

A Farewell Message from the Immediate Past President

By Lynn Poster-Zimmerman

At the stroke of midnight, June 1, 2020, my chariot turned back into a pumpkin. And, what a ride it has been! Although I never got my tiara, I felt like a queen all year, sometimes like queen of the prom, sometimes like a beleaguered leader.

With all kidding aside, I have felt most honored and privileged to be at the helm of this great bar association. On June 7, 2019, I asked all of you to do one thing, and so many of you did, and then you did more than one thing. Because of all of your hard work and dedication to our bar association, we have continued to grow and to establish new and inventive programs and initiatives, all to the great benefit of our legal community and the litigants in Suffolk County.

While I do lament not being able to go forward with some of our projects, most notably Restorative Justice on May 1, the Supreme Court admission trip and the Women's History Day collaborative event, we hope to still have those events when the world turns right-side up again. Yet, we should not lose sight of all we have accomplished. I am proud that we have established a Mentoring Program for at-risk youths in our local public schools, to have reinvigorated our Speaker's Bureau, to have continued the fight to raise the rate of pay for 18b counsel, of the amazing success of our Charity Foundation, of the collaboration we have enjoyed with our specialty bars and the other local bar associations, and the dialog we have created amongst our members and between the bench and bar, especially in these last months. I thank you all for your contributions to our many successful endeavors.

When I began my tenure as president,

I was told by many that there would be terrific moments and challenging moments. Now, I am not a person who shirks from a challenge, so I was ready, or so I thought. I attended the Bar Leaders' Institute in Chicago, an amazing experience to learn and grow and meet bar leaders around the country. I knew I had the support of so many amazing people in this bar association, the wisdom of my predecessors, and a dedicated bar association staff who made sure to maintain a supply of caffeine free diet coke and 1 percent milk for me.

However, and this is a big "however," all those well-meaning individuals and the many seminars I attended left out the chapter on "How to Handle a Global Pandemic." In the biblical sense, we are living through a real, live plague. I was not prepared for what could undoubtedly be categorized not only as an unforeseen event, but as a seismic change in our entire universe and way of life as we had heretofore known it. No one was prepared for what has now become, as Eugene Barnosky recently stated, "our new abnormal." I think that this bar association mobilized with all its might to continue its operations, bring the ever-changing rules to our membership and the lines of communication open. It was nothing less than a herculean effort, but an effort that could not have happened without each one of you.

It is a testament to our strength as judges and attorneys practicing in Suffolk County, as Americans, and as human beings, that we have persevered in the face of such adversity and have risen to the occasion to meet this overwhelming challenge. It is my fervent belief that, out of this darkness, there will be light, and our world and our legal



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community will learn new ways of functioning that will make us better and stronger.

That is not to say that this pandemic has been anything short of tragic. Our great State of New York has had the unfortunate designation of being the world epicenter of Covid-19, in particular New York City, and Long Island only second to the city, with over 80,000 people having contracted this dreadful disease. The loss of so many lives, over 100,000 in the United States, is devastating. One-hundred thousand families in mourning, losing loved ones so senselessly. There are no words.

My very heartfelt sympathies go out to the families of the members we have lost and to all of our members who have lost a loved one.

As I have said many times throughout this year, and especially in these last few months, we have survived and thrived in no small measure due to the hard work of our bar association staff. I owe a world of gratitude to each of you. I cannot thank our Executive Director, Sarah Jane LaCova enough, and our Technology Director and Past President, Barry Smolowitz. Without Jane and Barry, we would not have continued to function. Who ever heard of "Zoom" before March 16? Now, it is seared into our vocabulary, along with "social distancing," "PPE" and "PPP." The knowledge, guidance and unending hours of work of Jane and Barry allowed me to perform my job and keep our bar association going.

I am sure I speak for all of us in thanking our District Administrative Judge, the Honorable C. Randall Hinrichs, for all of his hard work in guiding us and our court

system through this challenging time, with the utmost sense of grace, patience and dedication.

Last week, I had the very great privilege of hosting the New York State Bar Association Installation of their 123rd President, our very own Scott M. Karson. We could not be prouder of Scott for having achieved this great accomplishment. He has been an active and dedicated member of our bar association for over 40 years, having worn many hats, including that of the president. I can think of no one better suited to guide the legal community in the State of New York at a time like this. Congratulations and the best of luck to Scott.

I want to thank the members of the Board of Directors of the Suffolk County Bar Association for your support throughout this year, and especially in these recent upside-down months. By the time you read this, we will have had a new president sworn in, the Honorable Derrick Robinson. My very best congratulations to you and my most heartfelt wishes for a successful year. While these challenges are not going away anytime soon, I know that this bar association is in very capable hands and Judge Robinson will lead us all through this continually changing landscape with strength, wisdom and grace.

Thank you all for this amazing opportunity. It has been the greatest honor and privilege to have served as President of the Suffolk County Bar Association.

To all of you and your families, be well and stay healthy.

All my best,

Lynn

CIVIL RIGHTS

Focus on FOIL: The Reasonably Described Record

By Cory Morris

New York's Freedom of Information Law, codified in the Public Officer's Law, is a pivotal tool in litigation. Whether one seeks records relating to public schools, police body cameras, government contracts, wrongful convictions, traffic cameras or infrastructure and design, any member of the public has standing to request such agency records. And the attorney(s) who represent a spurned FOIL petitioner in an article 78 proceeding is allowed to request reasonable attorney's fees.

Matter of Jewish Press, Inc. v. New York City Dept. of Educ., 2020 N.Y. Slip Op 2785 (2nd Dep't. 2020) ("*Jewish Press*") was rendered on May 13, 2020 reiterating to both records requestors and agencies obliged to produce such records that "[w]here the request is sufficiently detailed to enable the agency to locate the records in question, the agency cannot complain about the nomenclature of the request as described."¹

Freedom of Information Law

The Court of Appeals has often repeated and confirmed the simple rationale behind FOIL, that "the public is vested with an inherent right to know and that official secrecy

is anathematic to our form of government."²

FOIL (Public Officers Law § 89(3)(a)) mandates that within five business days of receiving a request for a record, an agency shall either: (1) make the record available to the requestor; (2) deny the request in writing; or (3) furnish a written acknowledgment of the receipt of the request with a statement setting forth the approximate date when the request will be granted or denied. "The New York State Legislature enacted FOIL to promote an open government and public accountability."³ The statute "imposes a broad duty on government to make its records available to the public."⁴ Once challenged, it is the agency, not the records requestor, that bears the burden of explaining why records must be withheld from the public.

In accordance with the desire to encourage "open government"⁵ and "public accountability"⁶, FOIL generally mandates all agencies to make reasonably described records available unless, the material being sought falls within a statutory exemption. As such, "[a]ll government records are presumptively open for public inspection and copying unless they fall

within one of the enumerated exemptions of Public Officers Law § 87(2)." It bears repeating that disclosure may be withheld "[o]nly where the material requested falls squarely within the ambit of one of these statutory exemptions."⁷ The request for records, then, must be detailed but the idea that the person requesting records detail that exact

record has been and was flatly rejected in *Jewish Press*.

FOIL: Reasonably described records

The Committee on Open Government regularly disseminates opinions concerning the Public Officers Law, New York's Freedom of Information Law. "If the agency is able to locate the requested records with reasonable effort, it is required to do so."⁸ Providing names, the type of records sought, dates of birth, job titles, social security numbers, time frames and document locations will aid an agency in locating records. Specifically, Public Officers Law § 89(3) states in part that: "[e]ach 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 avail-

able to the person requesting it..."⁹ Whether not readily apparent or not sufficient for a records search, the FOIL Records Access Officer may deny a request or ask for clarification on such grounds thus delaying the production of records.

The New York Court of Appeals in *Farbman v. NYC Health & Hosps.*, 62 N.Y.2d 75 (1984) ("*Farbman*") held "FOIL, which requires only that the records be 'reasonably described,' " mandates that the respondent bears the burden in "establish[ing] that the descriptions were insufficient for purposes of locating and identifying the documents sought."¹⁰ The issue is a recurrent one and *Jewish Press*, citing *Farbman*, constrains the extent a FOIL Records Access Officer may simply conclude that records were not reasonably described in denying the release of unpleasant, or perhaps incriminating, records in response to a reasonably described FOIL request.

Although the Freedom of Information Law, as initially enacted, required that an applicant must seek "identifiable" records, since 1978 it has merely required that an applicant "reasonably describe" the records sought. One

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attorney's fees are always subject to review by the Surrogate for reasonableness.

Equally reasonably, where an estate with a value of \$50,000 or less must be administered through the Surrogate's Court, the court system provides a simplified process. In such an instance, the interested party seeking appointment by the Surrogate's Court is able to readily represent him or herself, with assistance available from the Small Estate Department of the respective Surrogate's Court and with a filing fee of only \$1.

In Suffolk County, as well as other communities whose legal needs are usually addressed by local, small law firms, estate administration often constitutes a significant portion of an attorney or a firm's practice. Law Practice Management treatises refer to this type of work as "bread and butter clients."

Currently in Suffolk County, and I presume other similarly situated counties where the majority of attorneys are solo practitioners or practice in a small firm environment (less than 10 attorneys), attorneys are struggling through this pandemic personally and professionally along with

the rest of their communities. Attorneys and non-attorneys share equally in some of the pandemic's most significant consequences – personal health crises and complications, loss of loved ones, limitations on and fear of interpersonal interactions, challenges in caring for immediate and extended family and community members, and anxiety created by an uncertain future economically, personally and beyond. Add to that the pressures of maintaining a law practice – rent, staff salaries, insurances (health, malpractice, etc.), CLE requirements, registration fees and other professional obligations – while courts are closed and income cannot be earned. Going on months and through the future indefinitely, many legal transactions have been compromised, if not stalled or prevented, and client interaction is next to impossible. The struggle is real.

Now, in the midst of it all, a request has been made by Your Honor and a response provided through our large-firm-dominated state bar association, which endeavors to take away a significant practice area for countless members of our professional community

without there being a necessity for doing so. Respectfully, before the damage is done, I implore Your Honor, our NYSBA leadership and this newly formed Task Force to consider the members of the Bar whose livelihood this initiative would impact so adversely.

While large firms may have pro bono departments and associates available to be "train[ed as] attorney volunteers" to fulfill these tasks while still generating the extraordinary fees for the uninterrupted services they remain able to provide which assure their continuation, creation of this ready-made, previously-unavailable avenue for pro bono representation will cause a tremendous and very real detriment to many members of our profession. By providing no cost representation where there is no necessity of doing so (based upon this area of law's long-standing manner of delivery of services and its reasonable determination and imposition of attorneys' fees), this task force can provide "great press" for the profession. Unfortunately, as is so often the case from the statewide perspective, such press will be to the detriment of and cause the potential demise of many of

the profession's own members. In fact, I fear, it will be taking the bread, and butter, out of its own members' mouths.

Your Honor's interest, together with the interest of the New York State Bar Association and this recently formed Task Force in trying to assist families who have been impacted by the pandemic, is laudable. To that end there may be better potential solutions that are more reasonable without adversely affecting the Bar's own members. Two readily come to mind – 1) where technology already exists in the form of allowing E-filing of new proceedings, as is true in Suffolk County, permit the filing of new matters to the extent they are able to be handled through submissions (and will be readily able to otherwise proceed once restrictions prohibiting personal contact are lifted), and 2) waive all filing fees for new probate and administration proceedings, as that is the only money that must be paid by a family to initiate a proceeding. Unlike the recently announced pro bono initiative, both would help all involved parties and not harm lawyers in doing so.

Respectfully,
Sheryl L. Randazzo

cc via e-mail only to:

Chief Administrative Judge Lawrence K. Marks
Michael Miller, NYSBA COVID-19 Task Force Chair
Hank Greenberg, NYSBA President
Scott M. Karson, NYSBA Incoming-President
Lynn Poster-Zimmerman, SCBA President
Honorable Derrick Robinson, SCBA Incoming-President
The Suffolk Lawyer

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should be cognizant that the Court of Appeals decision in *Farbman* was rendered before the days of Google searches, desktop computer terminals and smart phones.

Agencies must conduct a search. To the extent that records do not exist, the law is clear in that the agency "shall certify that it does not have possession of such record or that such record cannot be found after diligent search," Public Officers Law § 89(3)(a), designate a FOIL Appeal(s) person, and instruct a petitioner to whom a FOIL Appeal should be directed.¹¹ Lastly, once an administrative appeal is made, the agency must send the results of the FOIL Appeal to the New York State Committee on Open Government.

Matter of Jewish Press, Inc.

Jewish Press involved a (Kings County) FOIL request (petitioner) "for copies of forms used by the respondent's employees to request absences for religious observances, in cases where the request was denied, for the period of Jan. 1, 2015, to April 20, 2018." In response, "[t]he respondent denied the request on the ground that the requested records were not reasonably described...so as to enable the respondent, with reasonable effort, to conduct a search to locate and identify the requested records." The petitioner appealed the lower court determination denying and dismissing the petition to obtain such records and attorney's fees.

The Second Department held that the *Jewish Press* FOIL request was "not open-end-



ed and does not require the respondent to manually search every document filed with it over a broad time period." Like *Farbman*, the records in *Jewish Press* were identifiable. *Jewish Press* reminds FOIL Records Access Officers that Public Officers Law § 89(3)(a) does not allow an agency to deny a request merely because it is voluminous. The Second Department in *Jewish Press*, remanded the petition as "[t]he issue of burden and/or whether the respondent is able to engage an outside professional service to cull the records sought was not addressed by the Supreme Court..." After litigation, the request will likely receive more than a simple deni-

al and may subject the respondents to paying petitioner reasonable attorney's fees.

To avoid the costs of litigation, together with an award of fees to a substantially prevailing petitioner, agencies should do more than simply deny requests that require a search. This should be an opportunity to create a system to easily ascertain and disseminate information (such as making records available through a website on a rolling basis) or work with the public in creating a more free and open society, as the New York Legislature intended. Conversely, *Jewish Press* should be cited by any FOIL records requestor who has been denied access to re-

ords on the grounds that the records requested could not be identified or were not reasonably described.

Note: Named a SuperLawyer, Cory Morris is admitted to practice in NY, EDNY, SDNY, Florida and the SDNY. Mr. Morris holds an advanced degree in psychology, is an adjunct professor at Adelphi University and is a CASAC-T. The Law Offices of Cory H. Morris focuses on helping individuals facing addiction and criminal issues, accidents and injuries, and, lastly, accountability issues.

1. *Matter of Jewish Press, Inc. v. New York City Dept. of Educ.*, 2020 N.Y. Slip Op 2785 (2nd Dep't. 2020).
2. *Matter of Fink v. Lefkowitz*, 47 NY2d 567, 571 (1979)
3. *Abrams, Fensterman, Fensterman, Eisman, Formato, Ferrara, Wolf & Carone, LLP v. New York City Police Dept.*, 2018 N.Y. Slip Op 32334 (NYC Sup. Ct. 2018) (citation omitted).
4. *Miller v. New York State DOT*, 58 AD3d 981 (3d Dep't. 2009)
5. *Matter of Newsday, Inc. v. Empire State Dev. Corp.*, 98 NY2d 359, 362 (2002); Public Officers Law § 84.
6. *Matter of Gould v. New York City Police Dept.*, 89 NY2d 267, 274 (1996).
7. *Matter of Fink v. Lefkowitz*, 47 NY2d 567(1979)
8. FOIL-AO-18949.
9. *Id.* (emphasis added); see FOIL-AO-19189; see also FOIL-AO-19203.
10. *Id.* (citing Public Officers Law, § 89, subd 3); see also *Konigsberg v. Coughlin*, 68 N.Y.2d 245, 508 N.Y.S.2d 393, 501 N.E.2d 1 (1986).
11. Public Officers Law § 89.