attorney general at an office of the attorney general in the county in which venue of the proceeding is designated, or if there is no office of the attorney general within such county, at the office of the attorney general nearest such county" (CPLR 7804[c]).

ii. Burden

An Article 78 proceeding brought to compel the production of records is not subject to the standard "arbitrary and capricious" review (see, e.g., Prall v. New York City Dept. of

Corrections, 129 AD3d 734, 735 [2d Dept 2015] ["Thus, in this proceeding, the Supreme Court erred in applying the "arbitrary and capricious" standard."]).

Instead, the standard language utilized to discuss the burden and standard of review is as follows:

In a proceeding pursuant to CPLR article 78 to compel the production of material pursuant to FOIL, the agency denying access has the burden of demonstrating that the material requested falls within a statutory exemption, which exemptions are to be narrowly construed (see Public Officers Law § 89 [5] [e], [f]; Matter of West Harlem Bus. Group v Empire State Dev. Corp., 13 NY3d 882, 885 [2009]; Matter of Data Tree, LLC v Romaine, 9 NY3d 454, 462-463 [2007]). This showing requires the entity resisting disclosure to "articulate a 'particularized and specific justification for denying access' " (Matter of Dilworth v Westchester County Dept. of Correction, 93 AD3d 722, 724 [2d Dept 2012], quoting Matter of Capital Newspapers Div. of Hearst Corp. v Burns, 67 NY2d 562, 566 [1986]). "Conclusory assertions that certain records fall within a statutory exemption are not sufficient; evidentiary support is needed" (Matter of Dilworth, 93 AD3d at 724). Because FOIL is "based on a presumption of access to the records" (Matter of Data Tree, LLC v Romaine, 9 NY3d at 462), "FOIL 'compels disclosure, not concealment' " wherever the agency fails to demonstrate that a statutory exemption applies (id. at 463, quoting Matter of Westchester Rockland Newspapers v Kimball, 50 NY2d 575, 580 [1980]; see Matter of Buffalo News v Buffalo Enter. Dev. Corp., 84 NY2d 488, 492 [1994]).

The Third Department, in Aurigemma v New York State Dept. of Taxation and Fin., 128 AD3d 1235, 1238–39 (3d Dept 2015), provided an often-overlooked aspect of an agency's burden:

Respondents bore two separate burdens in this matter: first, to articulate "a particularized and specific justification for denying access" to the requested documents at the administrative level (Matter of MacKenzie v. Seiden, 106 A.D.3d at 1141, 964 N.Y.S.2d 702 [internal quotation marks and citations omitted]) and, second, in the context of the ensuing CPLR article 78 proceeding, to serve an answer containing "pertinent and material facts showing the grounds of [their] action[s]" (CPLR 7804[d]). In our view, merely attaching the privilege log to the records appeal officer's affidavit—without any corresponding reference to the cited exemptions or any explanation as to the manner in which such exemptions apply to the documents at issue—does not satisfy either of those burdens. As a result, neither of the alternative grounds relied upon by respondents will be considered by this Court. Respondents' remaining contentions, to the extent not specifically addressed, have been examined and found to be lacking in merit.

The Third Department, however, is not always consistent with this notion, as noted in Mazzone v New York State Dept. of Transp., 95 AD3d 1423, 1425 (3d Dept 2012):

Next, petitioner claims that it was respondent's burden to establish that these documents were exempt from disclosure, and that this burden was not satisfied by simply submitting these materials to Supreme Court for an in camera inspection. When an agency claims that a record is exempt from disclosure, it must establish "that the material requested falls squarely within the

ambit of one of these statutory exemptions." An agency is required to provide " 'a full written explanation of the reasons for denying access to a record,' " and may satisfy its burden by submitting " 'the records in question for in camera inspection by the court.' "

Agencies must support their reasons for denials with first-hand information (not just attorney affirmations in opposition).

However, an agency is not required to discuss and go into detail over every document withheld. Instead, discussing the generic kinds of documents withheld will usually be sufficient (Matter of Lesher v. Hynes, 19 NY3d 57, 67 [2012] ["The agency must identify the generic kinds of documents for which the exemption is claimed, and the generic risks posed by disclosure of these categories of documents. Put slightly differently, the agency must still fulfill its burden under Public Officers Law § 89 (4) (b) to articulate a factual basis for the exemption."]). Nevertheless, this is a fine line to walk, and agencies run into problems when they do not provide sufficient details about the withheld records and simply rely on conclusory allegations (Dekom v. Waag, Index No. 14484/2012 [Sup Ct, Nassau County Feb. 19, 2013] ["The respondents' broad and unsubstantiated conclusion that most of the emails found in its search are exempt fails to satisfy the burden required to be met for nondisclosure under FOIL, thus necessitating an in camera inspection by this court."]).

Intent of FOIL (Useful for Introductory Paragraph in MOL)

The legislative declaration section of FOIL announces New York's public policy that "a free society is maintained when government is responsive and responsible to the public, and when the public is aware of governmental actions ... [T]he public, individually and collectively and represented by a free press, should have access to the records of government in accordance with the provisions of [FOIL]." Public Officers Law § 84. FOIL "proceeds under the premise that the public is vested with an inherent right to know and that official secrecy is anathematic to our form of government." *Matter of Fink v. Lefkowitz,* 47 N.Y.2d 567, 571, 419 N.Y.S.2d 467, 393 N.E.2d 463 (1979). This Court must bear in mind that "FOIL is to be liberally construed and its exemptions narrowly interpreted so that the public is granted maximum access to the records of government." *Matter of Capital Newspapers, Div. of Hearst Corp. v. Whalen,* 69 N.Y.2d 246, 252, 513 N.Y.S.2d 367, 505 N.E.2d 932 (1987).

New York Times Co. v New York State Exec. Chamber, 56 NYS3d 821, 825–26 [Sup Ct 2017]

iii. Attorney's Fees

With the December 13, 2017, amendment to Public Officers Law § 89, attorney's fees under FOIL have become markedly easier to obtain. The amended statute states, in pertinent part:

The court in such a proceeding:

(i) may assess, against such agency involved, reasonable attorney's fees and other litigation costs reasonably incurred by such person in any case under the provisions of this section in which such person has substantially prevailed, and when the agency failed to respond to a request or appeal within the statutory time;

and (ii) shall assess, against such agency involved, reasonable attorney's fees and other litigation costs reasonably incurred by such person in any case under the provisions of this section in which such person has substantially prevailed and the court finds that the agency had no reasonable basis for denying access.

The First Department appears to be the first court to issue a published opinion under the new law (Rauh v de Blasio, 161 AD3d 120, 126 [1st Dept 2018]).

In the prior version, a court had discretion to award attorney's fees under both prongs. However, the most recent amendment now requires a court to award attorney's fees in the second prong. This is a prime example of why applicants need to outline in detail the reasons for their entitlement to records in the underlying FOIL appeal. It is harder for an agency to say that it had a "reasonable basis" to deny a FOIL request when it was presented with caselaw during the administrative appeal that plainly stated otherwise.

The award of attorney's fees is intended to " 'create a clear deterrent to unreasonable delays and denials of access [and thereby] encourage every unit of government to make a good faith effort to comply with the requirements of FOIL' " (S. Shore Press, Inc. v Havemeyer, 136 AD3d 929, 931 [2d Dept 2016])

Moreover, an award of an attorney's fee and costs pursuant to FOIL is particularly appropriate to promote the purpose of and policy behind FOIL. Specifically, in enacting FOIL, the legislature declared that "government is the public's business" and expressly found that "a free society is maintained when government is responsive and responsible to the public, and when the public is

aware of governmental actions" (S. Shore Press, Inc. v Havemeyer, 136 AD3d 929, 931 [2d Dept 2016]).

In determining whether to exercise their discretionary authority to award attorney's fees, courts look to several factors. These factors primarily relate to the parties' conduct during the administrative process (see, e.g., Competitive Enter. Inst. v Atty. Gen. of New York, 56 Misc 3d 569, 571–72 [Sup Ct, Albany County 2017] [Instead, in the Court's view, respondent stonewalled, and as noted in the November 2016 Decision and Order baldly "asserted that the records fell within 'one or more' of five possible exemptions ... (and completely failed) its obligation to 'fully explain in writing ... the reason for the denial of access' "]; Gonsalves v. Nassau County, Index No. 3442/2017 [Sup Ct, Nassau County 2017] [denying attorney's fees where the agency made a "good faith" effort]; Urac Corp. v Pub. Serv. Com'n of State of N.Y., 223 AD2d 906, 908 [3d Dept 1996] ["Nevertheless, even assuming that petitioner has satisfied all three of these criteria, we conclude that in light of evidence of confusion and possible misunderstanding involved in the Department's efforts to comply with petitioner's request, Supreme Court did not abuse its discretion in denying petitioner's request for counsel fees."]).

Additional factors courts look to prior to exercising discretion is the reasonableness of the agency in withholding the sought-after records, and the length of the delay in providing the appropriate statutory responses (see, e.g., Matter of Mineo v. New York State Police, 119 AD3d 1140, 1142 [3d Dept 2014]).

In determining whether attorney's fees are "reasonable," courts look to multiple factors, including:

1. the time, effort, and skill required;

2. the difficulty of the questions presented;

3. the responsibility involved;

4. counsel's experience, ability, and reputation;

5. the fee customarily charged in the locality; and

6. the contingency or certainty of compensation.

Competitive Enter. Inst. v Atty. Gen. of New York, 56 Misc 3d 569, 571–72 [Sup Ct, Albany County 2017], quoting Shrauger v. Shrauger, 146 AD2d 955, 956 [3d Dept 1989]). An additional factor to consider is the result obtained (Lee Enters., Inc. v. City of Glen Falls, 55 Misc3d 1207(A), *2 [Sup Ct, Warren County 2017]).

Courts will generally cap an attorney's hourly rate depending on the locality (Lee Enters., Inc. v. City of Glen Falls, 55 Misc3d 1207(A), *2 [Sup Ct, Warren County 2017] [finding the demanded hourly rate to be "excessive for this locality"]). However, courts have allowed attorneys to bill at their normal rates under particular circumstances (Competitive Enter. Inst. v Atty. Gen. of New York, 56 Misc 3d 569, 571–72 [Sup Ct, Albany County 2017] ["On this record, and particularly towards encouraging respondent to make a good faith effort in complying with FOIL, the court declines respondent's request to reduce an already discounted hourly rate. Any less would be counterproductive and unreasonable under the circumstances."]).

These two cases provide a great discussion of what courts look to when deciding how much to award and what to award it for. However, many practitioners cite to cases analyzing attorney's fees under other statutes in FOIL proceedings.

iv. No Reasonable Basis

This is often a subjective analysis by the court. A review of the underlying record here is crucial in making a determination as to whether the agency's actions were reasonable. For FOIL applicants who intend to utilize this prong for attorney's fees, it is important to build the record that the agency is not being reasonable. This is oftentimes done by supplying the agency with caselaw that refutes their positions or by securing an advisory opinion by the Committee. It is hard for an agency to claim that it is being reasonable, for example, when the Committee provides an advisory opinion to the contrary.

In analyzing whether an agency had a "reasonable basis" for denying access to records, a review of caselaw is best:

However, aside from those very limited exceptions, the Village Manager had no reasonable basis for denying access to any other materials "relating to depositions and supporting subpoena material from" (Rec. Ex. 1) litigations which were settled pursuant to the SCJ—including, but not limited to, the balance of the Rosenshein Deps which were submitted for in camera inspection and, to the extent they were in the Village's possession, the transcripts of the deposition of Bernard J. Rosenshein which was noticed by MBYC and any materials which were produced in response to the Taylor Point Subpoena (McCrory v Vil. of Mamaroneck, 34 Misc 3d 603, 629–30 [Sup Ct 2011]).

Upon our review of this record, we cannot say that it was reasonable for respondents to issue a blanket denial of petitioner's document request. The argument that there was a reasonable basis to believe that the records were exempt from disclosure is belied by the virtually immediate release of the requested information upon commencement of this proceeding. Furthermore, our independent review of the records reveals that, at most, respondents could have reasonably believed that a small portion of the records were exempt. However, respondents have failed to

articulate any persuasive reason why the records could not have been redacted and the portions that were not exempt from disclosure turned over (New York State Defs. Ass'n v New York State Police, 87 AD3d 193, 197 [3d Dept 2011]).

The Court denies this branch of petitioners' application. While petitioners have substantially prevailed in this matter, the Court is not persuaded that respondents lacked a reasonable basis for their actions. The bulk of the relief accorded to petitioners comes not from a determination that OSC erred in rejecting the "substitute key" approach advocated for by petitioners, but from the Court's conclusion that the written record does not support the agency's interpretation of the FOIL request as requiring the production of the requested data in its most useful form (Hearst Corp. v State, Off. of State Comptroller, 24 Misc 3d 611, 632 [Sup Ct 2009]).

While the Court has found that the records should be provided, the Chambers' reasons for withholding the records are, at least, arguable (New York Times Co. v New York State Exec. Chamber, 56 NYS3d 821, 836 [Sup Ct 2017]).

v. Substantially Prevailed

There is no clear definition to the term "substantially prevailed" under FOIL. Clearly, a party has substantially prevailed when it receives all or most of the relief that it was seeking. However, when it does not receive all of the relief requested, what percentage of relief provided to relief sought qualifies as substantial? Is a percentage of documents received over denied even an appropriate way to analyze whether one has substantially prevailed?

The best way to examine this inquiry is also through a review of caselaw.

Saxton v New York State Dept. of Taxation and Fin., 107 AD3d 1104, 1105 [3d Dept 2013]

With respect to the request for counsel fees, we find no basis to disturb Supreme Court's conclusion that, having secured the disclosure of only three additional documents out of the 18 sought, petitioners did not substantially prevail.

Henry Schein, Inc. v Eristoff, 35 AD3d 1124, 1126 [3d Dept 2006]

Further, the court's decision to order the release of 17 pages of the remaining 181 pages in dispute does not, in our view, necessarily indicate that petitioner "substantially prevailed" in the dispute.

Grabell v New York City Police Dept., 47 Misc 3d 203, 216 (Sup Ct, New York County 2014), aff'd as modified 139 AD3d 477 (1st Dept 2016) – the First Department found the petitioner did not substantially prevail after it reduced the records that the petitioner was entitled to.

Here, the NYPD denied petitioner's request in toto, and inasmuch as the court is ordering the NYPD to provide petitioner with at least redacted versions of documents responsive to four of the five requests in connection with which the NYPD acknowledges that it has documents, petitioner has "substantially prevailed." While the NYPD may have had a reasonable basis for withholding some of the documents that are responsive to petitioner's first five requests, it had no reasonable basis for withholding them all, or for failing to provide some of them in redacted form.

Madeiros v New York State Educ. Dept., 30 NY3d 67, 79 (2017)

Here, the Appellate Division concluded that the statutory requirement that petitioner "substantially prevail" was not met because the "majority of the [Department's] challenged redactions were appropriate." However, this analysis fails to take into account that the Department made no disclosures, redacted or otherwise, prior to petitioner's commencement of this CPLR article 78 proceeding. Although the Department's redactions in the eventually-released records have been upheld, petitioner's legal action ultimately succeeded in obtaining substantial unredacted post-commencement disclosure responsive to her FOIL request—including both disclosure that was volunteered by the agency and disclosure that was compelled by Supreme Court's order.

Under these circumstances, petitioner substantially prevailed within the meaning of Public Officers Law § 89 (4) (c) and the Appellate Division erred in determining that petitioner failed to meet the statutory prerequisites for an award of attorneys' fees. Indeed, to conclude otherwise would be to permit agencies to circumvent section 89 (4) (c) because "only a petitioner who fully litigated a matter to a successful conclusion could ever expect an award of counsel fees and a respondent whose position was meritless need never be concerned about the possible imposition of such an award so long as they ultimately settled a matter—however dilatorily."

Kalish v. City of New York, 2009 WL 2844530 (Sup Ct, Queens County 2009)

A party has "substantially prevailed" in a FOIL proceeding where the initiation of the proceeding brought about the release of the requested documents.

Bottom v Fischer, 129 AD3d 1604, 1605 (4th Dept 2015)

Inasmuch as respondent ultimately provided all but one of the documents in the FOIL request, petitioner "substantially prevailed" within the meaning of the statute

Cook v Nassau County Police Dept., 140 AD3d 1059, 1060 (2d Dept 2016)

Here, the record does not support the Supreme Court's finding that the petitioner “substantially prevailed” in this proceeding. Although the NCPD was eventually ordered to disclose certain records, its claims of exemptions were largely sustained

William J. Kline and Son, Inc. v Fallows, 124 Misc 2d 701, 705 [Sup Ct, Montgomery County 1984]

Whether a party has substantially prevailed is to be determined by looking at the situation prior to the commencement of suit, the situation as it presently exists, and the effect the litigation had, if any, in bringing about the change.

Tuf Racing Products, Inc. v Am. Suzuki Motor Corp., 94 C 50392, 1999 WL 669226, at *1 [ND Ill Aug. 27, 1999], affd, 223 F3d 585 [7th Cir 2000]

A plaintiff is considered a prevailing party in the context of a fee-shifting statute if he succeeds on any significant issue which brings him some benefit sought. . . . The court finds that Tuf Racing is entitled to attorney's fees and costs because it substantially prevailed in this action.

The case of Legal Aid Soc. v. New York State Dep't of Corr. & Cmty. Supervision, 105 A.D.3d 1120, 1121-22 (3d Dept 2013), illustrates why it is important to always request a certification if no records exist. In that case, the petitioner was found to substantially prevail where the only relief it was provided was a certification after the commencement of litigation.

II. OPEN MEETINGS LAW

A. Legislative Declaration

It is essential to the maintenance of a democratic society that the public business be performed in an open and public manner and that the citizens of this state be fully aware of and able to observe the performance of public officials and attend and listen to the deliberations and decisions that go into the making of public policy. The people must be able to remain informed if they are to retain control over those who are their public servants. It is the only climate under which the commonweal will prosper and enable the governmental process to operate for the benefit of those who created it (POL § 100).

B. Definition of "Meeting"

POL 102(1) defines a "meeting" as: the official convening of a public body for the purpose of conducting public business, including the use of videoconferencing for attendance and participation by the members of the public body.

The term has been expansively interpreted by courts. Any time a quorum of a public body gathers for the purpose of discussing public business, the meeting must be convened open to the public, whether or not there is intent to take action, and regardless of the manner in which the gathering may be characterized.

A public body, however, is permitted to conduct "retreats" wherein no official business is discussed. A retreat allows a public body to participate in team building, and improve interpersonal relations (OML-AO-4762).

A public body that meets by chance, socially, or some other "casual encounter," and absent an intent to conduct public business, no meeting has taken place (OML-AO-4534).

No meeting took place where revisions to a document were based upon discussions between members of a public body individually and the body's counsel, and no quorum of the public body was present at the time of these discussions (Gedney Ass'n v. City of White Plains, 147 A.D.3d 938, 939 [2d Dept 2017]).

Meetings of a public body may take place outside of the boundaries of that public body where there is no law, regulation, or policy to the contrary (Petersen v. Incorporated Village of Saltaire, 77 A.D.3d 954, 956 [2d Dept 2010]).

Scheduling a meeting at 7:30 a.m. is considered "questionable" as it would likely prevent many people from attending (OML-AO-5280 [citing Matter of Goetchius v. Board of Education, Supreme Court, Westchester County, New York Law Journal, August 8, 1996]).

The public meeting May 19, 2015, was open to the public. The Open Meetings Law requires an opportunity for the public to participate only by observing and listening to the proceedings, not by speaking at the meeting as petitioners contend (Jacobs v New York City Landmarks Preserv. Commn., 59 Misc 3d 1223(A) [Sup Ct 2017]).

C. Notice of Meeting

For meetings of public bodies scheduled at least one week prior to the actual meeting, notice "shall be given or electronically transmitted to the news media and shall be conspicuously posted in one or more designated public locations at least seventy-two hours before such meeting" (POL 104[1]).

For meetings with less than one week's notice, notice of the time and place "shall be given or electronically transmitted, to the extent practicable, to the news media and shall be conspicuously posted in one or more designated public locations at a reasonable time prior thereto" (POL 104[2]).

These notice requirements do not require the same level of publication as a legal notice (POL 104[3]).

If a meeting will be streamed live over the internet, the public notice for the meeting shall inform the public of the internet address of the website streaming such meeting (POL 104 [5]).

When a public body has the ability to do so, notice of the time and place of a meeting given in accordance with subdivision one or two of this section, shall also be conspicuously posted on the public body's internet website (POL 104[6]).

If videoconferencing is used to conduct a meeting, the public notice for the meeting shall inform the public that videoconferencing will be used, identify the locations for the meeting, and state that the public has the right to attend the meeting at any of the locations (POL 104[4]).

Agency records subject to 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 post such records to the agency's website to the extent practicable as determined by the agency prior to the meeting (POL 103[e]). This only applies to agencies that maintain "a regularly and routinely updated website and utilizes a high speed internet connection" (id.), which presumably is the majority of agencies.

D. Definition of "Public Body"

"Public body" means any entity, for which a quorum is required in order to conduct public business and which consists of two or more members, performing a governmental function for the state or for an agency or department thereof, or for a public corporation as defined in section sixty-six of the general construction law, or committee or subcommittee or other similar body of such public body (POL 102[2]).

The seminal case of Smith v City Univ. of New York, 92 NY2d 707 (1999) provides assistance to practitioners in defining what is a public body:

> In determining whether an entity is a public body, various criteria or benchmarks are material. They include the authority under which the entity was created, the power distribution or sharing model under which it exists, the nature of its role, the power it possesses and under which it purports to act, and a realistic appraisal of its functional relationship to affected parties and constituencies.
>
> This Court has noted that the powers and functions of an entity should be derived from State law in order to be deemed a public body for Open Meetings Law purposes (*see, Matter of American Socy. for Prevention of Cruelty to Animals v. Board of Trustees of State Univ. of N. Y.,* 79 N.Y.2d 927, 929, 582 N.Y.S.2d 983, 591 N.E.2d 1169). In the instant case, the parties do not dispute that CUNY derives its powers from State law and it surely is essentially a public body subject to the Open Meetings Law for almost any imaginable purpose. The Association, Inc. contends, on the other hand, that it is a separate, distinct, subsidiary entity, and does not perform any governmental function that would render it also a public body.
>
> It may be that an entity exercising only an advisory function would not qualify as a public body within the purview of the Open Meetings Law (*see, Goodson Todman Enters. v. Town Bd.,* 151 A.D.2d 642, 643, 542 N.Y.S.2d 373, *lv. denied* 74 N.Y.2d 614, 547 N.Y.S.2d 848, 547 N.E.2d 103; *Matter of Poughkeepsie Newspaper Div. of Gannett Satellite Information Network v. Mayor's Intergovernmental Task Force on N.Y. City Water Supply Needs,* 145 A.D.2d 65, 67, 537 N.Y.S.2d 582; *Matter of Daily Gazette Co.*

v. North Colonie Bd. of Educ., 67 A.D.2d 803, 804, 412 N.Y.S.2d 494). More pertinently here, however, a formally chartered entity with officially delegated duties and organizational attributes of a substantive nature, as this Association, Inc. enjoys, should be deemed a public body that is performing a governmental function (*compare, Matter of Syracuse United Neighbors v. City of Syracuse,* 80 A.D.2d 984, 985, 437 N.Y.S.2d 466, *appeal dismissed* 55 N.Y.2d 995, 449 N.Y.S.2d 201, 434 N.E.2d 270). It is invested with decision-making authority to implement its own initiatives and, as a practical matter, operates under protocols and practices where its recommendations and actions are executed unilaterally and finally, or receive merely perfunctory review or approval. This Association, Inc., therefore, is manifestly not just a club or extracurricular activity.

Any entity consisting of two or more members of a public body, such as a committee, a subcommittee or "similar body" consisting of two or more members of a public body, would fall within the requirements of the Open Meetings Law when such an entity discusses or conducts public business collectively as a body (OML-AO-5068 [citing Syracuse United Neighbors v. City of Syracuse, 80 AD 2d 984, 437 NYS 2d 466, (4th Dept. 1981), appeal dismissed 55 NY 2d 995, 449 NYS 2d 201 (1982)]).

A “Project Selection Committee” under Private Housing Finance Law is a public body because its “decisions constitute binding instructions to the Local Program Administrator and the implementation of the NYMS Program” (OML-AO-5383).

Governing board of a fire district is a public body (OML-AO-5300; but see Hayes v. Chestertown Volunteer Fire Co., 93 A.D.3d 1117, 1120 [3d Dept 2012] [“While CVFC is an “agency” under FOIL, it is not a “public body” subject to the Open Meetings Law.”]).

The Interagency Committee on Sustainability and Green Procurement is a public body because it has “the authority to mak[e] binding decisions and to create standards with which state agencies must comply” (OML-AO-4832).

Athletic Councils of the eleven sections of the NYS Public High School Athletic Association are considered public bodies (OML-AO-5265).

Boards of trustees of public libraries are public agencies (OML-AO-3902).

E. Definition of "Executive Session"

Members of the public may only be excluded from a meeting during a properly convened "executive session" or when the meeting is specifically exempted by law.

POL 102(3) defines "executive session" as "that portion of a meeting not open to the general public."

It is important to emphasize that an executive session is not separate from an open meeting, but rather is defined as a portion of an open meeting during which the public may be excluded.

To hold an executive session, the law requires that a public body take several procedural steps. First, a motion must be made during an open meeting to enter into executive session; second, the motion must identify "the general area or areas of the subject or subjects to be considered;" and third, the motion must be carried by a majority vote of the total membership of a public body.

Executive sessions cannot take place prior to the meeting because you have to vote to enter into executive session (OML-AO-4889).

Nevertheless, the meeting's agenda may note that it is anticipated that the public body will enter into executive session at the beginning of a meeting (OML-AO-2426).

Attendance at an executive session shall be permitted to any member of the public body and any other persons authorized by the public body (POL 105[2]).

Various interpretations of the Education Law, §1708(3), however, indicate that, except in situations in which action during a closed session is permitted or required by statute, a school board cannot take action during an executive session [see United Teachers of Northport v. Northport Union Free School District, 50 AD 2d 897 (1975); Kursch et al. v. Board of Education, Union Free School District #1, Town of North Hempstead, Nassau County, 7 AD 2d 922 (1959); Sanna v. Lindenhurst, 107 Misc. 2d 267, modified 85 AD 2d 157, aff'd 58 NY 2d 626 (1982)]. Stated differently, based upon judicial interpretations of the Education Law, a school board generally cannot vote during an executive session, except in those unusual circumstances in which a statute permits or requires such a vote (OML-AO-5336).

F. Grounds for Executive Session

Public Officers Law 105(1) provides the statutory basis for entering into an executive session:

a. matters which will imperil the public safety if disclosed;

b. any matter which may disclose the identity of a law enforcement agent or informer;

c. information relating to current or future investigation or prosecution of a criminal offense which would imperil effective law enforcement if disclosed;

d. discussions regarding proposed, pending or current litigation;

e. collective negotiations pursuant to article fourteen of the civil service law;

f. the medical, financial, credit or employment history of a particular person or corporation, or matters leading to the appointment, employment, promotion, demotion, discipline, suspension, dismissal or removal of a particular person or corporation;

g. the preparation, grading or administration of examinations; and

h. the proposed acquisition, sale or lease of real property or the proposed acquisition of securities, or sale or exchange of securities held by such public body, but only when publicity would substantially affect the value thereof.

A motion to conduct an executive session must include reference to the subject or subjects to be discussed, and the motion must be carried by majority vote of a public body's membership before such a session may validly be held (OML-AO-5419).

OML-AO-3654 provides a detailed discussion pertaining to the sufficiency of a motion to enter into executive session:

> "It is insufficient to merely regurgitate the statutory language; to wit, 'discussions regarding proposed, pending or current litigation'. This boilerplate recitation does not comply with the intent of the statute. To validly convene an executive session for discussion of proposed, pending or current litigation, the public body must identify with particularity the pending, proposed or current litigation to be discussed during the executive session" [Daily Gazette Co. , Inc. v. Town Board, Town of Cobleskill, 44 NYS 2d 44, 46 (1981), emphasis added by court].
>
> The emphasis in the passage quoted above on the word "the" indicates that when the discussion relates to litigation that has been initiated, the motion must name the litigation. For example, a proper motion might be: "I move to enter into executive session to discuss our litigation strategy in the case of the XYZ Company v. the Town of Brighton." If the Town Board seeks to discuss its litigation strategy in relation to a person or entity that it intends to sue, and if premature identification of that person or entity could adversely affect the interests of the Town and its residents, it has been suggested that the motion need not identify that person or entity, but that it should clearly indicate that the discussion will involve the litigation strategy. Only by means of that kind of description can the public know that the subject matter may justifiably be considered during an executive session.

"Given the overriding purpose of the Open Meetings Law, section 105 is to be strictly construed, and the real purpose of an executive session will be carefully scrutinized 'lest the ... mandate [of the Open Meetings Law] be thwarted by thinly veiled references to the areas delineated thereunder.'" (Lucas v Bd. of Educ. of E. Ramapo Cent. School Dist., 57 Misc 3d 1207(A) [Sup Ct 2017]).

As was done here, by merely reciting to "litigation, personnel, real estate, and contracts" as the basis for entering into executive session, without describing with some detail the nature of the proposed discussions, the Board of Education has done exactly what the Open Meetings Law was designed to prevent. Nowhere does the Board of Education identify, for example, the name of the case that will be the subject of the discussion regarding "litigation," or the name of the property that will be the subject of the discussion regarding "real estate." Similarly, the Board of Education fails to identify which "contracts" they will be discussing during executive session or what particular "personnel" issues they will be discussing. As a result, the public lacks the ability to determine whether the subjects may properly be considered in private (Lucas v Bd. of Educ. of E. Ramapo Cent. School Dist., 57 Misc 3d 1207(A) [Sup Ct 2017]).

G. Exemptions

POL 108 provides three exemptions for the Open Meetings Law:

1. judicial or quasi-judicial proceedings, except proceedings of the public service commission and zoning boards of appeals;

2. a. deliberations of political committees, conferences and caucuses.

b. for purposes of this section, the deliberations of political committees, conferences and caucuses means a private meeting of members of the senate or assembly of the state of New York, or of the legislative body of a county, city, town or village, who are members or adherents of the same political party, without regard to (i) the subject matter under discussion, including discussions of public business, (ii) the majority or minority status of such political committees, conferences and caucuses or (iii) whether such political committees, conferences and caucuses invite staff or guests to participate in their deliberations; and

3. any matter made confidential by federal or state law.

When an exemption applies, the Open Meetings Law does not, and the requirements that would operate with respect to executive sessions are not in effect. Stated differently, to discuss a matter exempted from the Open Meetings Law, a public body need not follow the procedure imposed by §105(1) that relates to entry into an executive session. Further, although executive sessions may be held only for particular purposes, there is no such limitation that relates to matters that are exempt from the coverage of the Open Meetings Law (OML-AO-2727).

Discussions pertaining to information acquired in carrying out functions pursuant to Public Health Law 2805-j are confidential and therefore exempt (OML-AO-2727).

Settlement negotiations made confidential by a court order are exempted (OML-AO-3071).

A court-ordered pre-trial settlement conference is exempt from the provisions of the OML (OML-AO-4548).

Quasi-judicial hearings must lead to finality for a decision that may be reviewed in court (OML-AO-4924).

A meeting between a school board and parents of students is properly exempted when the discussions pertaining to information protected by FERPA (OML-AO-3863).

H. Minutes

Public Officers Law § 106 provides the statutory mandate for public bodies to take "minutes" of their meetings. It states:

1. Minutes shall be taken at all open meetings of a public body which shall consist of a record or summary of all motions, proposals, resolutions and any other matter formally voted upon and the vote thereon.

2. Minutes shall be taken at executive sessions of any action that is taken by formal vote which shall consist of a record or summary of the final determination of such action, and the date and vote thereon; provided, however, that such summary need not include any matter which is not required to be made public by the freedom of information law is added by article six of this chapter.

3. Minutes of meetings of all public bodies shall be available to the public in accordance with the provisions of the freedom of information law within two weeks from the date of such meeting except that minutes taken pursuant to subdivision two hereof shall be available to the public within one week from the date of the executive session.

There is no requirement as yet that minutes of meetings be posted on a website. An entity may choose to do so, and many do, but there is no obligation to do so (OML-AO-5077).

There is nothing in the Open Meetings Law or any other statute of which I am aware that requires that minutes be approved. Nevertheless, as a matter of practice or policy, many public bodies approve minutes of their meetings. In the event that minutes have not been approved, to comply with the Open Meetings Law, it has consistently been advised that minutes be prepared and made available within two weeks, and that if the minutes have not been approved, they may be marked "unapproved", "draft" or "preliminary", for example. By so doing within the requisite time limitations, the public can generally know what transpired at a meeting; concurrently, the public is effectively notified that the minutes are subject to change. If minutes have been prepared within less than two weeks, I believe that those unapproved minutes would be available

as soon as they exist, and that they may be marked in the manner described above (OML-AO-4146).

Based on the foregoing, minutes need not consist of a verbatim account of everything that was said; on the contrary, so long as the minutes include the kinds of information described in §106. (OML-AO-3369).

For many years, this office has advised that if a public body reaches a "consensus" upon which it relies, minutes reflective of decisions reached must be prepared and made available. In a similar manner, there are circumstances under which we believe a simple "It looks good to us" should be memorialized in the minutes. In circumstances when Board approval is required, for example, it is our opinion that even a general acknowledgment with no objections raised is required to be recorded as action taken. In our opinion, when Board approval is sought and granted with no objections, such action should be recorded in the minutes (OML-AO-5451).

As a general rule, a public body may take action during a properly convened executive session [see Open Meetings Law, §105(1)]. If action is taken during an executive session, minutes reflective of the action, the date and the vote must generally be recorded in minutes pursuant to §106(2) of the Law. If no action is taken, there is no requirement that minutes of the executive session be prepared. And, as confirmed by your counsel, minutes of executive sessions need not include information that may be withheld under the Freedom of Information Law (OML-AO-5336).

I. Enforcement

Public Officers Law § 107 provides the enforcement mechanism for the Open Meetings Law. Similar to FOIL, the "teeth" of the statute is seen through the Article 78 proceeding (which is discussed in detail in the FOIL section). Section 107 states:

1. Any aggrieved person shall have standing to enforce the provisions of this article against a public body by the commencement of a proceeding pursuant to article seventy-eight of the civil practice law and rules, or an action for declaratory judgment and injunctive relief. In any such action or proceeding, if a court determines that a public body failed to comply with this article, the court shall have the power, in its discretion, upon good cause shown, to declare that the public body violated this article and/or declare the action taken in relation to such violation void, in whole or in part, without prejudice to reconsideration in compliance with this article. If the court determines that a public body has violated this article, the court may require the members of the public body to participate in a training

session concerning the obligations imposed by this article conducted by the staff of the committee on open government.

An unintentional failure to fully comply with the notice provisions required by this article shall not alone be grounds for invalidating any action taken at a meeting of a public body. The provisions of this article shall not affect the validity of the authorization, acquisition, execution or disposition of a bond issue or notes.

2. In any proceeding brought pursuant to this section, costs and reasonable attorney fees may be awarded by the court, in its discretion, to the successful party. If a court determines that a vote was taken in material violation of this article, or that substantial deliberations relating thereto occurred in private prior to such vote, the court shall award costs and reasonable attorney's fees to the successful petitioner, unless there was a reasonable basis for a public body to believe that a closed session could properly have been held.

3. The statute of limitations in an article seventy-eight proceeding with respect to an action taken at executive session shall commence to run from the date the minutes of such executive session have been made available to the public.

The objective of the Open Meetings Law is to foster public accountability by allowing citizens "to observe the performance of public officials and attend and listen to the deliberations and decisions that go into the making of public policy" (Public Officers Law § 100; see Matter of Perez v. City Univ. of N.Y., 5 N.Y.3d 522, 528, 806 N.Y.S.2d 460, 840 N.E.2d 572; Matter of New York Univ. v. Whalen, 46 N.Y.2d 734, 735, 413 N.Y.S.2d 637, 386 N.E.2d 245). In furtherance of this objective, courts are empowered, in their discretion and upon "good cause shown," to declare void any action taken by a public body in violation of the Open Meetings Law (Public Officers Law § 107[1]). "Inclusion by the Legislature of this language vesting in the courts the discretion to grant remedial relief makes it abundantly clear that not every breach of the 'Open Meetings Law' automatically triggers its enforcement sanctions" (Matter of New York Univ. v. Whalen, 46 N.Y.2d at 735, 413 N.Y.S.2d 637, 386 N.E.2d 245) -- (Krauss v Suffolk County Bd. of Elections, 153 AD3d 1211, 1212–13 [2d Dept 2017]).

Applied here, the Court finds that Petitioners have established good cause to declare the action taken by the Board of Education, on May 20, 2014—approving the termination of the twenty bus drivers—to be void. The Petitioners have submitted evidence to sufficiently establish that the Board of Education has engaged in a persistent pattern of deliberate violations of the letter and spirit of the Open Meetings Law by, *inter alia*, improperly convening executive sessions and limiting the public's opportunity to participate at Board meetings (Lucas v Bd. of Educ. of E. Ramapo Cent. School Dist., 57 Misc 3d 1207(A) [Sup Ct 2017]).

Even assuming, arguendo, that petitioners established technical violations of the Open Meetings Law, we conclude that they have failed to establish that they were aggrieved by any unintentional failures to comply fully with the notice provisions or by any lack of information on the Town's website (*see Matter of Thorne v. Village of Millbrook Planning Bd.,* 83 A.D.3d 723, 726, 920 N.Y.S.2d 369 [2d Dept. 2011], *lv. denied* 17 N.Y.3d 711, 930 N.Y.S.2d 556, 954 N.E.2d 1182 [2011]), and thus they failed to establish the requisite good cause to void any action taken by the Town respondents (Fichera v New York State Dept. of Envtl. Conservation, 159 AD3d 1493, 1498 [4th Dept 2018]).

Even assuming that the December 12, 2012 meeting was procedurally defective and violated the Open Meetings Law for failing to sufficiently particularize the subject to be considered during executive session (*see* Public Officers Law § 105), its actions with respect to plaintiff's employment were "not void but, rather, voidable" (*Matter of Oakwood Prop. Mgt. LLC v. Town of Brunswick,* 103 A.D.3d 1067, 1069–1070, 960 N.Y.S.2d 535 [2013] [internal quotation marks and citation omitted], *lv denied* 21 N.Y.3d 853, 2013 WL 1800446 [2013]). Here, there is nothing in the record before us establishing that defendants intentionally violated the Open Meetings Law and, given that timely notice of the subject meeting was disseminated prior thereto and the undisputed fact that plaintiff was not reappointed to the office of Comptroller and, therefore, served as an at-will employee, we find that, under the circumstances presented, plaintiff failed to demonstrate sufficient good cause to warrant exercising our discretionary authority to invalidate defendants' determination terminating his employment (Phillips v Glenville, 160 AD3d 1264, 1267–68 [3d Dept 2018]).

Petitioner's remaining contentions do not require extended discussion. Assuming without deciding that petitioner was persuasive in arguing that the ZBA violated the Open Meetings Law (*see* Public Officers Law art 7) in the leadup to issuing its 2017 interpretation, petitioner has not demonstrated "good cause warranting the exercise of our discretionary power to invalidate the ZBA's determination" (Catskill Heritage All., Inc. v Crossroads Ventures, LLC, 161 AD3d 1413 [3d Dept 2018]).

The court does not find the that the respondent is a repeat violator of the offenses alleged in the petition. The newspaper stories, on which the petitioners apparently rely for support of blatant conduct by the respondents, are, as already stated herein, inapplicable, and hardly indicative of any prior conduct. Generally, where evidence indicates that a respondent has repeatedly violated the Open Meetings Law, such may justify an award of attorney's fees (*see, Gordon v. Vill. of Monticello, Inc.,* 87 N.Y.2d 124, 637 N.Y.S.2d 961, 661 N.E.2d 691 [1995]). That is not the case in the instant matter. Further, there is no irreparable harm, since petitioners were able to gather the information and report the news relative to the subject meeting in their medium (News 12 Co. v Hempstead Pub. Schools Bd. of Educ., 52 Misc 3d 479, 490 [Sup Ct 2016]).

The adoption of a subsequent resolution terminating petitioner's employment with the Village effective March 21, 2017 renders this proceeding moot and, accordingly, the petition is denied and this proceeding is dismissed, without costs or disbursements (In re Steward, Index No. 01079/2017 [Sup Ct, Suffolk County 2017]).

Moreover the court notes that nullification at this point would be of no real effect as the parties have, appropriately, made the court aware that the Town Board recently duly passed Resolution 251-2017, which is, in its substance, identical to Resolution 94-2017 (Ripp v. Town of Oyster Bay, Index No. 1834/2017 [Sup Ct, Nassau County 2017]).

No good cause is present where the resolution at issue results in a large monetary savings to the agency (Ripp v. Town of Oyster Bay, Index No. 1834/2017 [Sup Ct, Nassau County 2017]).

SAMPLE FOIL REQUEST

[This template is from the Committee on Open Government]

Dear Records Access Officer:
Please email the following records if possible [include as much detail about the record as possible, such as relevant dates, names, descriptions, etc.]:
OR
Please advise me of the appropriate time during normal business hours for inspecting the following records prior to obtaining copies [include as much detail about the records as possible, including relevant dates, names, descriptions, etc.]:
OR

Please inform me of the cost of providing paper copies of the following records [include as much detail about the records as possible, including relevant dates, names, descriptions, etc.].

AND/OR

If all of the requested records cannot be emailed to me, please inform me by email of the portions that can be emailed and advise me of the cost for reproducing the remainder of the records requested ($0.25 per page or actual cost of reproduction).

If the requested records cannot be emailed to me due to the volume of records identified in response to my request, please advise me of the actual cost of copying all records onto a CD or floppy disk.

If my request is too broad or does not reasonably describe the records, please contact me via email so that I may clarify my request, and when appropriate inform me of the manner in which records are filed, retrieved or generated.

If it is necessary to modify my request, and an email response is not preferred, please contact me at the following telephone number: _____.
If for any reason any portion of my request is denied, please inform me of the reasons for the denial in writing and provide the name, address and email address of the person or body to whom an appeal should be directed.

[Name]
[Address, if records are to be mailed].

SAMPLE FOIL REQUEST

[Insert on firm letterhead]

Re: Freedom of Information Law Request

Records Access Officer:

Pursuant to the Freedom of Information Law ("FOIL"), I hereby request the following records [on behalf of my client / law firm]:

1. Insert detailed description of records;
2. Insert detailed description of records.

I am requesting that these records be produced on a rolling basis. As such, as these records become available, I ask that they be produced. If no records exist responsive to the above request(s), I hereby request a certification to that effect. For records produced in response to the above request(s), I hereby request a certification that the record(s) produced are correct.

I am requesting that these records be produced in electronic format and e-mailed to me. If certain records cannot be produced through e-mail, please describe the reason why and advise me of the cost for reproducing those records. If records are too voluminous to transmit through e-mail, I will consent to the transmission of those records on a storage device (e.g., CD-ROM, flash drive, etc) and will pay the cost of such storage device.

If my request is too broad or does not reasonably describe the records, please contact me via email so that I may clarify my request, and when appropriate inform me of the manner in which records are filed, retrieved or generated.

Pursuant to Public Officers Law § 89 (3), within five business days of the receipt of this request, you must grant the request, deny the request in writing, providing a response for the reasoning of its denial, or provide a date certain when such a response will be provided. If for any reason any portion of my request is denied, please inform me of the reasons for the denial in writing and provide the name, address and e-mail address of the person or body to whom an appeal should be directed.

Please feel free to contact the undersigned with any inquiries you may have.

SAMPLE FOIL INITIAL RESPONSE (Granting or Extending Time)

[date]

[Name/Address]

Re: Response to FOIL Request

Dear [name]:

On [date], the [name of agency] received your Freedom of Information Law ("FOIL") request (enclosed herewith).

Sample Responses: (A) Your request is granted. Responsive records are enclosed herewith / Responsive records are available for inspection at [location and time] (B) A search for records will be conducted. We anticipate providing you with a further response on or before [date within 20 business days]

The [agency] charges the statutorily permitted fee of $.25 per page for duplication of records requested under FOIL (Public Officers Law §87[1][b][iii]). Further, if electronic records are sought, the [agency] may charge an amount equal to the hourly salary attributed to the lowest paid employee who has the necessary skill required to prepare a copy of the requested record(s) if at least two hours of employee time is needed to prepare the records (Public Officers Law §87[1][b],[c]). There is no provision in law or regulation requiring the waiver of this fee. Payment must be made to the [agency] by check or money order. Do not send any payment until you are notified that your request is granted and informed of the charge for your request. If your request is for electronic records in their electronic format and your request is granted, the records will be provided to you in that format.

Any person denied access to a record may appeal the decision in writing within thirty (30) days. Please state a specific ground for appeal and include copies of the initial request and the denial. Appeals should be sent to: [insert].

[Signature Line]
Records Access Officer

SAMPLE FOIL INITIAL RESPONSE (Denial)

[date]

[Name/Address]

Re: Response to FOIL Request

Dear [name]:

On [date], the [name of agency] received your Freedom of Information Law ("FOIL") request (enclosed herewith).

Please be advised that the [agency] denies your first FOIL request. Your request is denied because the [agency] is not in possession of such a document and an agency need not create a record in response for information.

OR

Please be advised that the [agency] denies your first FOIL request. Your request is denied because such records are education records and contain "personally identifiable information," as that term is defined by the Family Educational Rights and Privacy Act ("FERPA"). I find that no sufficient amount of redaction would justify disclosure of the records in this instance. Due to the limited number of students and uniqueness of the records, student identities would still be "easily traceable" even after redaction. As such, the records must be withheld in their entirety. Your request is further denied as it constitutes an unwarranted invasion of privacy.

Any person denied access to a record may appeal the decision in writing within thirty (30) days. Please state a specific ground for appeal and include copies of the initial request and the denial. Appeals should be sent to: [insert].

[Signature Line]
Records Access Officer

[See 21 NYCRR 1401.7 for a discussion on requirements for a proper denial]

SAMPLE FOIL APPEAL

[date]

[Name/Address]

Re: FOIL Appeal

Dear Mr/Mrs. [Name]

Please allow this to serve as an appeal from the [date] FOIL response by [name of Records Access Officer].

I hereby appeal the response received to item #1 of my FOIL request:

[insert the request]
[insert the response received]

Your denial of my request for videotapes of the incident outlined in this request is improper. Videotapes are considered "records" under FOIL (*see e.g.*, *Buffalo Broadcasting v. N.Y.S. Dept. of Correctional Servs.*, 155 AD2d 106 [3d Dept 1990]; FOIL-AO-18991 [2012]). As such, whether a videotape may be disclosed is analyzed under the same standards as any other record (*id.*). As with any record, blanket denials of videotapes are improper where the video may be properly redacted (*id.*). Therefore, to the extent that you are in possession of videotape footage containing the incident outlined in the request, such records must be disclosed pursuant to FOIL. If no videotape of the incident exists, I hereby request a certificate to that effect (FOIL-AO-17434).

I hereby appeal the response received to item #2 of my FOIL request:

[insert the request]
[insert the response received]
[Reasons why denial was wrong]

Your response to my appeal is due within 10 business days of this date. As a reminder, I note that you must transmit your decision to the Committee on Open Government (21 NYCRR § 1401.7 [g]). Please note that nothing herein constitutes a waiver of my right to proceed with an Article 78 due to your agency's failure to properly respond to my initial FOIL appeal.

Please contact the undersigned with any further inquiries.

Enclosures:
FOIL Request
FOIL Denial

SAMPLE FOIL APPEAL

[date]

[Name/Address]

Re: FOIL Appeal

Dear Mr/Mrs. [Name]

Please allow this to serve as an appeal from my FOIL request dated [date], a copy of which is enclosed herewith for your convenience. As you are aware, an agency is required to furnish a response to a FOIL request within 5 business days of its receipt (POL § 89[3][a]). As such, a response regarding my FOIL request was due on or before [date]. However, to date, no response has been provided.

Therefore, I hereby appeal the constructive denial of my request (21 NYCRR 1401.5[e][1]; FOIL-AO-11865). I remind you of your obligation to provide me with a response within 10 business days and to transmit a copy of your response to my appeal to the Committee on Open Government.

Please contact the undersigned with any further inquiries.

SAMPLE FOIL APPEAL DENIAL

[date]

[Name]
[Address]

Re: Response to FOIL Appeal

Dear [Name]:

I am in receipt of your Freedom of Information Law ("FOIL") appeal dated [date], and received by the [agency] on [date] (enclosed herewith). Please be advised that, after careful review of your request, your appeal is denied.

With respect to your appeal of the first request, [insert request], your appeal is denied as the agency is not in possession of such a document and an agency need not create a record in response for information (*see e.g.*, FOIL-AO-19175 ["While New York's highest court has consistently interpreted the Freedom of Information Law in a manner that fosters maximum access, it does not require that an agency create records in response to a request."]).

With respect to your appeal of the second request, [insert request], your appeal is denied. After a review of the requested records, I agree with the Records Access Officer's determination that such records are education records and contain "personally identifiable information." Further, no sufficient amount of redaction would justify disclosure of the records in this instance. As stated by the Records Access Officer: "Due to the limited number of students and uniqueness of the records, student identities would still be 'easily traceable' even after redaction. As such, the records must be withheld in their entirety." In addition, the request was properly denied as it constituted an unwarranted invasion of privacy.

[If necessary—To further expand upon the Records Access Officer's denial …]

I respectfully refer you to 21 NYCRR § 1401.7 for a complete recitation of your rights on appeal.

c: [Attorney for agency]

Committee on Open Government

Department of State
One Commerce Plaza
99 Washington Avenue, Suite 650
Albany, NY 12231

SAMPLE FOIL PETITION

Note – this Petition is taken from a simple case wherein the agency failed to respond to the initial FOIL request within the statutory timeline and then failed to respond to the appeal of the constructive denial. Much more detail may need to be provided in more advanced cases.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK

X

Law Offices of [Insert],

Index No. _____

Petitioner,

Verified Petition

-against-

[Insert],

Respondent,

For a Judgment Pursuant to Article 78 of the Civil Practice Law and Rules

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X

TO THE ABOVE-NAMED RESPONDENT:

Petitioner, [insert], as and for its Verified Petition alleges as follows:

PRELIMINARY STATEMENT

1. That, this Article 78 proceeding pursuant to the Freedom of Information Law ("FOIL"), Article 6 of the Public Officers Law, seeks to vindicate the rights of Petitioner, [insert], and of the public to access records regarding Respondent, [insert].

2. That, Respondent has refused to produce public records in response to a FOIL request dated [insert].

3. That, Respondent has failed to respond within the timelines mandated by the Freedom of Information Law.

4. That, having exhausted its administrative remedies, Petitioner now asks the Court to order the production of requested documents within 30 days of this Court's order; awarding Petitioner its costs and attorney's fees in this proceeding; and granting such other and further relief as this Court deems just and proper.

VENUE

5. That, pursuant to CPLR 7804(b) and 506(b), venue in this proceeding lies in New York County, in the judicial district in which Respondent took the action challenged here and where the offices of Respondent are located.

PARTIES

6. That, Petitioner, [insert], is a limited liability partnership duly located in the County of [insert], State of New York (hereinafter "Petitioner").

7. That, [insert], is an attorney with the Law Offices of [insert].

8. That, upon information and belief, Respondent, [insert], was and still is a Municipal Corporation, duly organized and existing under and by virtue of the laws of the State of New York, having its offices located at [insert].

9. That, upon information and belief, at all times relevant hereto, Respondent was and still is a public body duly authorized and existing under and by virtue of the laws of the State of New York.

FACTS

10. On [date], the Petitioner served the following FOIL request on Respondent (Exhibits "1"). The request sought the following records:

[cut and paste applicable paragraphs from FOIL request]

11. That, the request sought the aforementioned records in "electronic format" to be provided to the e-mail address indicated in the request (Exhibit "1").

12. On [date], Respondent acknowledged receipt of the FOIL request (Exhibit "2"). Respondent assigned FOIL reference number [insert] to the request. In the response, Respondent stated that it anticipated providing a response by [insert].

13. By [date], however, no response had been provided to the request.

14. Consequently, on [date], Petitioner appealed the constructive denial of the request (Exhibit "3").

15. The statutory 10 business day timeframe to respond to an appeal ended on [date]. Respondent has failed to respond to the appeal within the statutory time. Further, Respondent has failed to produce the requested records. As such, Petitioner has exhausted its administrative remedies.

AS FOR THE FIRST CAUSE OF ACTION

16. Petitioner repeats, reiterates, and realleges each and every allegation set forth in the proceeding paragraphs of this Verified Petition with the same force and effect as if same were more fully set forth at length herein.

17. Respondent has engaged in a pattern and practice of failing to comply with its obligations under New York Public Officers Law section 84 *et seq.*, Section 1401.5 of the Rules and Regulations of the State of New York, and Respondent's [insert citation to Respondent's

internal regulations if applicable] by routinely ignoring statutory deadlines, constructively and improperly denying requests and appeals, and ultimately failing to disclose to Petitioner the requested documents to which it is entitled.

18. To date, Respondent has not produced the requested records under Petitioner's FOIL request dated [insert], nor has it responded to the [date] appeal.

19. Petitioner exhausted its administrative remedies when it appealed Respondent's constructive denial of the FOIL request, and Respondent failed to furnish a response within 10 business days.

WHEREFORE, Petitioner prays for an order:

1. Compelling Respondent to perform the duties required by New York Public Officers Law section 84 *et seq*, 21 NYCRR 1401.5, and Regulation [insert citation to Respondent's regulation if applicable] by, *inter alia*, producing the documents requested in Petitioner's FOIL request within 30 days of this Court's order;

2. Awarding Petitioner its costs and attorney's fees in this proceeding;

3. Granting such other and further relief as this Court deems just and proper.

[signature]

The Committee on Open Government - Robert J. Freeman, Executive Director

- Freedom of Information Law
- Open Meetings Law
- Personal Privacy Protection Law

The Committee

The Committee on Open Government is responsible for overseeing implementation of the Freedom of Information Law (Public Officers Law sections 84-90) and the Open Meetings Law (Public Officers Law sections 100-111). The Freedom of Information Law governs rights of access to government records, while the Open Meetings Law concerns the conduct of meetings of public bodies and the right to attend those meetings. The Committee also oversees the Personal Privacy Protection Law.

The Committee is composed of 11 members, 5 from government and 6 from the public. The five government members are the Lieutenant Governor, the Secretary of State, whose office acts as secretariat for the Committee, the Commissioner of General Services, the Director of the Budget, and one elected local government official appointed by the Governor. Of the six public members, at least two must be or have been representatives of the news media.

The Freedom of Information Law ("FOIL") directs the Committee to furnish advice to agencies, the public and the news media, issue regulations and report its observations and recommendations to the Governor and the Legislature annually. Similarly, under the Open Meetings Law, the Committee issues advisory opinions, reviews the operation of the law and reports its findings and recommendations annually to the Legislature.

When questions arise under either the Freedom of Information or the Open Meetings Law, the Committee staff can provide written or oral advice and attempt to resolve controversies in which rights may be unclear. Since its creation in 1974, more than 24,000 written advisory opinions have been prepared by the Committee at the request of government, the public and the news media. In addition, hundreds of thousands of verbal opinions have been provided by telephone. Staff also provides training and educational programs for government, public interest and news media organizations, as well as students on campus.

Opinions prepared since early 1993 that have educational or precedential value are maintained online, identified by means of a series of key phrases in separate indices created in relation to the Freedom of Information Law and the Open Meetings Law.

The indexes can be accessed at the following links:

FOIL Advisory Opinions OML Advisory Opinions

Each index to advisory opinions is updated periodically to ensure that interested persons and government agencies have the ability to obtain opinions recently rendered.

The website also includes the following:

The text of the Freedom of Information Law;

Rules and Regulations of the Committee on Open Government (21 NYCRR Part 1401);

Model Rules for Agencies;

Sample Request for Records;

Sample Request for Records via Email;

Sample Appeal;

Sample Appeal When Agency Fails to Respond in a Timely Manner;

FOIL Case Law Summary;

Frequently Asked Questions regarding FOIL;

The text of the Open Meetings Law;

Model Rules for Public Bodies;

An Article on Boards of Ethics;

OML Case Law Summary;

Frequently Asked Questions regarding OML;

The text of the Personal Privacy Protection Law (only applies to State Agencies);

You Should Know, regarding the Personal Privacy Protection Law.

If you are unable to locate information on the website and need advice regarding either the Freedom of Information Law or the Open Meetings Law, feel free to contact:

Committee on Open Government
NYS Department of State
One Commerce Plaza
99 Washington Ave
Albany, NY 12231
(518) 474-2518 Tel
(518) 474-1927 Fax
coog@dos.state.ny.us

Freedom of Information

FOIL affirms your right to know how your government operates. It provides rights of access to records reflective of governmental decisions and policies that affect the lives of every New Yorker. The law continues the existence of the Committee on Open Government, which was created by enactment of the original Freedom of Information Law in 1974.

Scope of the law

All agencies are subject to the Freedom of Information Law, and FOIL defines "agency" to include all units of state and local government in New York State, including state agencies, public corporations and authorities, as well as any other governmental entities performing a governmental function for the state or for one or more units of

local government in the state (§86(3)).

The term "agency" does not include the State Legislature or the courts. For purposes of clarity, "agency" will be used hereinafter to include all entities of government in New York, except the State Legislature and the courts, which will be discussed later.

What is a record?

All records are subject to the FOIL, and the law defines "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. . ." (§86(4)). It is clear that items such as audio or visual recordings, data maintained electronically, and paper records fall within the definition of "record." An agency is not required to create a new record or provide information in response to questions to comply with the law; however, the courts have held that an agency must provide records in the form requested if it has the ability to do so. For instance, if the agency can transfer data into a requested format, the agency must do so upon payment of the proper fee.

Accessible records

FOIL is based on a presumption of access, stating that all records are accessible, except records or portions of records that fall within one of eleven categories of deniable records (§87(2)).

Deniable records include records or portions thereof that:

(a) are specifically exempted from disclosure by state or federal statute;

(b) would if disclosed result in an unwarranted invasion of personal privacy;

(c) would if disclosed impair present or imminent contract awards or collective bargaining negotiations;

(d) are trade secrets or are submitted to an agency by a commercial enterprise or derived from information obtained from a commercial enterprise and which if disclosed would cause substantial injury to the competitive position of the subject enterprise;

(e) are compiled for law enforcement purposes and which if disclosed would:

i. interfere with law enforcement investigations or judicial proceedings;

ii. deprive a person of a right to a fair trial or impartial adjudication;

iii. identify a confidential source or disclose confidential information relative to a criminal investigation; or

iv. reveal criminal investigative techniques or procedures, except routine techniques and procedures;

(f) could if disclosed endanger the life or safety of any person;

(g) are inter-agency or intra-agency communications, except to the extent that such materials consist of:

i. statistical or factual tabulations or data;

ii. instructions to staff that affect the public;

iii. final agency policy or determinations; or

iv. external audits, including but not limited to audits performed by the comptroller and the federal government;

(h) are examination questions or answers that are requested prior to the final administration of such questions; or

(i) if disclosed, would jeopardize an agency's capacity to guarantee the security of its information technology assets, such assets encompassing both electronic information systems and infrastructures; or

* (j) are photographs, microphotographs, videotape or other recorded images prepared under authority of section eleven hundred eleven-a of the vehicle and traffic law.

* NB Repealed December 1, 2014

* (k) are photographs, microphotographs, videotape or other recorded images prepared under authority of section eleven hundred eleven-b of the vehicle and traffic law.

* NB Repealed December 1, 2014

* (l) are photographs, microphotographs, videotape or other recorded images produced by a bus lane photo device prepared under authority of section eleven hundred eleven-c of the vehicle and traffic law.

* NB Repealed September 20, 2015

The categories of deniable records generally involve potentially harmful effects of disclosure. They are based in great measure upon the notion that disclosure would in some instances "impair," "cause substantial injury," "interfere," "deprive," "endanger," etc.

One category of deniable records that does not deal directly with the effects of disclosure is exception (g), which deals with inter-agency and intra-agency materials. The intent of the exception is twofold. Written communications transmitted from an

official of one agency to an official of another or between officials within an agency may be denied insofar as they consist of advice, opinions or recommendations. For example, an opinion prepared by staff which may be rejected or accepted by the head of an agency need not be made available. Statistical or factual information, on the other hand, as well as the policies and determinations upon which an agency relies in carrying out its duties are available, unless a different exception applies.

There are also special provisions in the law regarding the protection of trade secrets and critical infrastructure information. Those provisions pertain only to state agencies and enable a business entity submitting records to state agencies to request that records be kept separate and apart from all other agency records. When a request is made for records falling within these special provisions, the submitter of such records is given notice and an opportunity to justify a claim that the records would if disclosed result in substantial injury to the competitive position of commercial enterprise. A member of the public requesting records may challenge such a claim.

Generally, the law applies to existing records. Therefore, an agency need not create a record in response to a request. Nevertheless, each agency must maintain the following records:

(a) a record of the final vote of each member in every agency proceeding in which the member votes;

(b) a record setting forth the name, public office address, title and salary of every officer or employee of the agency; and

(c) reasonably detailed current list by subject matter of all records in possession of an agency, whether or not the records are accessible. (§87(3))

Protection of privacy

One of the exceptions to rights of access referenced earlier states that records may be withheld when disclosure would result in "an unwarranted invasion of personal privacy" (§87(2)(b)).

Unless otherwise deniable, disclosure shall not be construed to constitute an unwarranted invasion of personal privacy when identifying details are deleted, when the person to whom a record pertains consents in writing to disclosure, or when upon presenting reasonable proof of identity, a person seeks access to records pertaining to him or herself.

When a request is made for records that constitute a list of names and home addresses or its equivalent, the agency is permitted to require that the applicant certify that such list will not be used for solicitation or fund-raising purposes and will not sell, give or otherwise make available such lists to any other person for the purpose of allowing that person to use such list for solicitation or fund-raising purposes (§89(3)(a)).

Since 2010, agencies have been prohibited from intentionally releasing social security numbers to the public (§96-a).

How to Obtain Records

Subject matter list

As noted earlier, each agency must maintain a "subject matter list" (§87(3)(c)). The list is not a compilation of every record an agency has in its possession, but rather is a list of the subjects or file categories under which records are kept. It must make reference to all records in possession of an agency, whether or not the records are available. You have a right to know the kinds of records agencies maintain.

The subject matter list must be compiled in sufficient detail to permit you to identify the file category of the records sought, and it must be updated annually. Each state agency is required to post its subject matter list online. An alternative to and often a substitute for a subject matter list is a records retention schedule. Schedules regarding state and local government outside of New York City are prepared by the State Archives; those applicable in New York City are prepared by the NYC Department of Records and Information Services

Regulations

Each agency must adopt standards based upon general regulations issued by the Committee. These procedures describe how you can inspect and copy records. The Committee's regulations and a model designed to enable agencies to easily comply are available on the Committee's website. See Regulations of the Committee on Open Government and Model Rules for Agencies.

Designation of records access officer

Under the Committee's regulations, each agency must appoint one or more persons as records access officer. The records access officer has the duty of coordinating an agency's response to public requests for records in a timely fashion. In addition, the records access officer is responsible for ensuring that agency personnel assist in identifying records sought, make the records promptly available or deny access in writing, provide copies of records or permit you to make copies, certifying that a copy is a true copy and, if the records cannot be found, certify either that the agency does not have possession of the requested records or that the agency does have the records, but they cannot be found after diligent search.

The regulations also state that the public shall continue to have access to records through officials who have been authorized previously to make information available.

Requests for records

An agency may ask you to make your request in writing. See Sample Request for Records. The law requires you to "reasonably describe" the record in which you are interested (section 89(3)(a)). Whether a request reasonably describes records often relates to the nature of an agency's filing or recordkeeping system. If records are kept alphabetically, a request for records involving an event occurring on a certain date might not reasonably describe the records. Locating the records in that situation might involve a search for the needle in the haystack, and an agency is not required to engage in that degree of effort. The responsibility of identifying and locating records sought rests to an extent upon the agency. If possible, you should supply dates, titles, file designations, or any other information that will help agency staff to locate requested records, and it may be worthwhile to find out how an agency keeps the records of your interest (*i.e.,* alphabetically, chronologically or by location) so that a proper request can be made.

The law also provides that agencies must accept requests and transmit records requested via email when they have the ability to do so. See Sample Request for Records via Email.

Within five business days of the receipt of a written request for a record reasonably described, the agency must make the record available, deny access in writing giving the reasons for denial, or furnish a written acknowledgment of receipt of the request and a statement of the approximate date when the request will be granted or denied, which

must be reasonable in consideration of attendant circumstances, such as the volume or complexity of the request. The approximate date ordinarily cannot exceed 20 business days from the date of the acknowledgment of the receipt of a request. If it is determined that more than 20 business days will be needed to grant a request in whole or in part, the agency's acknowledgment must explain the reason and provide a specific date within which it will grant a request in whole or in part. When a response is delayed beyond five business days, it must be reasonable in relation to the circumstances of the request.

If the agency fails to abide by any of the requirements concerning the time within which it must respond to a request, the request is deemed denied, and the person seeking the records may appeal the denial. For more information, see Explanation of Time Limits for Responding to Requests.

Fees

Copies of records must be made available on request. Except when a different fee is prescribed by statute (an act of the State Legislature), an agency may not charge for inspection, certification or search for records, or charge in excess of 25 cents per photocopy up to 9 by 14 inches (§87(1)(b)(iii)). Fees for copies of other records may be charged based upon the actual cost of reproduction. There may be no basis to charge for copies of records that are transmitted electronically; however, when requesting electronic data, there are occasions when the agency can charge for employee time spent preparing the electronic data. For more information see 2008 News/Fees for Electronic Information

Denial of access and appeal

Unless a denial of a request occurs due to a failure to respond in a timely manner, a denial of access must be in writing, stating the reason for the denial and advising you of your right to appeal to the head or governing body of the agency or the person designated to determine appeals by the head or governing body of the agency. You may appeal within 30 days of a denial.

Upon receipt of the appeal, the agency head, governing body or appeals officer has 10 business days to fully explain in writing the reasons for further denial of access or to provide access to the records. Copies of appeals and the determinations thereon must be sent by the agency to the Committee on Open Government (§89(4)(a)). A failure to determine an appeal within 10 business days of its receipt is considered a denial of the

appeal.

You may seek judicial review of a final agency denial by means of a proceeding initiated under Article 78 of the Civil Practice Law and Rules. When a denial is based on an exception to rights of access, the agency has the burden of proving that the record sought falls within the exception (§89(4)(b)).

The Freedom of Information Law permits a court, in its discretion, to award reasonable attorney's fees to a person denied access to records. To do so, a court must find that the person denied access "substantially prevailed", and either that the agency had no reasonable basis for denying access or that it failed to comply with the time limits for responding to a request or an appeal.

Access to Legislative Records

Section 88 of the Freedom of Information Law applies only to the State Legislature and provides access to the following records in its possession:

(a) bills, fiscal notes, introducers' bill memoranda, resolutions and index records;

(b) messages received from the Governor or the other house of the Legislature, as well as home rule messages;

(c) legislative notification of the proposed adoption of rules by an agency;

(d) transcripts, minutes, journal records of public sessions, including meetings of committees, subcommittees and public hearings, as well as the records of attendance and any votes taken;

(e) internal or external audits and statistical or factual tabulations of, or with respect to, material otherwise available for public inspection and copying pursuant to this section or any other applicable provision of law;

(f) administrative staff manuals and instructions to staff that affect the public;

(g) final reports and formal opinions submitted to the Legislature;

(h) final reports or recommendations and minority or dissenting reports and opinions of members of committees, subcommittees, or commissions of the Legislature; and

(i) any other records made available by any other provision of law.

In addition, each house of the Legislature must maintain and make available:

(a) a record of votes of each member in each session, committee and subcommittee meeting in which the member votes;

(b) a payroll record setting forth the name, public office address, title and salary of every officer or employee; and

(c) a current list, reasonably detailed, by subject matter of any record required to be made available by section 88.

Each house is required to issue regulations pertaining to the procedural aspects of the law. Requests should be directed to the public information officers of the respective houses.

Access to Court Records

Although the courts are not subject to the Freedom of Information Law, section 255 of the Judiciary Law has long required the clerk of a court to "diligently search the files, papers, records and dockets in his office" and upon payment of a fee make copies of such items.

Agencies charged with the responsibility of administering the judicial branch are not courts and therefore are treated as agencies subject to the Freedom of Information Law.

Sample Letters

Requesting Records (Sample)

Records Access Officer
Name of Agency
Address of Agency
City, NY, ZIP code

Re: Freedom of Information
Law Request
Records Access Officer:

Records Access Officer:

Under the provisions of the New York Freedom of Information Law, Article 6 of the Public Officers Law, I hereby request records or portions thereof pertaining to (or containing the following) _____ (attempt to identify the records in which you are interested as clearly as possible). If my request appears to be extensive or fails to reasonably describe the records, please contact me in writing or by phone at _____ .

If there are any fees for copying the records requested, please inform me before filling the request (or: ... please supply the records without informing me if the fees are not in excess of $____).

As you know, the Freedom of Information Law requires that an agency respond to a request within five business days of receipt of a request. Therefore, I would appreciate a response as soon as possible and look forward to hearing from you shortly. If for any reason any portion of my request is denied, please inform me of the reasons for the denial in writing and provide the name and address of the person or body to whom an appeal should be directed.

Sincerely,
Signature
Name
Address
City, State, ZIP code

Requesting Records via Email (Sample)

(It has been suggested that agencies create an email address dedicated to the receipt of requests. It is recommended that you review the website of the agency maintaining the records that you seek in order to locate its email address and its records access officer.)

(The subject line of your request should be "FOIL Request".)

Dear Records Access Officer:

Please email the following records if possible (include as much detail about the record as possible, such as relevant dates, names, descriptions, etc.):

OR

Please advise me of the appropriate time during normal business hours for inspecting the following records prior to obtaining copies (include as much detail about the records as possible, including relevant dates, names, descriptions, etc.):

OR

Please inform me of the cost of providing paper copies of the following records (include as much detail about the records as possible, including relevant dates, names, descriptions, etc.).

AND/OR

If all of the requested records cannot be emailed to me, please inform me by email of the portions that can be emailed and advise me of the cost for reproducing the remainder of the records requested ($0.25 per page or actual cost of reproduction).

If the requested records cannot be emailed to me due to the volume of records identified in response to my request, please advise me of the actual cost of copying all records onto a CD or floppy disk.

If my request is too broad or does not reasonably describe the records, please contact me via email so that I may clarify my request, and when appropriate inform me of the manner in which records are filed, retrieved or generated.

If it is necessary to modify my request, and an email response is not preferred, please contact me at the following telephone number: _____.

If for any reason any portion of my request is denied, please inform me of the reasons for the denial in writing and provide the name, address and email address of the person or body to whom an appeal should be directed.

(Name)

(Address, if records are to be mailed).

Appeal A Written Denial (Sample)

Name of Agency Official
Appeals Officer
Name of Agency
Address of Agency
City, NY, ZIP code

Re: Freedom of Information
Law Appeal

Dear _____:

I hereby appeal the denial of access regarding my request, which was made on _____ (date) and sent to _____ (records access officer, name and address of agency).

The records that were denied include:_____ (describe the records that were denied to the extent possible and, if possible, offer reasons for disagreeing with the denial, i.e., by attaching an opinion of the Committee on Open Government acquired for its website).

As required by the Freedom of Information Law, the head or governing body of an agency, or whomever is designated to determine appeals, is required to respond within 10 business days of the receipt of an appeal. If the records are denied on appeal, please explain the reasons for the denial fully in writing as required by law.

In addition, please be advised that the Freedom of Information Law directs that all appeals and the determinations that follow be sent to the Committee on Open Government, Department of State, One Commerce Plaza, 99 Washington Ave., Albany, New York 12231.

Sincerely,
Signature
Name
Address
City, State, ZIP code

Appeal A Denial due to an Agency's Failure to Respond in a Timely Manner
(Sample)

FOIL Appeals Officer
Name of Agency
Address of Agency
City, NY, ZIP Code

RE: Freedom of Information Law Appeal

Dear _____:

I requested (describe the records) by written request made on _____ (date). More than five business days have passed since the receipt of the request without having received a response… or… Although the receipt of the request was acknowledged and I was informed that a response would be given by _____ (date), no response has been given. Consequently, I consider the request to have been denied, and I am appealing on that basis.

As required by the Freedom of Information Law, the head or governing body of an agency, or whomever is designated to determine appeals, is required to respond within 10 business days of the receipt of an appeal. If the records are denied on appeal, please explain the reasons for the denial fully in writing as required by law.

In addition, please be advised that the Freedom of Information Law directs that all appeals and the determinations that follow be sent to the Committee on Open Government, Department of State, One Commerce Plaza, 99 Washington Ave., Albany, New York 12231.

Sincerely,
Signature
Name
Address
City, State, ZIP code

Open Meetings

The Open Meetings Law, often known as the “Sunshine Law”, went into effect in 1977. Amendments that clarify and reaffirm your right to hear the deliberations of public bodies became effective in 1979.

In brief, the law gives the public the right to attend meetings of public bodies, listen to the debates and watch the decision making process in action. It requires public bodies to provide notice of the times and places of meetings, and keep minutes of all action taken.

As stated in the legislative declaration in the Open Meetings Law (§100): "It is essential to the maintenance of a democratic society that the public business be performed in an open and public manner and that the citizens of this state be fully aware of and able to observe the performance of public officials and attend and listen to the deliberations and decisions that go into the making of public policy."

What is a meeting?

"Meeting" is defined to mean "the official convening of a public body for the purpose of conducting public business" (§102(1)), and has been expansively interpreted by the courts. Any time a quorum of a public body gathers for the purpose of discussing public business, the meeting must be convened open to the public, whether or not there is intent to take action, and regardless of the manner in which the gathering may be characterized. The definition also authorizes members of public bodies to conduct meetings by videoconference. A meeting cannot validly be held by telephone or through the use of email.

Since the law applies to "official" meetings, chance meetings or social gatherings are not covered by the law.

Also, the law is silent with respect to public participation. Therefore, a public body may permit the public to speak at open meetings, but is not required to do so.

What is covered by the law?

The law applies to all public bodies. "Public body" is defined to cover entities consisting of two or more people that conduct public business and perform a governmental function for the state, for an agency of the state, or for public

corporations, including cities, counties, towns, villages and school districts (§102(2)). In addition, committees and subcommittees consisting solely of members of a governing body are specifically included within the definition. Consequently, city councils, town boards, village boards of trustees, school boards, commissions, legislative bodies and sub/committees of those groups all fall within the framework of the law. Citizens advisory bodies and similar advisory groups that are not created by law are not required to comply with the Open Meetings Law.

Notice of Meetings

The law requires that notice of the time and place of all meetings be given prior to every meeting (§104).

If a meeting is scheduled at least a week in advance, notice must be given to the public and the news media not less than 72 hours prior to the meeting. Notice to the public must be accomplished by posting in one or more designated public locations and, when possible, online.

When a meeting is scheduled less than a week in advance, notice must be given to the public and the news media "to the extent practicable" at a reasonable time prior to the meeting. Again, notice to the public must be given by means of posting in designated locations and online.

If videoconferencing is used to conduct a meeting, the public notice for the meeting must inform the public that videoconferencing will be used, identify the locations for the meeting, and state that the public has the right to attend the meeting at any of the locations.

When can a meeting be closed?

The law provides for closed or "executive" sessions under circumstances prescribed in the law. It is important to emphasize that an executive session is not separate from an open meeting, but rather is defined as a portion of an open meeting during which the public may be excluded (§105).

To hold an executive session, the law requires that a public body take several procedural steps. First, a motion must be made during an open meeting to enter into executive session; second, the motion must identify "the general area or areas of the subject or subjects to be considered;" and third, the motion must be carried by a majority vote of the total membership of a public body.

A public body cannot close its doors to the public to discuss the subject of its choice,

for the law specifies and limits the subject matter that may appropriately be discussed in executive session. The eight areas that may be discussed behind closed doors include:

(a) matters which will imperil the public safety if disclosed;

(b) any matter which may disclose the identity of a law enforcement agency or informer;

(c) information relating to current or future investigation or prosecution of a criminal offense which would imperil effective law enforcement if disclosed;

(d) discussions regarding proposed, pending or current litigation;

(e) collective negotiations pursuant to Article 14 of the Civil Service Law (the Taylor Law);

(f) the medical, financial, credit or employment history of a particular person or corporation, or matters leading to the appointment, employment, promotion, demotion, discipline, suspension, dismissal or removal of a particular person or corporation;

(g) the preparation, grading or administration of examinations; and

(h) the proposed acquisition, sale or lease of real property or the proposed acquisition of securities, or sale or exchange of securities held by such public body, but only when publicity would substantially affect the value thereof.

These are the only subjects that may be discussed behind closed doors; all other deliberations must be conducted during open meetings.

It is important to point out that a public body can never vote to appropriate public monies during a closed session. Therefore, although most public bodies may vote during a properly convened executive session, any vote to appropriate public monies must be taken in public.

The law also states that an executive session can be attended by members of the public body and any other persons authorized by the public body.

Note that item (f) is often referenced as “personnel,” even though that term does not appear in the grounds for holding executive sessions. Only when the discussion focuses on “a particular person or corporation” in relation to one or more of the topics listed in that provision is an executive session permitted.

After the meeting — minutes

If you cannot attend a meeting, you can still find out what actions were taken, because the Open Meetings Law requires that minutes of both open meetings and

executive sessions must be compiled and made available (§106).

Minutes of an open meeting must consist of "a record or summary of all motions, proposals, resolutions and any matter formally voted upon and the vote thereon." Minutes of executive sessions must consist of "a record or summary of the final determination" of action that was taken, "and the date and vote thereon." Therefore, if, for example, a public body merely discusses a matter during executive session, but takes no action, minutes of an executive session need not be compiled; however, if action is taken, minutes of the action taken must be compiled and made available.

It is also important to point out that the Freedom of Information Law requires that a voting record must be compiled that identifies how individual members voted in every instance in which a vote is taken. Consequently, minutes that refer to a four to three vote must also indicate who voted in favor, and who voted against. The law does not require the approval of minutes, but directs that minutes of open meetings be prepared and disclosed within two weeks.

Enforcement of the law

What can be done if a public body holds a secret meeting? What if a public body makes a decision in private that should have been made in public?

Any "aggrieved" person can bring a lawsuit. Since the law says that meetings are open to the general public, a person may be aggrieved if improperly excluded from a meeting or if an executive session was improperly held.

Upon a judicial challenge, a court has the power to declare either that the public body violated the Open Meetings Law and/or declare the action taken void (§107). If the court determines that a public body has violated the law, it has the authority to require the members of the public body to receive training given by staff of the Committee. A court also has the authority to award reasonable attorney fees to the successful party. This means that if you go to court and you win, a court may (but need not) reimburse you for your expenditure of legal fees. If, on the other hand, the court found that a public body voted in private “in material violation” of the law “or that substantial deliberations occurred in private” that should have occurred in public, the court would be required to award costs and attorney’s fees to the successful party. A mandatory award of attorney’s fees would apply only when secrecy is the issue.

It is noted that an unintentional failure to fully comply with the notice requirements "shall not alone be grounds for invalidating action taken at a meeting of a public body."

The site of meetings

As specified earlier, all meetings of a public body are open to the general public. The law requires that public bodies make reasonable efforts to ensure that meetings are held in facilities that permit "barrier-free physical access" to physically handicapped persons, and that meetings are held in rooms that can “adequately accommodate” the volume of members of the public who wish to attend (§103).

Exemptions from the law

The Open Meetings Law does not apply to:

(1) judicial or quasi-judicial proceedings, except proceedings of zoning boards of appeals;

(2) deliberations of political committees, conferences and caucuses; or

(3) matters made confidential by federal or state law (§108).

Stated differently, the law does not apply to proceedings before a court or before a public body that acts in the capacity of a court, to political caucuses, or to discussions concerning matters that might be made confidential under other provisions of law. For example, federal law requires that records identifying students be kept confidential. As such, a discussion of records by a school board identifiable to a particular student would constitute a matter made confidential by federal law that would be exempt from the Open Meetings Law.

Public Participation and recording meetings

The Open Meetings Law provides the public with the right to attend meetings of public bodies, but it is silent concerning the ability of members of the public to speak or otherwise participate. Although public bodies are not required to permit the public to speak at their meetings, many have chosen to do so. In those instances, it has been advised that a public body should do so by adopting reasonable rules that treat members of the public equally.

Public bodies are required to allow meetings to be photographed, broadcast, webcast or otherwise recorded as long as the equipment used to do so is not disruptive or obtrusive. If the public body adopts rules regarding such activities, they must be reasonable and conspicuously posted, and provided to those in attendance upon request (§103(d)).

Revised, September 2011

FOIL AND THE OML

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OUTLINE

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FREEDOM OF INFORMATION LAW ("FOIL")

- The Freedom of Information Law ("FOIL"), codified in Article 6 of the Public Officers Law, establishes a mechanism for the public to hold the government accountable (POL § 84).
- FOIL affirms your right to know how your government operates. It provides rights of access to records reflective of governmental decisions and policies that affect the lives of every New Yorker. The law continues the existence of the Committee on Open Government ("Committee"), which was created by enactment of the original Freedom of Information Law in 1974.

FOIL

- FOIL is based on the principle that "[o]pen and accessible government is a hallmark of a free society, engendering public understanding and participation" (Russo v. Nassau Community College, 81 N.Y.2d 690, 697 [1993])).
- The courts have consistently recognized that" 'the public is vested with an inherent right to know and that official secrecy is anathematic to our form of government,' "(Capital Newspapers v. Whalen, 69 N.Y.2d 246, 252 [1987])(quoting Fink v. Lefkowitz, 47 N.Y.2d 567, 571 [1979]), and that the Legislature enacted FOIL to: "achieve[ ] a more informed electorate and a more responsible and responsive [government]" (Westchester Rockland Newspapers, Inc. v. Kimball, 50 N.Y.2d 575, 579 [1980])(in accord Buffalo News, Inc. v. Buffalo Enterprise Dev. Corp., 84 N.Y.2d 488, 492 [1994] ("to assure accountability and to thwart secrecy.")).

WHO IS SUBJECT TO FOIL?

- All agencies are subject to the Freedom of Information Law, and FOIL defines "agency" to include all units of state and local government in New York State, including state agencies, public corporations and authorities, as well as any other governmental entities performing a governmental function for the state or for one or more units of local government in the state (POL §86(3)).
- The term "agency" does not include the State Legislature or the courts. For purposes of clarity, "agency" will be used hereinafter to include all entities of government in New York, except the State Legislature and the courts.

WHO IS SUBJECT TO FOIL?

- A "fire company" is an "agency" subject to FOIL (FOIL-AO-19197).
- A "housing authority" is an "agency" subject to FOIL (FOIL-AO-19195).
- New York State Public High School Athletic Association is an "agency" subject to FOIL (FOIL-AO-19004)
- Local municipalities, school districts, police, village fire departments, are subject to FOIL including the New York City Police Department.
- The Port Authority is subject to neither FOIL nor FOIA (Ryan v. Port Authority of New York, Index No. 1354/2015 [Sup Ct, New York County 2015]). It does, however, have its own policies with respect to accessing records.

WHO IS SUBJECT TO FOIL?

- * New Case Alert *
- The Nassau County Traffic and Parking Violations Agency, at least in part, is subject to FOIL (Law Offices of Cory H. Morris v. County of Nassau, 158 AD3d 630 [2d Dept 2018]).

WHAT CAN I GET FROM A FOIL REQUEST?

- All records are subject to the FOIL, and the law defines "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 (POL § 86 [4]).
- It is clear that items such as audio or visual recordings, data maintained electronically, and paper records fall within the definition of "record."

WHAT CAN I GET FROM A FOIL REQUEST?

- An agency is not required to create a new record or provide information in response to questions to comply with the law; however, the courts have held that an agency must provide records in the form requested if it has the ability to do so. For instance, if the agency can transfer data into a requested format, the agency must do so upon payment of the proper fee.

WHAT CAN I GET FROM A FOIL REQUEST?

- There is no requirement that a "record" "evince some governmental purpose" (Capital Newspapers, Div. of Hearst Corp. v. Whalen, 69 NY2d 246 [1987]).
- A computer software application is not a record (Miller v. New York State Div. of Human Rights, 122 AD3d 431 [1st Dept 2014]).
- Filmstrips used by a professor in a course given in a public college constitute records subject to FOIL (Russo v. Nassau County Comm. College, 81 NY2d 690 [1993]).
- Videotaped news broadcasts retained by the District Attorney's office constituted a record under FOIL (Pennington v. Clark, 16 AD3d 1049 [4th Dept 2005]).

REQUESTS FOR RECORDS

- An agency may ask you to make your request in writing. The law requires you to "reasonably describe" the record in which you are interested (POL § 89(3)(a)). Whether a request reasonably describes records often relates to the nature of an agency's filing or recordkeeping system. If records are kept alphabetically, a request for records involving an event occurring on a certain date might not reasonably describe the records.
- An agency has to establish that "the descriptions were insufficient for purposes of locating and identifying the document sought." Konigsberg v. Coughlin, 68 NY2d 245,249 (1986).

REQUESTS FOR RECORDS

- Records were properly denied where "petitioner failed to provide dates of birth, addresses, or other identifiable information for these persons to distinguish their records from the records of other people." Roque v. Kings Cty. Dist. Attorney's Office, 12 A.D.3d 374, 375, 784 N.Y.S.2d 155, 156 (2d Dept 2004)
- However, the request does not need to be as detailed as a discovery demand pursuant to the CPLR (Farbman & Sons v. New York City Health & Hosps. Corp, 62 NY2d 75, 82-83 [1984]). The CPLR objections of overbroad, unduly burdensome, use of any and all, etc, are not appropriate or are subject to different standards.
- A request for information (e.g., asking a question) does not reasonably describe a record (Newman v. Dinallo, 69 AD3d 636 [2d Dept 2010]).
- A request is overbroad, and therefore does not reasonably describe a record, when the request would require the agency to search over 500,000 records and the parameters set by the search would not allow the agency to meaningfully search those records (Asian Am. Legal Defense and Educ. Fund v New York City Police Dept., 125 AD3d 531 [1st Dept 2015]).

WHO CAN MAKE A RECORDS REQUEST?

- "[T]he applicant's status or purpose is irrelevant to the availability of records pursuant to FOIL." Gomez v. Fischer, 74 A.D.3d 1399, 1401, 902 N.Y.S.2d 212, 215 (3d Dep't. 2010) (citations omitted).
- "[T]he Civil Rights Law does not preclude [prisoners] from making FOIL requests for government records." Hillard v. Clark, 254 A.D.2d 756, 756, 677 N.Y.S.2d 857, 858 (4th Dep't. 1998)

HOW DO I MAKE A RECORDS REQUEST?

- There is no specific format for making written requests, nor may agencies require one (FOIL-AO-16607). The use of an agency's form, however, may be beneficial for the requestor because it may be easier for the agency to process, may provide a set of directions for the request (e.g., where and how to send the request to the agency), and may allow you to get a faster response.
- The law also provides that agencies must accept requests and transmit records requested via email when they have the ability to do so.

HOW DO I MAKE A RECORDS REQUEST?

- The request should then be sent to the Records Access Officer ("RAO"). Under the Committee's regulations, each agency must appoint one or more persons as records access officer. The records access officer has the duty of coordinating an agency's response to public requests for records in a timely fashion.
- The RAO is responsible for "contact[ing] persons seeking records when a request is voluminous or when locating the records sought involves substantial effort, so that agency personnel may ascertain the nature of records of primary interest and attempt to reasonably reduce the volume of the records requested" (21 NYCRR 1401.2)

HOW DO I MAKE A RECORDS REQUEST?

- Practice Point:
- Try to find out the types of records that an agency normally maintains which would contain the information you want (e.g., subject matter list, news articles, etc.).
- Make sure the legal research is done prior to making the request. You should know what you can get, what you can't get, and what you may get lucky with (doesn't hurt to ask sometimes).
- If you are seeking multiple records, you may want to break up your requests into different FOIL requests (will help with "substantially prevailing").

TIMELINES FOR FOIL RESPONSES

- "[T]he FOIL statute creates a three-step process. An agency that initially denies a request is not required to specify a reason for the denial. Upon the second step, the administrative appeal, the agency is required to "fully explain in writing ... the reasons for further denial". The third step is a CPLR article 78 proceeding, in which the agency "shall have the burden of proving that such record falls within the provisions of" a statutory exception (Competitive Enter. Inst. v Attorney Gen. of New York, 161 AD3d 1283 [3d Dept 2018] [citations omitted]).

INITIAL RESPONSE

The first statutory requirement for the response is to set forth a response within five business days of the receipt of the written request. See POL § 89 (3)(a). The four types of responses are:

- 1. Grant the request and provide the records requested (should be done in writing);
- 2. Deny the request in writing (this one must be done in writing);
- 3. If more than five business days is needed, which is typically the case for voluminous requests, acknowledge receipt of the request in writing within five business days and provide an approximate date within 20 business days of when the request will be granted or denied.
- 4. If more than five business days is needed and the agency cannot provide the records within 20 business days, the agency must acknowledge receipt of the request in writing and inform the applicant of the reason for the delay beyond 20 business days and provide a "date certain," a self-imposed deadline, indicating a promised date by which access will be granted in whole or in part. This date must be reasonable based on attendant facts and circumstances.

EXTENDING TIME TO RESPOND

- An agency must have a reasonable basis for not granting or denying access to a record within 20 business days of the date of acknowledgement of receipt. The Committee has provided factors to be used by agencies to assist in determining a reasonable time to provide access. As stated by the Committee in 21 NYCRR 1401.5(d):
- In determining a reasonable time for granting or denying a request under the circumstances of a request, agency personnel shall consider the
- [1] volume of a request,
- [2] the ease or difficulty in locating,
- [3] retrieving or generating records,
- [4] the complexity of the request,
- [5] the need to review records to determine the extent to which they must be disclosed,
- [6] the number of requests received by the agency, and
- [7] similar factors that bear on an agency's ability to grant access to records promptly and within a reasonable time.

EXTENDING TIME TO RESPOND

- Requests for extensions must also be "reasonable." Determining what is reasonable is always a case-by-case basis. The below caselaw outlines some differing views on this issue:
- Seven months of extensions was found not to be constructively denied (Huseman v. NYC Dep't of Educ., Index No. 15109/2016, 2016 NY Slip Op 30959(U) [Sup Ct, NY County 2016])
- "In the rare situation in which it is found that more than twenty additional business days are needed, the agency may do so, with an explanation of the reason for the delay and an indication of a 'date certain,' a self-imposed deadline by which it will grant access to the records in whole or in part" (FOIL-AO-18,008 [2010], citing 21 NYCRR § 1401.5). Notably, "[t]here is no provision that permits agencies to indicate extension after extension" (id. [emphasis added]). Such conduct is considered a constructive denial of access and may appropriately be appealed (id.).

DENIAL OF ACCESS AND APPEAL

- Denial by Records Access Officer -
- Unless a denial of a request occurs due to a failure to respond in a timely manner (i.e., constructive denial), a denial of access must be in writing, should state the reason for the denial and advising you of your right to appeal to the head or governing body of the agency or the person designated to determine appeals by the head or governing body of the agency. You may appeal within 30 days of a denial.
- Denial by Appeals Officer -
- Upon receipt of the appeal, the agency head, governing body or appeals officer has 10 business days to fully explain in writing the reasons for further denial of access or to provide access to the records. Copies of appeals and the determinations thereon must be sent by the agency to the Committee on Open Government (§89(4)(a)). A failure to determine an appeal within 10 business days of its receipt is considered a denial of the appeal.
- An Article 78 is then utilized to appeal the agency's final decision (discussed later).

DENIAL OF ACCESS AND APPEAL

- Practice Point
- Agencies will (or at least should) have internal regulations outlining where appeals go to, and how they should be addressed.
- The internal regulations should always be reviewed prior to filing an appeal.
- Additionally, some internal regulations provide a shorter time span for an appeals officer to respond, which may mean an appeal is constructively denied sooner (e.g. 10 days and not 10 business days).

FEES FOR PRODUCTION

- Copies of records must be made available on request. Except when a different fee is prescribed by statute (an act of the State Legislature), an agency may not charge for inspection, certification or search for records, or charge in excess of 25 cents per photocopy up to 9 by 14 inches (§87(1)(b)(iii)).
- Fees for copies of other records may be charged based upon the actual cost of reproduction.
- There may be no basis to charge for copies of records that are transmitted electronically; however, when requesting electronic data, there are occasions when the agency can charge for employee time spent preparing the electronic data.

FEES FOR PRODUCTION

- When records are maintained electronically, an agency may charge a fee based on the "actual cost of reproduction," and §87(1)(c) provides that:
- "In determining the actual cost of reproducing a record, an agency may include only:
- 1. An amount equal to the hourly salary attributed to the lowest paid agency employee who has the necessary skill required to prepare a copy of the requested record;
- 2. The actual cost of the storage devices or media provided to the person making the request in complying with such request;
- 3. The actual cost to the agency of engaging an outside professional service to prepare a copy of a record, but only when an agency's information technology equipment is inadequate to prepare a copy, if such service is used to prepare the copy; and
- 4. Preparing a copy shall not include search time or administrative costs, and no fee shall be charged unless at least two hours of agency employee time is needed to prepare a copy of the record requested. A person requesting a record shall be informed of the estimated cost of preparing a copy of the record if more than two hours of an agency employee's time is needed, or if an outside professional service would be retained to prepare a copy of the record."

FEES FOR PRODUCTION

- Practice Tip
- Rather than incur the charge of $0.25 per record, request that the records be scanned and e-mailed to you. Assuming the agency has the ability to do so, this will avoid the expense (FOIL-AO-18620).
- Also, generally no charge for you to inspect the records.

PREVENTING ABUSE

- Agencies are not without protection from those that file inappropriate requests pursuant to FOIL.
- Individuals need to ensure that their FOIL requests are not done to "harass, annoy or embarrass another."
- This is especially so for attorneys making FOIL requests, as they can and should be held to a higher standard.

PREVENTING ABUSE

- The Second Department has upheld the injunction against a pro se applicant with respect to litigation relating to FOIL requests. In Robert v O'Meara, 28 AD3d 567, 568 (2d Dept 2006), the court held:
  - Further, although public policy generally mandates free access to the courts (see Matter of Shreve v. Shreve, 229 A.D.2d 1005, 645 N.Y.S.2d 198; Sassower v. Signorelli, 99 A.D.2d 358, 359, 472 N.Y.S.2d 702), courts have imposed injunctions barring parties from commencing any further litigation where those parties have engaged in continuous and vexatious litigation (see Melnitzky v. Apple Bank for Sav., 19 A.D.3d 252, 797 N.Y.S.2d 470; Miller v. Lanzisera, 273 A.D.2d 866, 868, 709 N.Y.S.2d 286). Given the petitioner's past litigation history with the DOH, as well as with other State agencies, and given his stated intention to continue filing FOIL requests, the Supreme Court properly issued such an injunction (see Harbas v. Gilmore, 244 A.D.2d 218, 219, 664 N.Y.S.2d 921).

CERTIFICATION OF RECORDS

- "Upon payment of, or offer to pay, the fee prescribed therefor, the entity shall provide a copy of such record and certify to the correctness of such copy if so requested, or as the case may be, shall certify that it does not have possession of such record or that such record cannot be found after diligent search" (Pub. Off. Law § 89[3][a]).
- Even if records are produced are known not to be accurate (e.g., scrivener's error on an internal memorandum), certification is still required (FOIL-AO-18781).
- "The statute does not specify the manner in which an agency must certify that documents cannot be located. Neither a detailed description of the search nor a personal statement from the person who actually conducted the search is required. Here, the Department satisfied the certification requirement by averring that all responsive documents had been disclosed and that it had conducted a diligent search for the documents it could not locate" (Rattley v New York City Police Dept., 96 NY2d 873, 875 [2001]).

CERTIFICATION OF RECORDS

- "[T]here is no legal authority to allow a petitioner or independent third party to conduct a search of an agency's records to locate responsive documents; indeed, such a search would be improper because it would inevitably permit the person to view agency records that were not responsive or that were exempt from disclosure" (Gartner v New York State Attorney Gen.'s Off., 160 AD3d 1087, 1089 [3d Dept 2018]).
- The case of Legal Aid Soc. v. New York State Dep't of Corr. & Cmty. Supervision, 105 A.D.3d 1120, 1121-22 (3d Dept 2013), illustrates why it is important to always request a certification if no records exist. In that case, the petitioner was found to substantially prevail where the only relief it was provided was a certification after the commencement of litigation.

EXEMPTIONS

- As a general matter, the Freedom of Information Law is based upon a presumption of access. Stated differently, all records of an agency are available, except to the extent that records or portions thereof fall within one or more grounds for denial appearing in §87(2) of the Law. These exemptions were the Legislature's recognition that certain records needed to remain withheld or confidential.
- To ensure maximum access to government records, the 'exemptions are to be narrowly construed, with the burden resting on the agency to demonstrate that the requested material indeed qualifies for exemption' (Matter of Hanig v. State of New York Dept. of Motor Vehicles, 79 N.Y.2d 106, 109, 580 N.Y.S.2d 715, 588 N.E.2d 750 see, Public Officers Law § 89[4][b]). As this Court has stated, '[o]nly where the material requested falls squarely within the ambit of one of these statutory exemptions may disclosure be withheld' (Matter of Fink v. Lefkowitz, 47 N.Y.2d, 567, 571, 419 N.Y.S.2d 467, 393 N.E.2d 463)" (id., 275).

EXEMPTIONS – GLOMAR RESPONSE

- *New Case Alert*
- Abdur-Rashid v. New York City Police Dep't, 31 NY3d 217 (2018)
- Requesters commenced article 78 proceeding challenging refusal by city police department to disclose whether it possessed responsive documents to their FOIL requests related to any surveillance and investigation of them as individuals and of specific entities with which they were associated.
- The issue presented is whether an agency may decline to acknowledge that requested records exist in response to a FOIL request when necessary to safeguard statutorily exempted information. Under these circumstances, we hold that it may and therefore affirm the Appellate Division order, which reached the same conclusion.

RECORDS EXEMPTED BY STATUTE

- Public Officers Law § 87(2)(a) exempts from disclosure those records that "are specifically exempted from disclosure by state or federal statute." This exemption generally requires that records be withheld in their entirety unless the statute only mandates the withholding of certain information contained in the record (See, e.g., MacKenzie v. Seiden, 106 A.D.3d 1140, 1143 [3d Dep't 2013] ["As such, if a document is protected by Civil Rights Law § 50–b, a state statute, it would be categorically excluded in its entirety and not subject to redaction or deletion."]).

RECORDS EXEMPTED BY STATUTE

- The withholding must be done pursuant to state or federal statutes; local laws or regulations are not "statutes" that qualify (Morris v. Martin, 55 N.Y.2d 1026, 1028 [1982]; FOIL-AO-7609 [1993]), although local laws may be authorized by the Legislature, providing the requisite legal authority for the exemption (see Mitchell v. Borakove, 225 A.D.2d 435, 440 [1st Dep't 1996] [Tom, J. concurring] ["Accordingly, a city's power to adopt a new charter, or amend an existing one, has been codified by the Legislature."]).

RECORDS EXEMPTED BY STATUTE

- There is no legal requirement that a statute expressly state that a record or portion thereof must be withheld. Instead, agencies may look to the legislative intent of a statute in determining whether the statute requires the withholding of certain records. However, there must be a "showing of clear legislative intent to establish" confidentiality of the records (Capital Newspapers Div. of Hearst Corp. v. Burns, 67 N.Y.2d 562, 567 [1986]). Stated differently, the "statute must be clear" (FOIL-AO-19187 [2014]).
- Where a statute expressly provides that a record is exempted in its entirety, an agency may withhold a record in its entirety and is not required to redact portions of it (see, e.g., MacKenzie v Seiden, 128 AD3d 1291, 1292 [3d Dept 2015] ["Even if it were possible to redact the identifying information, this course of action is not appropriate given that such documents are categorically excluded from disclosure…."]).

RECORDS EXEMPTED BY STATUTE

- Records may be protected by attorney-client privilege (CPLR 4503).
- Certain records concerning investigations and prevention programs in hospitals (Pub. Health Law § 2805-m).
- Public welfare records are protected by statute (Social Services Law § 136).
- We conclude that, once electronic ballot images have been preserved in accordance with the procedures set forth in Election Law § 3–222(1), there is no statutory impediment to disclosure and they may be obtained through a FOIL request (Kosmider v Whitney, 160 AD3d 1151, 1151 [3d Dept 2018]). * New Case Alert *

CIVIL RIGHTS LAW 50-A

- Civil Rights Law 50-a provides that "all personnel records used to evaluate performance toward continued employment or promotion" of police officers (and other types of peace officers and firefighters) "shall be considered confidential and not subject to inspection or review."
- The term "personnel records" is not defined by statute and is frequently the cause for litigation.
- Rather, the statute simply says "that such records must be under the control of the particular agency or department and be used to evaluate performance toward continued employment or promotion" (Prisoners' Legal Services of New York v. New York State Dept. of Correctional Services, 73 N.Y.2d 26, 31 [1988]).

CIVIL RIGHTS LAW 50-A

- A police officer's personnel records continue to be exempt from disclosure after he or she departs from public service. Columbia-Greene Beauty Sch., Inc. v. City of Albany, 121 A.D.3d 1369 (3d Dept 2014).
- Videotape footage of an incident between an inmate and a correctional officer was not protected. The court found the video to be a "mixed use material, meaning it could be used for several purposes including that of an officer(s) evaluation." Green v. Annucci, Index No. 2156/2017, 2017 WL 8229475 (Sup. Ct. Albany County 2017).
- A settlement agreement involving an officer's separation from service that did not evaluate the officer's performance or contemplate his continued employment was disclosable under FOIL. Village of Brockport v. Calandra, 191 Misc.2d 718 (Sup. Ct. Monroe County 2002).

CIVIL RIGHTS LAW 50-B

- Civil Rights Law 50-b makes certain records pertaining sex offense victims confidential. Specifically, the 50-b(1) states that the:
  - identity of any victim of a sex offense, as defined in article one hundred thirty or section 255.25, 255.26 or 255.27 of the penal law, or of an offense involving the alleged transmission of the human immunodeficiency virus, shall be confidential. No report, paper, picture, photograph, court file or other documents, in the custody or possession of any public officer or employee, which identifies such a victim shall be made available for public inspection. No such public officer or employee shall disclose any portion of any police report, court file, or other document, which tends to identify such a victim except as provided in subdivision two of this section.
  - The statute also provides a carve out for certain types of information.

CIVIL RIGHTS LAW 50-B

- Although this is a broad exemption, it is not absolute. This statute "does not justify a blanket denial of a request for any documents relating to a sex crime. If a requested document does not contain information that tends to identify the victim of a sex crime, . . . the document must be disclosed" (*Mazza v. Village of Croton-on-Hudson*, 140 A.D.3d 878, 880 [2d Dep't 2016] [quoting *Fappiano v. New York City Police Dep't*, 95 N.Y.2d 738, 748 [2001]]). Conversely, any record that does contain "identifying information" is "categorically excluded in its entirety and not subject to redaction or deletion" (Id. at 880).

CIVIL RIGHTS LAW 50-B

- Courts have also held that the voluntary disclosure of such information by the victim constitutes a waiver of the right to non-disclosure under § 50-b (*Feeney v. City of New York*, 255 A.D.3d 483, 484 [2d Dep't 1998]). However, knowing the identity of the victim or knowing what may be contained in such records does not justify disclosure (Fappiano, 95 N.Y.2d at 748).
- A private right of action does exist for agencies violating 50-b. As such, this is oftentimes a hotly contested exemption.

CIVIL RIGHTS LAW 50-B

- Where charges of rape were dropped prior to prosecution and the victim testified that she was not raped, the protections of § 50-b(1) were no longer available. Brown v. New York City Police Dep't, 264 A.D.2d 558 (1st Dep't 1999).
- In-camera inspection should have been conducted to determine whether an entire case file was properly withheld pursuant to § 50-b(1). Mazza v. Village of Croton-on-Hudson, 140 A.D.3d 878 (2d Dep't 2016).
- A FOIL request for copies of a bill of particulars, DD5s, and UF-61s was properly denied on the grounds that such records contained information protected by § 50-b(1). Velez v. Dennehy, 55 Misc.3d 1205(A) (Sup. Ct. Kings County 2017).

UNWARRANTED INVASION OF PERSONAL PRIVACY

- An agency may deny a record or portion thereof if disclosure would constitute an unwarranted invasion of privacy (POL 87[2][b]). Public Officers Law 89 (2)(b), however, defines what constitutes an unwarranted invasion of privacy, which is:

An unwarranted invasion of personal privacy includes, but shall not be limited to:

- i. disclosure of employment, medical or credit histories or personal references of applicants for employment;
- ii. disclosure of items involving the medical or personal records of a client or patient in a medical facility;
- iii. sale or release of lists of names and addresses if such lists would be used for solicitation or fund-raising purposes;
- iv. disclosure of information of a personal nature when disclosure would result in economic or personal hardship to the subject party and such information is not relevant to the work of the agency requesting or maintaining it;
- v. disclosure of information of a personal nature reported in confidence to an agency and not relevant to the ordinary work of such agency;
- vi. information of a personal nature contained in a workers' compensation record, except as provided by section one hundred ten-a of the workers' compensation law; or
- vii. disclosure of electronic contact information, such as an e-mail address or a social network username, that has been collected from a taxpayer under section one hundred four of the real property tax law.

UNWARRANTED INVASION OF PERSONAL PRIVACY

- Where none of the delineated issues are present, courts determine whether disclosure would constitute an unwarranted invasion of personal privacy "by balancing the privacy interests at stake against the public interest in disclosure of the information," whether any invasion of privacy is unwarranted (Sell v. N.Y.C. Dept. of Educ., 135 AD3d 594, 595 [1st Dept 2016]).
- The Court of Appeals has also held that a standard for determining when disclosure would constitute an unwarranted invasion of personal privacy involves the reasonable person of ordinary sensibilities, and whether a reasonable person would consider an item to be intimate or sensitive (FOIL-AO-17794).
- Practice Point: Practitioners may find trouble FOILing their own clients' records due to this provision. To alleviate this issue, include with the FOIL request a signed release from the client. You may also seek signed releases from third parties when making a FOIL request.

UIPP – PUBLIC EMPLOYEES

- It is emphasized that there is no exception for "personnel matters" in the Freedom of Information Law, and the term "personnel" appears nowhere in that statute. The nature and content of so-called personnel records may differ from one agency to another, and from one employee to another. In any case, neither the characterization of documents as "personnel records" nor their placement in personnel files would necessarily render those documents "confidential" or deniable under the Freedom of Information Law (see Steinmetz v. Board of Education, East Moriches, Sup. Ct., Suffolk Cty., NYLJ, Oct. 30, 1980).
- On the contrary, the contents of those documents serve as the relevant factors in determining the extent to which they are available or deniable under the Freedom of Information Law" (FOIL-AO-16530).

UIPP – PUBLIC EMPLOYEES

- Based on judicial decisions, it is clear that public officers and employees enjoy a lesser degree of privacy than others, for it has been found in various contexts that those individuals are required to be more accountable than others. The courts have found that, as a general rule, records that are relevant to the performance of the official duties of a public officer or employee are available, for disclosure in such instances would result in a permissible rather than an unwarranted invasion of personal privacy.
- Conversely, to the extent that items relating to public officers or employees are irrelevant to the performance of their official duties, it has been found that disclosure would indeed constitute an unwarranted invasion of personal privacy" (*id.*).

UIPP – PUBLIC EMPLOYEES

- Practice Point:
- Under the CPLR, an employee's personnel files may not be obtainable, at least not in its entirety (see, e.g., Pecile v. Titan Capital Group, LLC, 113 AD3d 526, 526-27 [1st Dept. 2014]; Gutierrez v. Trillium USA, LLC, 111 AD3d 669, 672 [2d Dept 2013]).
- However, this does not hold true under FOIL. You can FOIL a municipal employee's personnel file, even if you do not intend on commencing an action against the municipality. This is an advantage many practitioners overlook when demanding a public employee's personnel file through discovery.

IMPAIR PRESENT OR IMMINENT CONTRACT AWARDS OR COLLECTIVE BARGAINING NEGOTIATIONS

- FOIL-AO-19286 - In the exception referenced above, §87(2)(c), the key word is "impair", and the question under that provision involves whether or the extent to which disclosure would "impair" the contracting process by diminishing the ability of the government to reach an optimal agreement on behalf of the taxpayers. After the contract has been awarded, the exemption is no longer applicable.
- FOIL-AO-18882 - As a general matter, it is our view that the purpose of §87(2)(c) in the context of collective bargaining is to avoid placing a government agency at a disadvantage when engaging in a negotiation process.
- When both parties have the same records, the bargaining table is balanced, and neither party would benefit or be impaired via disclosure. On the other hand, when records are kept and known by only one party to the negotiations, the result would likely be different. If, for instance, an internal memo known only to agency officials detailed the agency's strategy in negotiations, disclosure to the other party to the negotiations would result in disadvantage to the agency and a cost that would likely be borne by taxpayers.

TRADE SECRETS

- This exemption allows an agency to withhold or redact records that "are [1] trade secrets or [2] are submitted to an agency by a commercial enterprise or derived from information obtained from a commercial enterprise and which if disclosed would cause substantial injury to the competitive position of the subject enterprise" (POL 87[2][d]).
- This exemption needs to be split into two parts due to the words "substantial injury" appearing towards the latter part of the text. In the past, both sections of this statute required a substantial injury to be shown if records were disclosed (see, e.g., FOIL-AO-19237). However, the first part of the text--trade secrets--was later held to not require substantial injury to be shown (Verizon N.Y., Inc. v. New York State Pub. Serv. Comm, 137 A.D.3d 66, 72-73 [3d Dept. 2016]).

TRADE SECRETS

- In determining whether records are trade secrets, courts initially consider whether the material is "a formula, pattern, device or compilation of information" the commercial entity uses to its competitive advantage. Id at 72 (quoting *New York Telephone Co. v. Public Serv. Comm. Of the State of New York,* 52 N.Y.2d 213, 219 n.3 (1982)). If so, courts next consider various additional factors, including
  - (1) the extent to which the information is known outside of [the] business; (2) the extent to which it is known by employees and others involved in [the] business; (3) the extent of measures taken by [the business] to guard the secrecy of the information; (4) the value of the information to [the business] and [its] competitors; (5) the amount of effort or money expended by [the business] in developing the information; [and] (6) the ease or difficulty with which the information could be properly acquired or duplicated by others.
  - *Schroeder v. Pinterest Inc.*, 133 A.D.3d 12, 27 (1st Dep't 2015) (in commercial dispute involving alleged misappropriation of trade secrets; Crawford v New York City Dept. of Info. Tech., 2017 NY Slip Op 30982[U], 28 [Sup Ct, New York County 2017]).

RECORDS COMPILED FOR LAW ENFORCEMENT PURPOSES

- For this exception, the record must be compiled for law enforcement purpose and, if disclosed, would:
- i. interfere with law enforcement investigations or judicial proceedings;
- ii. deprive a person of a right to a fair trial or impartial adjudication;
- iii. identify a confidential source or disclose confidential information relating to a criminal investigation; or
- iv. reveal criminal investigative techniques or procedures, except routine techniques and procedures;

RECORDS COMPILED FOR LAW ENFORCEMENT PURPOSES

- The agency claiming this exemption does not need to be a law enforcement agency (e.g., police department). Rather, the agency must be compiling the records for a "law enforcement purpose" (Madeiros v. New York State Educ. Dept., 30 N.Y.3d 67, 75 [2017]). As held by the Court of Appeals in Madeiros:
- To that end, "law enforcement" is generally defined by Black's Law Dictionary as "[t]he detection and punishment of violations of the law" (Black's Law Dictionary [10th ed. 2014], law enforcement). It is undisputed that the Department lacks jurisdiction to punish criminal violations of the law. However, as the dictionary further provides, the term "law enforcement" is "not limited to the enforcement of criminal laws" (Black's Law Dictionary [10th ed. 2014], law enforcement).

RECORDS COMPILED FOR LAW ENFORCEMENT PURPOSES

- * New Case Alert *
- Friedman v. Rice, 30 N.Y.3d 461 (2017)
- This case dealt with the "confidential" prong of the compiled for law enforcement purpose.
- " We hold that a government agency may rely on this exemption only if the agency establishes (1) that an express promise of confidentiality was made to the source, or (2) that the circumstances of the particular case are such that the confidentiality of the source or information can be reasonably inferred."

INTER/INTRA AGENCY

- This exception exempts records that are inter-agency or intra-agency materials which are not:
- i. statistical or factual tabulations or data;
- ii. instructions to staff that affect the public;
- iii. final agency policy or determinations;
- iv. external audits, including but not limited to audits performed by the comptroller and the federal government.
- Note - "Inter" - between; among. "Intra" - on the inside; within.

INTER/INTRA AGENCY

- "It is noted that the language quoted above contains what in effect is a double negative. While inter-agency or intra-agency materials may be withheld, portions of such materials consisting of statistical or factual information, instructions to staff that affect the public, final agency policy or determinations or external audits must be made available, unless a different ground for denial could appropriately be asserted." - These words are consistently found in COOG's advisory opinions concerning this exception.
- The Court of Appeals has held that §87(2)(g) is intended to protect the "deliberative process". In its consideration of the matter, the Court found that:
  - "the purpose underlying the intra-agency exemption, is 'to protect the deliberative process of the government by ensuring that persons in an advisory role [will] be able to express their opinions freely to agency decision makers' (Matter of Xerox Corp. v. Town of Webster, 65 NY2d 131, 132 [quoting Matter of Sea Crest Constr. Corp. v. Stubing, 82 AD2d 546, 549]). Consistent with this limited aim to safeguard internal government consultations and deliberations..." [Gould v. New York City, 89 NY2d 267, 276 (1996)].

INTER/INTRA AGENCY

- i. statistical or factual tabulations or data;
  - "[f]actual data ... simply means objective information, in contrast to opinions, ideas, or advice exchanged as part of the consultative or deliberative process of government decision making" (The New York Times Co. v City of New York Fire Dept., 4 NY3d 477, 487 [2005]).
- ii. instructions to staff that affect the public;
  - "There is little decisional law that deals directly with subparagraph (ii). Typically, agency guidelines, procedures, staff manuals and the like provide direction to an agency's employees regarding the means by which they must perform their duties. Some may be "internal", in that they deal solely with the relationship between an agency and its staff. Others may provide direction in terms of the manner in which staff performs its duties in relation to or that affects the public, which would ordinarily be accessible. To be distinguished would be advice, opinions or recommendations that may be accepted or rejected. An instruction to staff, a policy or a determination, each would represent a matter that is mandatory or directory in nature that would in our view be accessible pursuant to §87(2)(g)(ii)" (FOIL-AO-18986).

INTER/INTRA AGENCY

- iii. final agency policy or determinations;
  - "An initial question is whether those portions deleted reflect a determination upon which the District relies, or merely opinions of the reviewers. If they are reflective of decisions, which appears to be so, I believe that they are accessible to the public, for subparagraph (iii) of §87(2)(g) requires the disclosure of final agency determinations. On the other hand, to the extent that the comments withheld reflect the opinions of the administrator and the other District employee, the redaction would, in my view, be consistent with law" (FOIL-AO-16486).
- iv. external audits, including but not limited to audits performed by the comptroller and the federal government.
  - "Neither the legislative history nor the case law supports respondents' contention that the internal audit is wholly exempt from disclosure where such reports contain statistical or factual tabulations" (Gannett Co., Inc. v Rochester City School Dist., 179 Misc 2d 502, 506 [Sup Ct 1998], affd sub nom. Matter of Gannett Co., Inc. v Rochester City School Dist., 267 AD2d 964 [4th Dept 1999]).

INTER/INTRA AGENCY

- Communications between an agency and a private official are not exempted under this exemption, although they may be protected under another exemption. For example, a petitioner sought "certain email messages sent from or received by any government email accounts assigned to the Office of the Mayor to or from Cathleen Black, at the time she was a nominee for the position of New York City School Chancellor." First Department held that inter-agency / intra-agency exemption did not apply because, at that time, Ms. Black was still a private citizen (Hernandez v. Office of Mayor of City of New York, 100 A.D.3d 555 [1st Dep't. 2012]).
- It is well settled that for communications between a governmental agency and an outside consultant to fall under the agency exemption, the outside consultant must be retained by the governmental agency (Rauh v de Blasio, 161 AD3d 120, 125 [1st Dept 2018]).

OTHER EXEMPTIONS

- (h) are examination questions or answers which are requested prior to the final administration of such questions.
- (i) if disclosed, would jeopardize the capacity of an agency or an entity that has shared information with an agency to guarantee the security of its information technology assets, such assets encompassing both electronic information systems and infrastructures; or
- (j) [Deemed repealed Dec. 1, 2019] are photographs, microphotographs, videotape or other recorded images prepared under authority of section eleven hundred eleven-a of the vehicle and traffic law.
- (k) [Expires and deemed repealed Dec. 1, 2019] are photographs, microphotographs, videotape or other recorded images prepared under authority of section eleven hundred eleven-b of the vehicle and traffic law.
- (l) [Expires and deemed repealed Sept. 20, 2020] are photographs, microphotographs, videotape or other recorded images produced by a bus lane photo device prepared under authority of section eleven hundred eleven-c of the vehicle and traffic law.
- (m) [Expires and deemed repealed Aug. 30, 2018] are photographs, microphotographs, videotape or other recorded images prepared under the authority of section eleven hundred eighty-b of the vehicle and traffic law.
- (n) [Expires and deemed repealed July 25, 2018] are photographs, microphotographs, videotape or other recorded images prepared under the authority of section eleven hundred eighty-c of the vehicle and traffic law.
- (n) [Expires and deemed repealed Aug. 21, 2019] are photographs, microphotographs, videotape or other recorded images prepared under authority of section eleven hundred eleven-d of the vehicle and traffic law.
- (o) [Expires and deemed repealed Sept. 12, 2020, pursuant to L.2015, c. 222, § 15.] are photographs, microphotographs, videotape or other recorded images prepared under authority of section eleven hundred eleven-e of the vehicle and traffic law.

ARTICLE 78

- An applicant may commence a proceeding to review an appeal officer's denial of a records request through an Article 78 proceeding (POL § 89[5][d]). There is a four-month statute of limitations to commence the action (CPLR 217[1]).
- "It is well settled that the Statute of Limitations period does not begin to run until a petitioner receives notice of the final administrative determination, and not upon the issuance thereof. The burden of proving the applicability of the affirmative defense of statute of limitations rest upon the party asserting it, here the respondents. In the case at bar respondents make no effort to demonstrate when petitioner received the August 15, 2013, FOIL appeal determination" (Yuson v. Boll, Index No. 337/2014 [Sup Ct, Franklin County 2015]).

BURDEN

- An Article 78 proceeding brought to compel the production of records is not subject to the standard "arbitrary and capricious" review (see, e.g., Prall v. New York City Dept. of Corrections, 129 AD3d 734, 735 [2d Dept 2015] ["Thus, in this proceeding, the Supreme Court erred in applying the "arbitrary and capricious" standard."]).
- Instead, the standard language utilized to discuss the burden and standard of review is as follows:
- In a proceeding pursuant to CPLR article 78 to compel the production of material pursuant to FOIL, the agency denying access has the burden of demonstrating that the material requested falls within a statutory exemption, which exemptions are to be narrowly construed (see Public Officers Law § 89 [5] [e], [f]; Matter of West Harlem Bus. Group v Empire State Dev. Corp., 13 NY3d 882, 885 [2009]; Matter of Data Tree, LLC v Romaine, 9 NY3d 454, 462-463 [2007]). This showing requires the entity resisting disclosure to "articulate a 'particularized and specific justification for denying access' " (Matter of Dilworth v Westchester County Dept. of Correction, 93 AD3d 722, 724 [2d Dept 2012], quoting Matter of Capital Newspapers Div. of Hearst Corp. v Burns, 67 NY2d 562, 566 [1986]). "Conclusory assertions that certain records fall within a statutory exemption are not sufficient; evidentiary support is needed" (Matter of Dilworth, 93 AD3d at 724). Because FOIL is "based on a presumption of access to the records" (Matter of Data Tree, LLC v Romaine, 9 NY3d at 462), "FOIL 'compels disclosure, not concealment' " wherever the agency fails to demonstrate that a statutory exemption applies (id. at 463, quoting Matter of Westchester Rockland Newspapers v Kimball, 50 NY2d 575, 580 [1980]; see Matter of Buffalo News v Buffalo Enter. Dev. Corp., 84 NY2d 488, 492 [1994]).

BURDEN

- The Third Department, in Aurigemma v New York State Dept. of Taxation and Fin., 128 AD3d 1235, 1238–39 (3d Dept 2015), provided an often-overlooked aspect of an agency's burden:
  - Respondents bore two separate burdens in this matter: first, to articulate "a particularized and specific justification for denying access" to the requested documents at the administrative level (Matter of MacKenzie v. Seiden, 106 A.D.3d at 1141, 964 N.Y.S.2d 702 [internal quotation marks and citations omitted]) and, second, in the context of the ensuing CPLR article 78 proceeding, to serve an answer containing "pertinent and material facts showing the grounds of [their] action[s]" (CPLR 7804[d]). In our view, merely attaching the privilege log to the records appeal officer's affidavit—without any corresponding reference to the cited exemptions or any explanation as to the manner in which such exemptions apply to the documents at issue—does not satisfy either of those burdens. As a result, neither of the alternative grounds relied upon by respondents will be considered by this Court. Respondents' remaining contentions, to the extent not specifically addressed, have been examined and found to be lacking in merit.

BURDEN

- Agencies must support their reasons for denials with first-hand information (not just attorney affirmations in opposition).
- However, an agency is not required to discuss and go into detail over every document withheld. Instead, discussing the generic kinds of documents withheld will usually be sufficient (Matter of Lesher v. Hynes, 19 NY3d 57, 67 [2012] ["The agency must identify the generic kinds of documents for which the exemption is claimed, and the generic risks posed by disclosure of these categories of documents. Put slightly differently, the agency must still fulfill its burden under Public Officers Law § 89 (4) (b) to articulate a factual basis for the exemption."]).
- Nevertheless, this is a fine line to walk, and agencies run into problems when they do not provide sufficient details about the withheld records and simply rely on conclusory allegations (Dekom v. Waag, Index No. 14484/2012 [Sup Ct, Nassau County Feb. 19, 2013] ["The respondents' broad and unsubstantiated conclusion that most of the emails found in its search are exempt fails to satisfy the burden required to be met for nondisclosure under FOIL, thus necessitating an in camera inspection by this court."]).
- Thus, if you can, you should.

ATTORNEY'S FEES

- With the December 13, 2017, amendment to Public Officers Law § 89, attorney's fees under FOIL have become markedly easier to obtain. The amended statute states, in pertinent part:
  - The court in such a proceeding:
  - (i) may assess, against such agency involved, reasonable attorney's fees and other litigation costs reasonably incurred by such person in any case under the provisions of this section in which such person has substantially prevailed, and when the agency failed to respond to a request or appeal within the statutory time;
  - and (ii) shall assess, against such agency involved, reasonable attorney's fees and other litigation costs reasonably incurred by such person in any case under the provisions of this section in which such person has substantially prevailed and the court finds that the agency had no reasonable basis for denying access.
- The First Department appears to be the first court to issue a published opinion under the new law (Rauh v de Blasio, 161 AD3d 120, 126 [1st Dept 2018]).

ATTORNEY'S FEES

- In the prior version, a court had discretion to award attorney's fees under both prongs. However, the most recent amendment now requires a court to award attorney's fees in the second prong.
- This is a prime example of why applicants need to outline in detail the reasons for their entitlement to records in the underlying FOIL appeal. It is harder for an agency to say that it had a "reasonable basis" to deny a FOIL request when it was presented with caselaw during the administrative appeal that plainly stated otherwise.

ATTORNEY'S FEES

- The award of attorney's fees is intended to " 'create a clear deterrent to unreasonable delays and denials of access [and thereby] encourage every unit of government to make a good faith effort to comply with the requirements of FOIL' " (S. Shore Press, Inc. v Havemeyer, 136 AD3d 929, 931 [2d Dept 2016])

- Moreover, an award of an attorney's fee and costs pursuant to FOIL is particularly appropriate to promote the purpose of and policy behind FOIL. Specifically, in enacting FOIL, the legislature declared that "government is the public's business" and expressly found that "a free society is maintained when government is responsive and responsible to the public, and when the public is aware of governmental actions" (S. Shore Press, Inc. v Havemeyer, 136 AD3d 929, 931 [2d Dept 2016]).

ATTORNEY'S FEES

- In determining whether to exercise their discretionary authority to award attorney's fees, courts look to several factors. These factors primarily relate to the parties' conduct during the administrative process
- (see, e.g., Competitive Enter. Inst. v Atty. Gen. of New York, 56 Misc 3d 569, 571–72 [Sup Ct, Albany County 2017] [Instead, in the Court's view, respondent stonewalled, and as noted in the November 2016 Decision and Order baldly "asserted that the records fell within 'one or more' of five possible exemptions ... (and completely failed) its obligation to 'fully explain in writing ... the reason for the denial of access' "];
- Gonsalves v. Nassau County, Index No. 3442/2017 [Sup Ct, Nassau County 2017] [denying attorney's fees where the agency made a "good faith" effort];
- Urac Corp. v Pub. Serv. Com'n of State of N.Y., 223 AD2d 906, 908 [3d Dept 1996] ["Nevertheless, even assuming that petitioner has satisfied all three of these criteria, we conclude that in light of evidence of confusion and possible misunderstanding involved in the Department's efforts to comply with petitioner's request, Supreme Court did not abuse its discretion in denying petitioner's request for counsel fees."]).
- Additional factors courts look to prior to exercising discretion is the reasonableness of the agency in withholding the sought-after records, and the length of the delay in providing the appropriate statutory responses (see, e.g., Matter of Mineo v. New York State Police, 119 AD3d 1140, 1142 [3d Dept 2014]).

ATTORNEY'S FEES – HOW MUCH?

In determining whether attorney's fees are "reasonable," courts look to multiple factors, including:

- 1. the time, effort, and skill required;
- 2. the difficulty of the questions presented;
- 3. the responsibility involved;
- 4. counsel's experience, ability, and reputation;
- 5. the fee customarily charged in the locality; and
- 6. the contingency or certainty of compensation.

- Competitive Enter. Inst. v Atty. Gen. of New York, 56 Misc 3d 569, 571–72 [Sup Ct, Albany County 2017], quoting Shrauger v. Shrauger, 146 AD2d 955, 956 [3d Dept 1989]). An additional factor to consider is the result obtained (Lee Enters., Inc. v. City of Glen Falls, 55 Misc3d 1207(A), *2 [Sup Ct, Warren County 2017]).

ATTORNEY'S FEES – HOW MUCH?

- Courts will generally cap an attorney's hourly rate depending on the locality (Lee Enters., Inc. v. City of Glen Falls, 55 Misc3d 1207(A), *2 [Sup Ct, Warren County 2017] [finding the demanded hourly rate to be "excessive for this locality"]).
- However, courts have allowed attorneys to bill at their normal rates under particular circumstances (Competitive Enter. Inst. v Atty. Gen. of New York, 56 Misc 3d 569, 571–72 [Sup Ct, Albany County 2017] ["On this record, and particularly towards encouraging respondent to make a good faith effort in complying with FOIL, the court declines respondent's request to reduce an already discounted hourly rate. Any less would be counterproductive and unreasonable under the circumstances."]).

NO REASONABLE BASIS

- This is often a subjective analysis by the court. A review of the underlying record here is crucial in making a determination as to whether the agency's actions were reasonable.
- For FOIL applicants who intend to utilize this prong for attorney's fees, it is important to build the record that the agency is not being reasonable. This is oftentimes done by supplying the agency with caselaw that refutes their positions or by securing an advisory opinion by the Committee. It is hard for an agency to claim that it is being reasonable, for example, when the Committee provides an advisory opinion to the contrary.

NO REASONABLE BASIS

- In analyzing whether an agency had a "reasonable basis" for denying access to records, a review of caselaw is best:
- However, aside from those very limited exceptions, the Village Manager had no reasonable basis for denying access to any other materials "relating to depositions and supporting subpoena material from" (Rec. Ex. 1) litigations which were settled pursuant to the SCJ—including, but not limited to, the balance of the Rosenshein Deps which were submitted for in camera inspection and, to the extent they were in the Village's possession, the transcripts of the deposition of Bernard J. Rosenshein which was noticed by MBYC and any materials which were produced in response to the Taylor Point Subpoena (McCrory v Vil. of Mamaroneck, 34 Misc 3d 603, 629–30 [Sup Ct 2011]).

NO REASONABLE BASIS

- Upon our review of this record, we cannot say that it was reasonable for respondents to issue a blanket denial of petitioner's document request. The argument that there was a reasonable basis to believe that the records were exempt from disclosure is belied by the virtually immediate release of the requested information upon commencement of this proceeding. Furthermore, our independent review of the records reveals that, at most, respondents could have reasonably believed that a small portion of the records were exempt. However, respondents have failed to articulate any persuasive reason why the records could not have been redacted and the portions that were not exempt from disclosure turned over (New York State Defs. Ass'n v New York State Police, 87 AD3d 193, 197 [3d Dept 2011]).
- While the Court has found that the records should be provided, the Chambers' reasons for withholding the records are, at least, arguable (New York Times Co. v New York State Exec. Chamber, 56 NYS3d 821, 836 [Sup Ct 2017]).

SUBSTANTIALLY PREVAILED

- There is no clear definition to the term "substantially prevailed" under FOIL. Clearly, a party has substantially prevailed when it receives all or most of the relief that it was seeking. However, when it does not receive all of the relief requested, what percentage of relief provided to relief sought qualifies as substantial? Is a percentage of documents received over denied even an appropriate way to analyze whether one has substantially prevailed?
- Caselaw, however, does illustrate the point.

SUBSTANTIALLY PREVAILED

- Saxton v New York State Dept. of Taxation and Fin., 107 AD3d 1104, 1105 [3d Dept 2013]
  - With respect to the request for counsel fees, we find no basis to disturb Supreme Court's conclusion that, having secured the disclosure of only three additional documents out of the 18 sought, petitioners did not substantially prevail.
- Henry Schein, Inc. v Eristoff, 35 AD3d 1124, 1126 [3d Dept 2006]
  - Further, the court's decision to order the release of 17 pages of the remaining 181 pages in dispute does not, in our view, necessarily indicate that petitioner "substantially prevailed" in the dispute.

SUBSTANTIALLY PREVAILED

- Madeiros v New York State Educ. Dept., 30 NY3d 67, 79 (2017)
  - Here, the Appellate Division concluded that the statutory requirement that petitioner "substantially prevail" was not met because the "majority of the [Department's] challenged redactions were appropriate." However, this analysis fails to take into account that the Department made no disclosures, redacted or otherwise, prior to petitioner's commencement of this CPLR article 78 proceeding. Although the Department's redactions in the eventually-released records have been upheld, petitioner's legal action ultimately succeeded in obtaining substantial unredacted post-commencement disclosure responsive to her FOIL request—including both disclosure that was volunteered by the agency and disclosure that was compelled by Supreme Court's order.

SUBSTANTIALLY PREVAILED

- Kalish v. City of New York, 2009 WL 2844530 (Sup Ct, Queens County 2009)
  - A party has "substantially prevailed" in a FOIL proceeding where the initiation of the proceeding brought about the release of the requested documents.
- Bottom v Fischer, 129 AD3d 1604, 1605 (4th Dept 2015)
  - Inasmuch as respondent ultimately provided all but one of the documents in the FOIL request, petitioner "substantially prevailed" within the meaning of the statute
- Cook v Nassau County Police Dept., 140 AD3d 1059, 1060 (2d Dept 2016)
  - Here, the record does not support the Supreme Court's finding that the petitioner "substantially prevailed" in this proceeding. Although the NCPD was eventually ordered to disclose certain records, its claims of exemptions were largely sustained
- William J. Kline and Son, Inc. v Fallows, 124 Misc 2d 701, 705 [Sup Ct, Montgomery County 1984]
  - Whether a party has substantially prevailed is to be determined by looking at the situation prior to the commencement of suit, the situation as it presently exists, and the effect the litigation had, if any, in bringing about the change

OPEN MEETINGS LAW ("OML")

- It is essential to the maintenance of a democratic society that the public business be performed in an open and public manner and that the citizens of this state be fully aware of and able to observe the performance of public officials and attend and listen to the deliberations and decisions that go into the making of public policy.
- The people must be able to remain informed if they are to retain control over those who are their public servants. It is the only climate under which the commonweal will prosper and enable the governmental process to operate for the benefit of those who created it (POL § 100).

WHAT IS A MEETING?

- POL 102(1) defines a "meeting" as: the official convening of a public body for the purpose of conducting public business, including the use of videoconferencing for attendance and participation by the members of the public body.
- The term has been expansively interpreted by courts. Any time a quorum of a public body gathers for the purpose of discussing public business, the meeting must be convened open to the public, whether or not there is intent to take action, and regardless of the manner in which the gathering may be characterized.

WHAT IS A MEETING?

- A public body, however, is permitted to conduct "retreats" wherein no official business is discussed. A retreat allows a public body to participate in team building, and improve interpersonal relations (OML-AO-4762).
- A public body that meets by chance, socially, or some other "casual encounter," and absent an intent to conduct public business, no meeting has taken place (OML-AO-4534).
- No meeting took place where revisions to a document were based upon discussions between members of a public body individually and the body's counsel, and no quorum of the public body was present at the time of these discussions (Gedney Ass'n v. City of White Plains, 147 A.D.3d 938, 939 [2d Dept 2017]).
- Meetings of a public body may take place outside of the boundaries of that public body where there is no law, regulation, or policy to the contrary (Petersen v. Incorporated Village of Saltaire, 77 A.D.3d 954, 956 [2d Dept 2010]).

NOTICING A MEETING

- For meetings of public bodies scheduled at least one week prior to the actual meeting, notice "shall be given or electronically transmitted to the news media and shall be conspicuously posted in one or more designated public locations at least seventy-two hours before such meeting" (POL 104[1]).
- For meetings with less than one week's notice, notice of the time and place "shall be given or electronically transmitted, to the extent practicable, to the news media and shall be conspicuously posted in one or more designated public locations at a reasonable time prior thereto" (POL 104[2]).
- These notice requirements do not require the same level of publication as a legal notice (POL 104[3]).

NOTICING A MEETING

- If a meeting will be streamed live over the internet, the public notice for the meeting shall inform the public of the internet address of the website streaming such meeting (POL 104 [5]).
- When a public body has the ability to do so, notice of the time and place of a meeting given in accordance with subdivision one or two of this section, shall also be conspicuously posted on the public body's internet website (POL 104[6]).
- If videoconferencing is used to conduct a meeting, the public notice for the meeting shall inform the public that videoconferencing will be used, identify the locations for the meeting, and state that the public has the right to attend the meeting at any of the locations (POL 104[4]).
- Agency records subject to 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 post such records to the agency's website to the extent practicable as determined by the agency prior to the meeting (POL 103[e]). This only applies to agencies that maintain "a regularly and routinely updated website and utilizes a high speed internet connection" (id.), which presumably is the majority of agencies.

WHAT IS A PUBLIC BODY?

- "Public body" means any entity, for which a quorum is required in order to conduct public business and which consists of two or more members, performing a governmental function for the state or for an agency or department thereof, or for a public corporation as defined in section sixty-six of the general construction law, or committee or subcommittee or other similar body of such public body (POL 102[2]).
- Stated differently - Any entity consisting of two or more members of a public body, such as a committee, a subcommittee or "similar body" consisting of two or more members of a public body, would fall within the requirements of the Open Meetings Law when such an entity discusses or conducts public business collectively as a body (OML-AO-5068 [citing Syracuse United Neighbors v. City of Syracuse, 80 AD 2d 984, 437 NYS 2d 466, (4th Dept. 1981), appeal dismissed 55 NY 2d 995, 449 NYS 2d 201 (1982)]).

EXECUTIVE SESSION

- Members of the public may only be excluded from a meeting during a properly convened "executive session" or when the meeting is specifically exempted by law.
- POL 102(3) defines "executive session" as "that portion of a meeting not open to the general public."
- It is important to emphasize that an executive session is not separate from an open meeting, but rather is defined as a portion of an open meeting during which the public may be excluded.

EXECUTIVE SESSION

- Executive sessions cannot take place prior to the meeting because you have to vote to enter into executive session (OML-AO-4889).
- Nevertheless, the meeting's agenda may note that it is anticipated that the public body will enter into executive session at the beginning of a meeting (OML-AO-2426).
- Attendance at an executive session shall be permitted to any member of the public body and any other persons authorized by the public body (POL 105[2]).

EXECUTIVE SESSION

- Various interpretations of the Education Law, §1708(3), however, indicate that, except in situations in which action during a closed session is permitted or required by statute, a school board cannot take action during an executive session [see United Teachers of Northport v. Northport Union Free School District, 50 AD 2d 897 (1975); Kursch et al. v. Board of Education, Union Free School District #1, Town of North Hempstead, Nassau County, 7 AD 2d 922 (1959); Sanna v. Lindenhurst, 107 Misc. 2d 267, modified 85 AD 2d 157, aff'd 58 NY 2d 626 (1982)]. Stated differently, based upon judicial interpretations of the Education Law, a school board generally cannot vote during an executive session, except in those unusual circumstances in which a statute permits or requires such a vote (OML-AO-5336).

ENTERING INTO EXECUTIVE SESSION – HOW AND WHY?

- Public Officers Law 105(1) provides the statutory basis for entering into an executive session:
  - a. matters which will imperil the public safety if disclosed;
  - b. any matter which may disclose the identity of a law enforcement agent or informer;
  - c. information relating to current or future investigation or prosecution of a criminal offense which would imperil effective law enforcement if disclosed;
  - d. discussions regarding proposed, pending or current litigation;
  - e. collective negotiations pursuant to article fourteen of the civil service law;
  - f. the medical, financial, credit or employment history of a particular person or corporation, or matters leading to the appointment, employment, promotion, demotion, discipline, suspension, dismissal or removal of a particular person or corporation;
  - g. the preparation, grading or administration of examinations; and
  - h. the proposed acquisition, sale or lease of real property or the proposed acquisition of securities, or sale or exchange of securities held by such public body, but only when publicity would substantially affect the value thereof.

ENTERING INTO EXECUTIVE SESSION – HOW AND WHY?

- A motion to conduct an executive session must include reference to the subject or subjects to be discussed, and the motion must be carried by majority vote of a public body's membership before such a session may validly be held (OML-AO-5419).
- OML-AO-3654 provides a detailed discussion pertaining to the sufficiency of a motion to enter into executive session:
  - "It is insufficient to merely regurgitate the statutory language; to wit, 'discussions regarding proposed, pending or current litigation'. This boilerplate recitation does not comply with the intent of the statute. To validly convene an executive session for discussion of proposed, pending or current litigation, the public body must identify with particularity the pending, proposed or current litigation to be discussed during the executive session" [Daily Gazette Co. , Inc. v. Town Board, Town of Cobleskill, 44 NYS 2d 44, 46 (1981), emphasis added by court].

ENTERING INTO EXECUTIVE SESSION – HOW AND WHY?

- Lucas v. Bd. of Educ., 57 Misc.3d 1207(A) (Sup Ct 2017) –
- "Given the overriding purpose of the Open Meetings Law, section 105 is to be strictly construed, and the real purpose of an executive session will be carefully scrutinized 'lest the ... mandate [of the Open Meetings Law] be thwarted by thinly veiled references to the areas delineated thereunder.'"
- As was done here, by merely reciting to "litigation, personnel, real estate, and contracts" as the basis for entering into executive session, without describing with some detail the nature of the proposed discussions, the Board of Education has done exactly what the Open Meetings Law was designed to prevent. Nowhere does the Board of Education identify, for example, the name of the case that will be the subject of the discussion regarding "litigation," or the name of the property that will be the subject of the discussion regarding "real estate." Similarly, the Board of Education fails to identify which "contracts" they will be discussing during executive session or what particular "personnel" issues they will be discussing. As a result, the public lacks the ability to determine whether the subjects may properly be considered in private.

OML EXEMPTIONS

- POL 108 provides three exemptions for the Open Meetings Law:
- 1. judicial or quasi-judicial proceedings, except proceedings of the public service commission and zoning boards of appeals;
- 2. a. deliberations of political committees, conferences and caucuses.
- b. for purposes of this section, the deliberations of political committees, conferences and caucuses means a private meeting of members of the senate or assembly of the state of New York, or of the legislative body of a county, city, town or village, who are members or adherents of the same political party, without regard to (i) the subject matter under discussion, including discussions of public business, (ii) the majority or minority status of such political committees, conferences and caucuses or (iii) whether such political committees, conferences and caucuses invite staff or guests to participate in their deliberations; and
- 3. any matter made confidential by federal or state law.

OML EXEMPTIONS

- When an exemption applies, the Open Meetings Law does not, and the requirements that would operate with respect to executive sessions are not in effect.
- Stated differently, to discuss a matter exempted from the Open Meetings Law, a public body need not follow the procedure imposed by §105(1) that relates to entry into an executive session. Further, although executive sessions may be held only for particular purposes, there is no such limitation that relates to matters that are exempt from the coverage of the Open Meetings Law (OML-AO-2727).

OML EXEMPTIONS

- Discussions pertaining to information acquired in carrying out functions pursuant to Public Health Law 2805-j are confidential and therefore exempt (OML-AO-2727).
- Settlement negotiations made confidential by a court order are exempted (OML-AO-3071).
- A court-ordered pre-trial settlement conference is exempt from the provisions of the OML (OML-AO-4548).
- Quasi-judicial hearings must lead to finality for a decision that may be reviewed in court (OML-AO-4924).
- A meeting between a school board and parents of students is properly exempted when the discussions pertaining to information protected by FERPA (OML-AO-3863).

MINUTES OF A MEETING

- Public Officers Law § 106 provides the statutory mandate for public bodies to take "minutes" of their meetings. It states:
- 1. Minutes shall be taken at all open meetings of a public body which shall consist of a record or summary of all motions, proposals, resolutions and any other matter formally voted upon and the vote thereon.
- 2. Minutes shall be taken at executive sessions of any action that is taken by formal vote which shall consist of a record or summary of the final determination of such action, and the date and vote thereon; provided, however, that such summary need not include any matter which is not required to be made public by the freedom of information law is added by article six of this chapter.
- 3. Minutes of meetings of all public bodies shall be available to the public in accordance with the provisions of the freedom of information law within two weeks from the date of such meeting except that minutes taken pursuant to subdivision two hereof shall be available to the public within one week from the date of the executive session.

MINUTES OF A MEETING

- There is no requirement as yet that minutes of meetings be posted on a website. An entity may choose to do so, and many do, but there is no obligation to do so (OML-AO-5077).
- There is nothing in the Open Meetings Law or any other statute of which I am aware that requires that minutes be approved. Nevertheless, as a matter of practice or policy, many public bodies approve minutes of their meetings. In the event that minutes have not been approved, to comply with the Open Meetings Law, it has consistently been advised that minutes be prepared and made available within two weeks, and that if the minutes have not been approved, they may be marked "unapproved", "draft" or "preliminary", for example. By so doing within the requisite time limitations, the public can generally know what transpired at a meeting; concurrently, the public is effectively notified that the minutes are subject to change. If minutes have been prepared within less than two weeks, I believe that those unapproved minutes would be available as soon as they exist, and that they may be marked in the manner described above (OML-AO-4146).

MINUTES OF A MEETING

- Based on the foregoing, minutes need not consist of a verbatim account of everything that was said; on the contrary, so long as the minutes include the kinds of information described in §106. (OML-AO-3369).
- For many years, this office has advised that if a public body reaches a "consensus" upon which it relies, minutes reflective of decisions reached must be prepared and made available. In a similar manner, there are circumstances under which we believe a simple "It looks good to us" should be memorialized in the minutes. In circumstances when Board approval is required, for example, it is our opinion that even a general acknowledgment with no objections raised is required to be recorded as action taken. In our opinion, when Board approval is sought and granted with no objections, such action should be recorded in the minutes (OML-AO-5451).

ENFORCEMENT

- Public Officers Law § 107 provides the enforcement mechanism for the Open Meetings Law. Similar to FOIL, the "teeth" of the statute is seen through the Article 78 proceeding (which is discussed in detail in the FOIL section). Section 107 states:
  - Any aggrieved person shall have standing to enforce the provisions of this article against a public body by the commencement of a proceeding pursuant to article seventy-eight of the civil practice law and rules, or an action for declaratory judgment and injunctive relief. In any such action or proceeding, if a court determines that a public body failed to comply with this article, the court shall have the power, in its discretion, upon good cause shown, to declare that the public body violated this article and/or declare the action taken in relation to such violation void, in whole or in part, without prejudice to reconsideration in compliance with this article. If the court determines that a public body has violated this article, the court may require the members of the public body to participate in a training session concerning the obligations imposed by this article conducted by the staff of the committee on open government.
  - An unintentional failure to fully comply with the notice provisions required by this article shall not alone be grounds for invalidating any action taken at a meeting of a public body. The provisions of this article shall not affect the validity of the authorization, acquisition, execution or disposition of a bond issue or notes.

ENFORCEMENT

- 2. In any proceeding brought pursuant to this section, costs and reasonable attorney fees may be awarded by the court, in its discretion, to the successful party. If a court determines that a vote was taken in material violation of this article, or that substantial deliberations relating thereto occurred in private prior to such vote, the court shall award costs and reasonable attorney's fees to the successful petitioner, unless there was a reasonable basis for a public body to believe that a closed session could properly have been held.
- 3. The statute of limitations in an article seventy-eight proceeding with respect to an action taken at executive session shall commence to run from the date the minutes of such executive session have been made available to the public.

ENFORCEMENT

- "Good Cause" Standard Language –
- The objective of the Open Meetings Law is to foster public accountability by allowing citizens "to observe the performance of public officials and attend and listen to the deliberations and decisions that go into the making of public policy" (Public Officers Law § 100; see Matter of Perez v. City Univ. of N.Y., 5 N.Y.3d 522, 528, 806 N.Y.S.2d 460, 840 N.E.2d 572; Matter of New York Univ. v. Whalen, 46 N.Y.2d 734, 735, 413 N.Y.S.2d 637, 386 N.E.2d 245). In furtherance of this objective, courts are empowered, in their discretion and upon "good cause shown," to declare void any action taken by a public body in violation of the Open Meetings Law (Public Officers Law § 107[1]). "Inclusion by the Legislature of this language vesting in the courts the discretion to grant remedial relief makes it abundantly clear that not every breach of the 'Open Meetings Law' automatically triggers its enforcement sanctions" (Matter of New York Univ. v. Whalen, 46 N.Y.2d at 735, 413 N.Y.S.2d 637, 386 N.E.2d 245) -- (Krauss v Suffolk County Bd. of Elections, 153 AD3d 1211, 1212–13 [2d Dept 2017]).

ENFORCEMENT

- Applied here, the Court finds that Petitioners have established good cause to declare the action taken by the Board of Education, on May 20, 2014—approving the termination of the twenty bus drivers—to be void. The Petitioners have submitted evidence to sufficiently establish that the Board of Education has engaged in a persistent pattern of deliberate violations of the letter and spirit of the Open Meetings Law by, *inter alia,* improperly convening executive sessions and limiting the public's opportunity to participate at Board meetings (Lucas v Bd. of Educ. of E. Ramapo Cent. School Dist., 57 Misc 3d 1207(A) [Sup Ct 2017]).
- Article 78 dismissed for failure to join a necessary party where the employee who was the center of the employment decision at issue was not named (In re Application of School Transparency Organization for Parents, Index No. 2015-1828 [Sup Ct, Broome County 2015]).

ENFORCEMENT

- Even assuming that the December 12, 2012 meeting was procedurally defective and violated the Open Meetings Law for failing to sufficiently particularize the subject to be considered during executive session (*see* Public Officers Law § 105), its actions with respect to plaintiff's employment were "not void but, rather, voidable" (*Matter of Oakwood Prop. Mgt. LLC v. Town of Brunswick,* 103 A.D.3d 1067, 1069–1070, 960 N.Y.S.2d 535 [2013] [internal quotation marks and citation omitted], *lv denied* 21 N.Y.3d 853, 2013 WL 1800446 [2013]).
- Here, there is nothing in the record before us establishing that defendants intentionally violated the Open Meetings Law and, given that timely notice of the subject meeting was disseminated prior thereto and the undisputed fact that plaintiff was not reappointed to the office of Comptroller and, therefore, served as an at-will employee, we find that, under the circumstances presented, plaintiff failed to demonstrate sufficient good cause to warrant exercising our discretionary authority to invalidate defendants' determination terminating his employment (Phillips v Glenville, 160 AD3d 1264, 1267–68 [3d Dept 2018]).

ENFORCEMENT

- The adoption of a subsequent resolution terminating petitioner's employment with the Village effective March 21, 2017 renders this proceeding moot and, accordingly, the petition is denied and this proceeding is dismissed, without costs or disbursements (In re Steward, Index No. 01079/2017 [Sup Ct, Suffolk County 2017]).
- Moreover the court notes that nullification at this point would be of no real effect as the parties have, appropriately, made the court aware that the Town Board recently duly passed Resolution 251-2017, which is, in its substance, identical to Resolution 94-2017 (Ripp v. Town of Oyster Bay, Index No. 1834/2017 [Sup Ct, Nassau County 2017]).

ENFORCEMENT

- The court does not find the that the respondent is a repeat violator of the offenses alleged in the petition. The newspaper stories, on which the petitioners apparently rely for support of blatant conduct by the respondents, are, as already stated herein, inapplicable, and hardly indicative of any prior conduct. Generally, where evidence indicates that a respondent has repeatedly violated the Open Meetings Law, such may justify an award of attorney's fees.
- That is not the case in the instant matter. Further, there is no irreparable harm, since petitioners were able to gather the information and report the news relative to the subject meeting in their medium.

News 12 Co. v Hempstead Pub. Schools Bd. of Educ., 52 Misc 3d 479, 490 [Sup Ct 2016]

ENFORCEMENT

- Ripp v. Town of Oyster Bay, Index No. 1834/2017 (Sup Ct, Nassau County 2017)
- Numerous violations of the OML alleged; however, court refuses to void resolutions at issue.
- Orders training of Town Board.
- Pro-se Petitioner

Faculty Biographies

The Freedom of Information Act
and the Open Meetings Law
2018

ROBERT J. FREEMAN

Executive Director

New York State Committee on Open Government

Bob Freeman has worked for the Committee since its creation in 1974 and was appointed executive director in 1976.

He received his law degree from New York University and a BS in Foreign Service from Georgetown University in Washington, DC.

Mr. Freeman has addressed numerous government related organizations, bar associations, media groups and has lectured at various colleges and universities. He has also spoken on open government laws and concepts throughout the United States, as well as Canada, the far east, Latin America and eastern Europe, and has taught the only course in an American law school on public access to government information.

He is the recipient of numerous honors, and in the spring of 2010, received the John Peter Zenger Award from the New York News Publishers Association and was selected by the National Freedom of Information Coalition and the Society of Professional Journalists for their Heroes of the 50 States award and induction into The Open Government Hall of Fame.

Most recently, Freeman was given the Lifetime Achievement Award by the New York State Associated Press Association.

Anthony J. Fasano, Esq.

Guercio & Guercio, LLP

Mr. Fasano graduated *cum laude* from Adelphi University where he majored in Finance, and is a graduate of Touro College, Jacob D. Fuchsberg Law Center, where he also graduated cum laude. During law school, he served as a Research Editor on the *Touro Law Review*. His case note, *The Decline of the Confrontation Clause in New York – People v. Encarnacion*, 28 Touro L. Rev. 929 (2012), was published and subsequently cited by a New York Supreme Court in People v. Umpierre, 951 N.Y.S.2d 382 (Sup. Ct. Bronx County 2012).

In addition to his academic career, Mr. Fasano received his commission as a second lieutenant in the New York Army National Guard as a graduate of the Hofstra University Reserve Officers' Training Corps, where he earned the George C. Marshall Award for overall outstanding student in military studies and leadership. He is a graduate of the U.S. Army Field Artillery Basic Officer Leader Course.

Areas of Practice:

Education Law

Labor and Employment Law

Personal Injury Litigation

Bar Admissions:

New York State

U.S. District Court, Eastern District of New York

U.S. District Court, Southern District of New York

Education:

Touro College, Jacob D. Fuchsberg Law Center, Central Islip, New York

Adelphi University, Garden City, New York

Honors and Awards:

Professional: Super Lawyers – "Rising Stars" (2018)

Super Lawyers – "Rising Stars" (2017)

American Institute of Personal Injury Attorneys – 10 Best Attorneys (2017)

Super Lawyers – "Rising Stars" (2016)

Nassau County Bar Association – Young Lawyer of the Month (Jan 2015)

Touro Law School: Research Editor, *Touro Law Review* (2012-2013)

Staff, *Touro Law Review* (2011-12)

Dean's List Recipient for Multiple Semesters

Military Service: Humane Service to NYS Ribbon for Operation Hurricane Irene

Humane Service to NYS Ribbon for Operation Hurricane Sandy

George C. Marshall Award for Outstanding Student in Military Studies

SGM Churchill Award for Academic Performance and Community Service

Continuing Legal Education

School Security and Employee Rights, Management Advocates for School Labor Affairs (July 2018)

Addressing Safety and Emergency Issues in the Public Sector, Labor and Employment Relations Association, Long Island Chapter (May 2018)

"FOIL"ed Again: The Article 78 and Attorney's Fees, Suffolk County Bar Association, Suffolk Academy of Law (Apr. 2018)

Fun with F.O.I.L., Suffolk County Bar Association, Suffolk Academy of Law (Oct. 2017)

FERPA and Family Court, Nassau County Bar Association (Oct. 2016)

Publications

Recent Trends in Attorney's Fees under FOIL, Nassau County Bar Association, *Nassau Lawyer* (Oct. 2017)

Common Pitfalls in Appeals to the Commissioner of Education, Nassau County Bar Association, *Nassau Lawyer*(Aug. 2017)

Navigating the Doctrine of Primary Jurisdiction, Nassau County Bar Association, *Nassau Lawyer* (Aug. 2016)

Contributing Editor, *Now That You've Turned 18* Pamphlet Series, NYSBA (2016)

FOIL 2015: A Year in Review, NYSBA, *Electronically In Touch* (Feb. 2016)

Ringing the Bell for Tinker, Nassau County Bar Association, *Nassau Lawyer* (Oct. 2015)

FOIL 101: An Inside Route to Better Discovery, NYSBA, *Perspective* (Apr. 2015)

A Primer on Student Suspension Hearings in New York Public Schools, NYSBA, *Electronically in Touch* (Oct. 2014)

The Decline of the Confrontation Clause in New York, 28 Touro L. Rev. 929 (2012)

Cory H. Morris, Esq.

The Law Offices of Cory H. Morris

Named a Superlawyer, **Cory Morris is admitted to practice in New York State, the Eastern District of New York and the Southern District of New York. He is also admitted to practice law in Florida State.** He was named top 40 under 40 by the Long Island Business News and named top 30 under 30 by the Huntington Chamber of Commerce. **Mr. Morris is an advocate for equality, civil rights and social justice within the legal community.** In recognition of this, Mr. Morris is the recipient of an Equality Award at the Suffolk County New York Civil Liberties Union 50th Anniversary Gala and the New York State Bar Empire Justice Award for Pro Bono work. He is focused on helping people charged with a crime, regardless of the allegations, and helping people vindicate their rights to be free from unreasonable government intrusion and excessive force. The Law Offices of Cory H. Morris focuses on helping individuals facing addiction and criminal issues, accidents and injuries, and, lastly, accountability issues.

Mr. Morris is familiar with the issues surrounding Long Island and has an advanced background in psychology, serving as an Adjunct at Adelphi University. He attended college on Long Island, starting at Nassau Community College, obtaining his Bachelor's Degree in Criminal Justice from Adelphi University in 2008 and his Master's Degree from Adelphi's Derner Institute of Advanced Psychological Studies in 2010. During his graduate degree, his concentration was on forensic psychology, substance abuse, and impulsive disorders. He obtained an assistantship with Dr. Larry Josephs, was published in the Encyclopedia of the History of Psychological Theories and contributed to Adelphi's scholarship, working with a doctoral student and post-doctoral professor in developing his thesis titled "Impulsivity in the form of Suicidality in Borderline Personality Disorder."

Mr. Morris graduated Touro College at the top of his class, was a Dean's List recipient and received both the David A. Berg Public Interest Fellowship and the Howard Glickstein Public Interest Fellowship. He served as President of the American Civil Liberties Union student group, vice president of the criminal justice society at Touro College and was a member of Touro's International Law Review. He also participated in the Center for Restorative Practices, the Unemployment Action Center, and other student groups and public interest organizations. During his tenure at Touro College, he volunteered with both the Mississippi Center for Justice and with Malik Rahim's Common Ground organization in Louisiana. He successfully helped nearly a dozen unemployment claimants at administrative hearings, receiving an award for outstanding advocate, helped high school students facing school suspension hearings, and worked as a live chat operator to help low-income New Yorkers obtain free legal services and

representation from pro bono attorneys. He is also the recipient of several awards for pro bono legal services as well as the Brian Lord Memorial Award for his demonstrated commitment to public interest.

Currently on appeal, the Matter of Rosasco v. St James Fire District et al (Sup. Court, Suffolk County), was a successful (Freedom of Information Law, FOIL) social justice litigation which resulted in the Respondents producing a report regarding the sale of the historic St. James Fire House. Upon release of the report and consistent with the contents within that report, the voters rejected the proposed sale of the firehouse. The matter is on appeal to determine whether the Supreme Court, *inter alia*, appropriately denied an award of reasonable attorney's fees and utilized the appropriate standard of review on a motion to dismiss an Article 78 petition seeking the release of public records.

A notable victory was *In the Matter of Law Offices of Cory H. Morris, appellant, v County of Nassau, et al*., respondents, a decision which held, *inter alia*, "to the extent that a TPVA record concerns the nonadjudicatory responsibilities of the TPVA, it is not exempt from disclosure under the definition of “agency” in Public Officers Law § 86(3)." The office also successfully opposed a School District's motion to hide surveillance footage capturing a school-incident, the choking of a student by a security guard, vis-a-vis a protective Order in *Edmond v. Longwood CSD* et al, 2:16-cv-02871-JFB-AYS, Document 55 (EDNY 04/17/17), a case where the Court found that "The District Defendants have provided this Court with no independent factual basis, nor case law, to issue a protective order other than the spectre that Plaintiffs may release the footage to the public."

Notes Pages


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