



**State of New York
Department of State
Committee on Open Government**

One Commerce Plaza
99 Washington Ave.
Albany, New York 12231

(518) 474-2518
Fax (518) 474-1927

FOIL AO 19867

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By Electronic Mail Only

The Committee on Open Government is authorized to issue advisory opinions. The ensuing advisory opinion is based solely upon the information presented in your correspondence.

Dear:

As you know, as of September 4, 2024, article six of the Freedom of Information Law (“FOIL”) was amended by [Chapter 302 of the Laws of 2024](#) to include a mandate that “[a]ll agencies subject to the requirements of this article shall develop a policy regarding providing a notification to public employees in the event that the agency is responding to a request for such employee’s disciplinary records.” [Public Officers Law \(“POL”\) § 87\(6\)](#).

We are writing in response to your request for an advisory opinion concerning the implementation of the mandate and the notification it contemplates. In order to provide such advice we must look to the [text of the amendment](#) and the legislative intent included with the [memorandum accompanying the amendment](#). In the following advisory, we seek to address your inquiries.

Does POL § 87(6) require notification to current *and* former public employees, or just currently employed public employees?

The text of the amendment does not define the term “public employee” for purposes of notification. We suggest that FOIL responsible entities look to holdings of courts finding that the 2020 amendment to FOIL, which required that law enforcement disciplinary records be subject to review and disclosure, applies equally to former law enforcement employees and current law enforcement employees.

Is there a penalty if an agency does not provide the notification? If there is a penalty, what is the penalty?

The text of the amendment does not include language imposing a penalty for non-compliance with the notification requirement nor does it include a remedy for public employees if notification is not provided to them in accordance with the statute. The memo accompanying the amendment is also silent on this matter.

What must be included in the notification and when must it be sent?

Although the text of the amendment does not make it clear when the required notification must be made – stating only that it is required “in the event that an agency *is responding* to a request” (emphasis added) – the memo accompanying the amendment contains some language which may explain the intention of the legislature on this question. The memo provides: “[t]his legislation simply recognizes that these impacted public employees should have *minimum* notice when their personal information *has been released* to the public” (emphasis added), suggesting that it is the legislature’s intention that the required notification be “minimal” and be made to the employee *after* the records have been released. The intention regarding the timing of the minimal notification (*i.e.*, after the release of the requested records) is strengthened by the following language from the memo: “[this amendment] would simply ensure that if a public employee’s personal information *has been released to the public*, then such affected employee would have notice of such release” (emphasis added).

Where must the notification to the public employee be sent? E.g., work address? Email address? Home address? If notification must be sent to a home address or email address, what if the agency does not have those addresses? If notification must be sent to a former public employee, what is an agency to do if it does not possess a current address for that former public employee?

The amendment requires that agencies develop a policy regarding the required notification but does not establish specific procedures for issuing the notification. We recommend that agency heads use their best judgement as to the most appropriate form of notification. While the text is silent on this matter, it is our opinion that the notification should be in writing so that the agency has evidence of compliance and that notice by either regular mail or email is sufficient. Agencies should make reasonable efforts to notify former employees and document their efforts to do so.

Does the legislation require that the affected public employee be provided with a copy of the FOIL request that is the subject of the POL § 87(6) notification and/or copies of the records that are provided to the requestor in response to the request?

As noted above, the amendment requires that agencies develop a policy regarding the required notification, but it does not establish specific procedures for issuing the notification. The [memo](#) accompanying the bill indicates that it is the intention of the legislature that the required policy and notification requirement “have no effect on the release of information that is now permissible” pursuant to FOIL. We understand this to mean that the legislature intends that whatever policy a FOIL responsible entity adopts to effectuate the new notice requirement, such policy may not serve as an impediment to hinder or delay the required production of affected records in response to a FOIL request.

While the text of the amendment does not reflect a proactive requirement on the part of the agency to provide the public employee a copy of the FOIL request or the responsive records, it is important to note that the request and responsive records are, themselves, “records” subject to rights of access under FOIL. See previously prepared advisory opinions on this topic linked below.

Request for Request

[10059](#), [11260](#), [13471](#), [14068](#), [16507](#), [16558](#), [17692](#), [19168](#)

What records are considered “disciplinary records”?

Although not specifically raised as one of your questions, we have also been asked what constitutes a “disciplinary record” and, specifically, whether “counseling memos” are considered disciplinary records. We suggest that in the absence of a statutory definition of the term “disciplinary record” as it applies to non-law enforcement employees, FOIL-responsible agencies look to [POL § 86\(6\)](#), which defines “law enforcement disciplinary records,” for guidance.

Thank you for your inquiry.

Very truly yours,

/s/ Shoshanah Bewlay

Shoshanah Bewlay
Executive Director