

Freedom of Information Law—Every Good Lawyer’s Tool

By Cory Morris

The Freedom of Information Law (FOIL), codified in Article 6 of the Public Officers Law (POL), establishes a mechanism for the public to hold the government accountable (POL § 84). This means that either a member of the public or a lawyer can create a FOIL request to certain New York State municipal entities and obtain information for a myriad of reasons—perhaps for research, government accountability and public participation or, as all attorneys should know, to be utilized in subsequent litigation.

The Committee on Open Government (COOG or “Committee”) is responsible for overseeing the implementation of FOIL and the Open Meetings Law (OML). The Committee’s website provides most of the information one needs in order to understand FOIL and how to make and respond to a FOIL request. The Committee prepares advisory opinions at the request of any person or agency. Such advisory opinions are frequently used in judicial proceedings as exhibits and many judicial decisions have cited opinions rendered by the Committee.

I. New York’s Freedom of Information Law

New York’s Freedom of Information Law declares that

a free society is maintained when government is responsive and responsible to the public, and when the public is aware of governmental actions. The more open a government is with its citizenry, the greater the understanding and participation of the public in government.¹

Whether it be records relating to police body cameras, government audits, wrongful convictions, traffic cameras or statements made to the police, any member of the public has standing to request such agency’s records, and the attorney(s) who represents a spurned FOIL Petitioner in an Article 78 proceeding is allowed to request reasonable attorney’s fees.

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... ”² The Legislature enacted FOIL to “achieve[] a more informed electorate and a more responsible and responsive [government].”³

II. Who and What Can Be “FOILed”?

The legislative purpose in the Freedom of Information Law is mainly accomplished through the definitions of “Agency” and “Record.”

Under Public Officers Law § 86(3), an “agency” is defined as

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



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And Pursuant to Public Officers Law § 86(4), the term “record” is defined 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.

This list is not exhaustive, as indicated by the phrase “but not limited to.” “[A]ll 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)(a) through (i) of the Law.”⁴ An agency, however, is not required to create a record in response to a FOIL request.⁵

Anything that is a “record” is subject to FOIL. This includes video, audio and other electronic records. Filmstrips used by a professor in a course given in a public college constitute records subject to FOIL.⁶ Videotaped news broadcasts retained by the District Attorney’s office constitute a record under FOIL.⁷

As government expands, what becomes government records will expand, from body cameras to school surveillance cameras. At the same time, the statutory exemptions will no doubt create some sort of endpoint for what is subject to disclosure under the New York Freedom of

Information Law. 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.⁸ 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.⁹

Personal injury attorneys can FOIL certain police, fire and emergency medical services’ records. Land use attorneys can FOIL certain municipal records. The public can access local government spending records, from the local hook and ladder company to the water district. The Parent Teacher Association can access school personnel files through FOIL requests. Researchers and academics can inquire of agencies as to studies created by the government and compile statistics for research utilizing real subjects. The range of your clients can vary and you can be creative in how you make use of the FOIL.

III. Making a FOIL Request—A Litigation Tool

Agency records should be requested in writing. However, there is no talismanic incantation necessary to make a FOIL request. The requirement of Public Officers Law § 89(3)(a) that requested documents be “reasonably described” serves to enable an agency to locate and identify the records in question.¹⁰ Whether a request reasonably describes the records sought may be dependent upon the terms of a request, as well as the nature of an agency’s filing or recordkeeping system (FOIL-AO-18863-provides a good discussion of several types of requests). 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 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... .

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.

Agencies bear the burden of denial. An agency has the burden to establish that “the descriptions were insufficient for purposes of locating and identifying the document sought.”¹¹ “If the agency is able to locate the requested records with reasonable effort, it is required to do so.”¹² The request does not need to be as detailed as a discovery demand pursuant to Civil Practice Law and Rules § 3120.¹³ The CPLR objections of overbroad, unduly

burdensome, use of “any and all,” etc., are not appropriate or are subject to different standards.

IV. Notes for New Lawyers

In sum, FOIL is a powerful tool that allows access to governmental records. Lawyers should take careful note, however, of the amendment to Public Officers Law § 89, which mandates, in certain circumstances, an award of reasonable attorney’s fees to litigants who substantially prevail after the commencement of litigation. It can be a lucrative tool for those who use it successfully and an unfortunate cost for those who lose.

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Endnotes

1. Public Officers Law § 84 (external quotations marks omitted).
2. *Capital Newspapers v. Whalen*, 69 N.Y.2d 246, 252, 505 N.E.2d 932, 513 N.Y.S.2d 367 (1987) (quoting *Fink v. Lefkowitz*, 47 N.Y.2d 567, 571, 393 N.E.2d 463, 419 N.Y.S.2d 467 (1979)).
3. *Westchester Rockland Newspapers, Inc. v. Kimball*, 50 N.Y.2d 575, 579, 408 N.E.2d 904, 430 N.Y.S.2d 574 (1980) (in accord *Buffalo News, Inc. v. Buffalo Enterprise Dev. Corp.*, 84 N.Y.2d 488, 492, 644 N.E.2d 277, 619 N.Y.S.2d 695 (1994) (“to assure accountability and to thwart secrecy”).
4. Committee on Open Government FOIL Advisory Opinion 12579 (Mar. 16, 2001).
5. POL § 89(3)(a).
6. *Russo v. Nassau County Comm. College*, 81 N.Y.2d 690, 623 N.E.2d 15, 603 N.Y.S.2d 294 (1993).
7. *Pennington v. Clark*, 16 A.D.3d 1049, 791 N.Y.S.2d 774 (4th Dep’t 2005).
8. *Capital Newspapers, Div. of Hearst Corp. v. Whalen*, 69 N.Y.2d 246, 505 N.E.2d 932, 513 N.Y.S.2d 367 (1987).
9. *In Re Sideri v. Off. of Dist. Atty., New York County*, 243 A.D.2d 423, 423, 663 N.Y.S.2d 206 (1st Dep’t 1997).
10. *Pflaum v. Grattan*, 116 A.D.3d 1103, 1104, 983 N.Y.S.2d 351 (3d Dep’t 2014).
11. *Konigsberg v. Coughlin*, 68 N.Y.2d 245, 249, 501 N.E.2d 1, 508 N.Y.S.2d 393 (1986).
12. FOIL-AO-18949.
13. *In re Farbman & Sons v. New York City Health & Hosps. Corp.*, 62 N.Y.2d 75, 82-3, 464 N.E.2d 437, 476 N.Y.S.2d 69 (1984).