



**Committee on
Open Government**

Freedom of Information Law

March 24, 2022

CONTACT INFORMATION

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Public Officers Law

Article 6

Sections 84-90

The Committee's Home Page

The screenshot shows a web browser window with the URL <https://opengovernment.ny.gov>. The browser's address bar and tabs are visible at the top. The website's header features a yellow banner with a COVID-19 update: "The COVID-19 vaccine is here. It is safe, effective and free. Walk in to get vaccinated at sites across the state. Continue to mask up and stay distant where directed." Below this is a navigation menu with the New York State logo and links for "Services", "News", "Government", and "Local". A search bar is located on the right side of the navigation menu. The main content area has a dark green header with "Open Government" and sub-links for "Freedom of Information Law", "Open Meetings Law", "Personal Privacy Protection Law", "News", and "Contact Us". The main banner features a large image of the New York State Capitol building with the text "NEW! Committee Staff to Offer Virtual Training" and "Committee Staff to offer virtual training on Tuesday, 5/25 and Thursday, 6/10. PRE-REGISTRATION REQUIRED." The browser's taskbar at the bottom shows the time as 11:39 AM on 6/7/2021.

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- Repealed and replaced with the current law in 1978 – presumption of access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 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.



“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

Time Limits

- 5 business days
- 20 business days
- Date Certain - Reasonable under the circumstances
- No repeated extensions
- 30 calendar days to appeal denial
- 10 business days for agency to respond to appeal



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
- Unless there are personal privacy concerns, an applicant for records should be permitted to remain anonymous



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 only to the extent that disclosure would:
 - i. interfere with law enforcement investigations or judicial proceedings, provided however, that any agency, which is not conducting the investigation that the requested records relate to, that is considering denying access pursuant to this subparagraph shall receive confirmation from the law enforcement or investigating agency conducting the investigation that disclosure of such records will interfere with an ongoing investigation;
 - 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
- Home telephone numbers or personal cell numbers
- 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



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, provided however, that any agency, which is not conducting the investigation that the requested records relate to, that is considering denying access pursuant to this subparagraph shall receive confirmation from the law enforcement or investigating agency conducting the investigation that disclosure of such records will interfere with an ongoing investigation;
 - 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

Certification

A response by an agency indicating that it does not possess the records sought is not a denial of access that gives rise to the right to an administrative appeal.

Section 89(3)(a) of FOIL states, in part:

“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...”



Certification

When an agency indicates that it does not maintain or cannot locate a record, an applicant for the record may seek a certification to that effect. Section 89(3) of the Freedom of Information Law provides in part that, in such a situation, on request, an agency “shall certify that it does not have possession of such record or that such record cannot be found after diligent search.” It is emphasized that when a certification is requested, an agency “shall” prepare the certification; it is obliged to do so.



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
 - May not charge for search or review time
2. Actual cost of reproduction for all other records
 - 2-hour rule
 - Cost of electronic storage device
 - Cost of having copy made by third party vendor
 - 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.”



QUESTIONS??

- ANYONE is welcome to contact our office by phone or by email with questions (government employees, members of the public, media representatives, etc.)
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