



**Committee on
Open Government**

Freedom of Information Law and Open Meetings Law

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CONTACT INFORMATION

Shoshanah Bewlay, Executive Director

Kristin O’Neill, Assistant Director

(518) 474-2518

coog@dos.ny.gov

www.dos.ny.gov/coog/





Public Officers Law

Article 6

Sections 84-90

Enactment

- The original law was enacted in 1974 and was limited in scope – access to 9 categories of records.
- Repealed and replaced with the current law in 1978 – presumption of access

Presumption of Access

Start with the assumption that all government records are subject to FOIL disclosure and then review to determine whether the record or portion of the record fits into one of the permissible grounds for denial.



Who is covered by FOIL?

FOIL governs access to agency records and the term “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.”



“Records”

POL §86(4) "Record" means any information kept, held, filed, produced or reproduced by, with or for an agency ... 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.



Not Required to Create Records

- This does not mean you are not required to make copies of records or convert them to a preferred format if possible.
- 3 exceptions:
 - Record of Vote
 - List: name, public office address, title, salary
 - Subject matter list



Creation v. Preparing a Copy

“An agency shall provide records on the medium requested by a person, if the agency can reasonably make such copy or have such copy made by engaging an outside professional service.” [POL §89(5)]



Creation v. Preparing a Copy

“When 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. When doing so requires less employee time than engaging in manual retrieval or redactions from non-electronic records, the agency shall be required to retrieve or extract such record or data electronically. 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.**” [POL §89(3)(a)]

Reasonably Describe Records



Can the agency locate or retrieve with reasonable effort?



Answer will likely be different depending on whether they are paper or electronic records

Records Access Officer

The governing body of a public corporation and the head of an executive agency or governing body of other agencies shall be responsible for insuring compliance with the regulations herein, **and shall designate one or more persons as records access officer by name or by specific job title** and business address, and when requests are accepted via email, an email address, who shall have the duty of coordinating agency response to public requests for access to records.



Time Limits

- 5 business days
- 20 business days
- Date Certain -
Reasonable under the
circumstances
- No repeated
extensions
- Appeals – 10 business
days



Email Requests

- If agency is able, it must accept requests by e-mail (every agency should be able to accept requests by e-mail at this point!)
- Agency cannot require a requestor to use its form, but can require that requests be made in writing



Appeals

- Express Denial of Access - a record possessed by an agency is withheld in whole or in part
- Constructive denial of access – agency fails to respond to request within time limits set forth in statute
- Model language can be found on COOG website



Permissible Grounds for Denial

- (a) are specifically exempted from disclosure by state or federal statute;
- (b) if disclosed would constitute an unwarranted invasion of personal privacy under the provisions of subdivision two of section eighty-nine of this article;
- (c) if disclosed would 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 relating to a criminal investigation; or
 - iv. reveal criminal investigative techniques or procedures, except routine techniques and procedures;
- (f) if disclosed could endanger the life or safety of any person;

Permissible Grounds for Denial

- (g) 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; or
 - iv. external audits, including but not limited to audits performed by the comptroller and the federal government; or
- (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;

REMAINDER RELATE TO RECORDS MAINTAINED PURSUANT TO VEHICLE AND TRAFFIC LAW



Exempt by Statute

Are exempt by state or federal statute

- Attorney-client communications – CPLR
- Student records – FERPA
- Mental health records – Mental Hygiene Law
- Autopsy Records – County Law
- County Operated E911 Records – County Law
- Social Security Numbers - Public Officers Law 96-a

Unwarranted Invasion of Personal Privacy

Examples:

- Employment application of person not hired
 - Unsubstantiated allegations of misconduct
 - Medical information
 - Public employee home addresses
 - Lists of names and addresses of natural persons if used for solicitation or fund-raising purposes
 - Mugshots
- ** Public Employees enjoy a lesser degree of privacy than others

Personnel Records of Police Officers, Corrections Officers, and Paid Firefighters

- Until very recently, personnel records of police officers, corrections officers, and paid firefighters that were used to evaluate performance toward continued employment were specifically exempted from disclosure by state statute: Civil Rights Law §50-a and, because of this, Public Officers Law §87(2)(a).
- On June 12, 2020, Governor Cuomo signed into law Chapter 96 of the Laws of 2020 repealing Civil Rights Law §50-a and amending FOIL to add certain provisions relating to law enforcement disciplinary records. Where prior to June 12, 2020, access to personnel records of a police officer was governed by §50-a and the resulting FOIL exemption pursuant to §87(a)(2), ending the FOIL analysis immediately, access is now governed by FOIL alone.

Personnel Records of Police Officers, Corrections Officers, and Paid Firefighters

- FOIL was amended to include language specifically relating to law enforcement disciplinary records. The law defines this term as:
 - any record created in furtherance of a law enforcement disciplinary proceeding, including, but not limited to:
 - (a) the complaints, allegations, and charges against an employee;
 - (b) the name of the employee complained of or charged;
 - (c) the transcript of any disciplinary trial or hearing, including any exhibits introduced at such trial or hearing;
 - (d) the disposition of any disciplinary proceeding; and
 - (e) the final written opinion or memorandum supporting the disposition and discipline imposed including the agency's complete factual findings and its analysis of the conduct and appropriate discipline of the covered employee. (Section 86(6) of FOIL)

Personnel Records of Police Officers, Corrections Officers, and Paid Firefighters

- FOIL was amended to provide guidance on what aspects of the disciplinary records must be redacted and which may be redacted (Sections 87(4-a) and 87(4-b)):
- 4-a. A law enforcement agency responding to a request for law enforcement disciplinary records as defined in section eighty-six of this article **shall** redact any portion of such record containing the information specified in subdivision two-b of section eighty-nine of this article prior to disclosing such record under this article.
 - medical history (not including records obtained during the course of an agency's investigation of such person's misconduct that are relevant to the disposition of such investigation); home addresses, personal telephone numbers, personal cell phone numbers, personal email addresses; social security numbers; the use of an employee assistance program, mental health service, or substance abuse assistance service

Personnel Records of Police Officers, Corrections Officers, and Paid Firefighters

- FOIL was amended to provide guidance on what aspects of the disciplinary records must be redacted and which may be redacted (Sections 87(4-a) and 87(4-b)):
- 4-b. A law enforcement agency responding to a request for law enforcement disciplinary records, as defined in section eighty-six of this article, **may** redact any portion of such record containing the information specified in subdivision two-c of section eighty-nine of this article prior to disclosing such record under this article.
- A law enforcement agency may redact records pertaining to technical infractions as defined in subdivision nine of section eighty-six of this article prior to disclosing such records under this article.
- “Technical infraction” means a minor rule violation by a person employed by a law enforcement agency as defined in this section as a police officer, peace officer, or firefighter or firefighter/paramedic, solely related to the enforcement of administrative departmental rules that (a) do not involve interactions with members of the public, (b) are not of public concern, and (c) are not otherwise connected to such person's investigative, enforcement, training, supervision, or reporting responsibilities.

Law Enforcement

Two Part Test – Records must be:

1. “Compiled for Law Enforcement Purposes”

“The phrase ‘compiled for law enforcement purposes’ contains no requirement that compilation be effected at a specific time and respondent established that the requested records were compiled for law enforcement purposes when the reply to petitioners' FOIL requests had to be performed.” *New York Times Co. v. New York State Exec. Chamber*, 57 Misc. 3d 405, 56 N.Y.S.3d 821 (N.Y. Sup. Ct. 2017)

“The exemption does not apply solely to records compiled for law enforcement purposes in connection with criminal investigations and punishment of violations of the criminal law.” *Madeiras v. New York State Educ. Dep't*, 30 N.Y.3d 67, 68, 86 N.E.3d 527 (2017)

And.....



Law Enforcement

2. Disclosure would cause one of the harms envisioned by the statute:
 - 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;

Intra-Agency and Inter-Agency Material

- Intended to protect the deliberative process
- Required to disclose
 - Statistical or factual information
 - Instructions to staff that affect the public
 - Final agency policy or determinations
 - External audits

Right to Appeal

- When denied access to a record or any portion thereof, applicant has 30 calendar days to appeal;
- FOIL Appeals Officer is “head or governing body” of agency, or person or persons designated by head or governing body;
- FOIL Appeals Officer cannot be the same as the Records Access Officer;
- Within 10 business days, FOIL Appeals Officer must either provide records sought or “fully explain” reasons for further denial (or a combination of both);
- The law does not contemplate a “remand” back to the Records Access Officer – it is the responsibility of the Appeals Officer to review records at the appeal level.



Fees

Two Fee Structures (Cannot be combined!):

1. \$.25 per photocopy for copies up to 9x14 inches
2. Actual cost of reproduction for all other records
 - 2 hour rule
 - Cost of electronic storage device
 - May not charge for search or review time

Enforcement

Via a CPLR Article 78 Proceeding

Attorney's Fees and other reasonable litigation costs can be awarded:

- Mandatory on part of judge when requestor “has substantially prevailed and the court finds that the agency had no reasonable basis for denying access.”
- Discretionary on part of judge when requestor “has substantially prevailed, and when the agency failed to respond to a request or appeal within the statutory time.”





Public Officers Law
Article 7
Sections 100-111

Intent

- It is essential that public business be performed in an open and public manner and that the citizens be “fully aware of and able to observe the performance of public officials.”
- Citizens have the right “to attend and listen to the deliberations and decisions that go into the making of public policy.”
- Public bodies shall make all reasonable efforts to ensure that meetings are held in an appropriate facility which can adequately accommodate members of the public who wish to attend such meetings.



Public Bodies

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.

- Two or more people
- Quorum necessary to conduct business
- Authority to act collectively
- Committees



Are you having a Meeting?

- Is there a quorum present?
- To discuss public business?
- If yes, you are having a meeting, regardless of intent, or lack thereof, to take action, or characterization.



No Legal Distinction

- Workshop or work session, Agenda Session
- Regular meeting
- Informal gathering
- Pre-board meeting



Other Gatherings

- Site visit
- “Retreat” or educational seminar
- Attendance at committee meeting
- Social

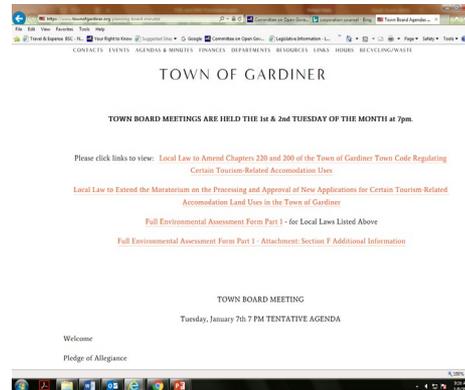


Telephone Calls, Emails

- Definition of “meeting”
 - Requires physical presence or
 - Videoconferencing permitted
- Cannot conduct a meeting via teleconference or by e-mail
- Does not mean that members of the public body cannot share information via e-mail

Notice

- ✦ Time and place
- ✦ Prior to every meeting
- ✦ To the media
- ✦ Designated location
- ✦ On the website



Notice

- At least 72 hours prior to a meeting scheduled at least one week in advance.
- For meetings on short notice, notice must be given to the extent practicable at a reasonable time prior to the meeting.
- The courts have suggested that the propriety of scheduling a meeting less than a week in advance (and providing less than 72 hours notice) is dependent upon the actual need to do so.

Minutes

- Must include: Motions/Proposals/ Resolutions/Votes
- Executive Sessions: Only necessary if actions taken
- Must be available within:
 - Two weeks for open session
 - One week for executive session
- Does not matter whether records are unapproved or in draft form.

Recording

- Any meeting of a public body that is open to the public shall be open to being photographed, broadcast, webcast, or otherwise recorded and/or transmitted by audio or video means
- Agency is not obligated to record
- Agency may establish reasonable rules to limit disruption/interference (model rules available on COOG website)

Executive Session

- Part of an open meeting (not prior to or separate from)
- Upon majority vote
- **Specificity of motion**



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.



“PERSONNEL”

Don't Use this Word in Your Motion!

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”



Public Participation

- Not required
- Can establish reasonable rules
- Implement fairly and consistently
- Hearings are not the same as meetings



RECORDS SCHEDULED TO BE DISCUSSED

- Proposed resolutions, laws, rules, regulations, policies or any amendment thereto
- Records, or portions thereof, that are public under FOIL
- Shall be made available upon request, prior to or at the meeting
- Shall be made available online prior to the meeting if the agency maintains a regularly and routinely updated website and utilizes a high speed internet connection
- Agency may, but not required to, spend additional moneys to implement this section

Exemptions

- Second mechanism for meeting “behind closed doors”
- If an exemption applies, the Open Meetings Law does not – as if the OML does not exist
- Section 108 Exemptions:
 - judicial or quasi-judicial proceedings, except proceedings of the public service commission and zoning boards of appeals;
 - deliberations of political committees, conferences and caucuses;
 - any matter made confidential by federal or state law (e.g., discussions relating to students made confidential by FERPA; meetings with agency attorney covered by attorney client privilege)

Non-Compliance and Enforcement

- Enforcement is through the initiation of a CPLR Article 78 proceeding
- Court has authority to:
 - award costs and attorney's fees
 - Invalidate action
 - require training



Questions??

- ANYONE is welcome to contact our office by phone or by email with questions (government employees, members of the public, media representatives, etc.)
- (518) 474-2518
- coog@dos.ny.gov

