



FOIL OVERVIEW

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WHAT IS FOIL?

- FOIL requires governmental agencies, including school districts, to enact rules and regulations governing the availability of records; to maintain certain records; and to make all records available for public inspection and copying except those specifically defined in statutory exceptions.
- FOIL can be found in the New York Public Officers Law Sections 84-90.

POLICY AND RULES

- Each school district must have written rules and regulations pertaining to the availability of records, including but not limited to:
 - The times and places records are available;
 - The persons from whom records may be obtained (e.g., the Records Access Officer); and
 - Fees for copies of records

INSPECTION AND COPYING

- Records must be available for inspection and copying at all reasonable times, *i.e.*, during all hours that the school district is regularly open for business. Any member of the public may inspect or obtain copies of school district records, whether or not he or she resides in the school district. Any person has the right to inspect accessible records at no charge. However, there may be situations in which some aspects of a record – but not the entire record – may be properly withheld. In that case, the school district may prepare a redacted copy and charge the established fee for the copy (*i.e.*, \$.25 per page).

WHAT ARE RECORDS?

- Under FOIL, a “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.”
- This can include, but is not limited to:
 - Letters/Emails
 - Text Messages
 - Personnel records
 - Vendor data, invoices, etc.
 - Voter Rolls
 - Audio Recordings of Board of Education Meetings

WHAT ARE RECORDS? CONT'D

- Are emails from a Board of Education member's personal emails discoverable under FOIL?
 - Yes.
- Are text messages sent between Board of Education members' personal cell phones discoverable under FOIL?
 - Yes.

The NYS Committee on Open Government has stated “electronic communications, such as e-mails or text messages that involve [school] business, whether stored on a government or a personal device, constitute ‘records’ that fall within the coverage of FOIL.”

RECORDS THAT MUST BE MAINTAINED BY STATUTE

- A record of the final vote of each school board member or trustee in every proceeding in which the member votes;
- A record setting forth the name, public office address, title and salary of every officer or employee of the school district; and
- A reasonably detailed current list, by subject matter, of all records in the possession of the school district, whether or not available under FOIL. The subject matter list must be updated annually.

RECORDS TO BE MADE AVAILABLE

- Each school district must make available for public inspection and copying all records **except** those allowed to be withheld under law, specifically NYS Public Officers Law §87(2).

RECORDS THAT MAY BE WITHHELD

- Records that are specifically exempt from disclosure by state or federal statute (for example, student records covered by the Family Educational Rights and Privacy Act (FERPA) and attorney-client communications);
- Records that, if disclosed would constitute an unwarranted invasion of personal privacy pursuant to Public Officers Law Section 89(2);
- Records that, if disclosed would impair present or imminent contract awards or collective bargaining negotiations;
- Records that are trade secrets or are submitted to a school district 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;

RECORDS THAT MAY BE WITHHELD CONT'D

- Records that are compiled for law enforcement purposes and which, if disclosed, would:
 - Interfere with law enforcement investigations or judicial proceedings;
 - Deprive a person of a right to a fair trial or impartial adjudication;
 - Identify a confidential source or disclose confidential information relating to a criminal investigation; or
 - Reveal criminal investigative techniques or procedures, except routine techniques and procedures
- Records that, if disclosed would endanger the life or safety of any person;

RECORDS THAT MAY BE WITHHELD CONT'D

- Inter-agency or intra-agency materials which are not:
 - Statistical or factual tabulations or data;
 - Instructions to staff that affect the public;
 - Final school district policy or determinations;
 - External audits, including but not limited to audits performed by the comptroller and the federal government
- Examination questions or answers which are requested prior to the final administration of such questions;
- Computer access codes;

RECORDS THAT MAY BE WITHHELD CONT'D

- Photocopies, microphotographs, videotapes or other recorded images prepared pursuant to the authority of Vehicle and Traffic Law Section 1111-a.

EXAMPLES OF RECORDS THAT MAY BE EXEMPT FROM DISCLOSURE

- ADA/FMLA leave related records
- Non-final disciplinary records, such as counseling memos, investigation notes, warnings, etc.
- APPR observations, data or final scores
- Medical treatment records
- Home addresses/phone numbers/personal email addresses
- Workers Compensation records
- Parts of resumes/CVs that are unrelated to the position for which the public employee was hired such as college GPA, marital status, hobbies, etc.

EXAMPLES OF RECORDS THAT MAY BE EXEMPT FROM DISCLOSURE CONT'D

- Application materials for unsuccessful job candidates
- Individualized Education Programs

WHAT IS AN UNWARRANTED INVASION OF PERSONAL PRIVACY?

- Under New York Public Officers Law §89(2), an unwarranted invasion of personal privacy includes, but shall not be limited to:
 - Disclosure of employment, medical or credit histories or personal references of applicants for employment;
 - Disclosure of items involving the medical or personal records of a client or patient in a medical facility;
 - Sale or release of lists of names and addresses if such lists would be used for solicitation or fund-raising purposes;
 - Disclosure of information of a personal nature when disclosure would result in economic or personal hardship to the subject party and such information is not relevant to the work of the agency requesting or maintaining it

WHAT IS AN UNWARRANTED INVASION OF PERSONAL PRIVACY? CONT'D

- Information of a personal nature contained in a workers' compensation record, except as provided by section one hundred ten-a of the workers' compensation law;
- Disclosure of electronic contact information, such as an e-mail address or a social network username, that has been collected from a taxpayer under section one hundred four of the real property tax law; or
- disclosure of law enforcement arrest or booking photographs of an individual, unless public release of such photographs will serve a specific law enforcement purpose and disclosure is not precluded by any state or federal laws.

PROCEDURES: RESPONDING TO A REQUEST

- The school district must respond to a written request for a record reasonable described within five (5) business days of receipt of the request by:
 - Making the record available to the person requesting it;
 - Denying the request in writing; or
 - Furnishing a written acknowledgement of the receipt of the request and a statement of the approximate date, which is reasonable under the circumstances of the request, when the request will be granted or denied, including, where appropriate, a statement that access to the record will be determined in accordance with Public Officers Law Section 89(5).

PROCEDURES: RESPONDING TO A REQUEST

- If neither a response to a request nor an acknowledgment of the receipt of a request is given within five business days, or if a school district delays responding for an unreasonable time after it acknowledges that a request has been received, a request may be considered to have been constructively denied. In such circumstances, the denial may be appealed.

PROCEDURES: EXTENSIONS

- If the school district determines to grant a request in whole or in part, and if circumstances prevent disclosure to the person, within twenty (20) business days from the date of the acknowledgement of the receipt of the request, the school district must state, in writing, the reason for the inability to grant the request within twenty (20) business days and a date certain within a reasonable period, when the request will be granted in whole or in part.

PROCEDURES: VOLUMINOUS REQUESTS

- Unfortunately, a school district cannot deny a request on the basis that the request is voluminous or that locating or reviewing the requested records or providing the requested copies is burdensome. If the school district lacks sufficient staffing, it may engage an outside professional service to provide copying, programming, or other services required to provide the copy.

PROCEDURES: PRODUCING THE DOCUMENTS

- Upon payment of or an offer to pay the fee for copies, the school must produce a copy of the record and certify to the correctness of the copy, if requested, or certify that it does not have possession of the record or that the record cannot be found after a diligent search.

PROCEDURES: CREATING RECORDS

- The school district does not have to prepare a record that it does not possess or maintain. Although the school district does not have to create a record in response to a request, if portions of records (i.e., databases) can be extracted or generated from existing records with reasonable effort, the school district is required to do so. Any programming necessary to retrieve a record maintained in a computer storage system and to transfer the record to the medium requested by a person is not deemed to be the preparation or creation of a new record.

PROCEDURES: FEES

- A fee of \$.25 per page may be charged for copying.
- A school district may require payment of the requisite fees in advance of the preparation of copies of requested records.
- Districts cannot charge for employee copying/searching time.
- The Committee on Open Government has stated: “Based on the language of the statute, it is clear that the only fee that may be charged when a request involves photocopies of paper records up to nine by fourteen inches is a maximum of twenty-five cents per photocopy; no additional fee may be charged for employee time, for search, redactions, etc.”

PROCEDURES: FEES CONT'D

- Employee time may be charged only when the request involves “other” records, those that are larger than nine by fourteen inches or which are maintained electronically, and even then, only in circumstances in which at least two hours of employee time are needed to prepare the records.
- The provisions concerning the actual cost of preparing copies of records specify that “preparing a copy shall not include search time or administrative costs” (see 87[1][c][iv]).
- A fee can be charged for the medium (e.g., a flash drive)

PROCEDURES: FEES CONT'D

- Employee time for electronic records can be charged if there is programming involved to cull a large database but only when at least two hours of an employee's time is necessary to prepare electronic copies.
- “If the document exists in electronic format and the agency has the authority and the ability to redact electronically, we believe it would be reasonable for the agency to provide the requested redacted copy at no charge, in light of the statutory fee provisions.” – FOIL-AO-19103

PROCEDURES: ELECTRONIC DOCUMENTS

- “With respect to scanning paper records in order to transmit them via email, it is our view that if the agency has the ability to do so and when doing so will not involve effort additional to an alternative method of responding, it would be required to scan the records.” – FOIL-AO-18620
- “When materials can be emailed there would be no fee because the records are not photocopied and a storage medium is not involved.” – FOIL-AO-18620

ADMINISTRATIVE APPEAL

- Any person denied access to a record may appeal the denial within 30 days in writing to the school district's head or chief executive or governing body or individual designated by the school board to receive and decide such appeals.
- A response to the appeal must be made within ten (10) business days of receipt of the appeal and must fully explain in writing to the person requesting the record the reasons for further denial or access to the record sought must be provided.

ADMINISTRATIVE APPEAL CONT'D

- The school district must provide a “particularized and specific justification for denying access” or a “factual basis” for claiming an exemption.
- This appeal and the determination must be filed with the Committee on Open Government.

JUDICIAL APPEAL

- If a person is denied access in the appeal determination, or an appeal is made but a determination is not rendered within ten (10) business days of the appeal, s/he may bring a proceeding for review of the denial in State Supreme Court pursuant to CPLR Article 78.
- The court may award reasonable attorney's fees and other litigation costs against the school district if the person requesting the record substantially prevails.
- The Commissioner of Education has no jurisdiction over alleged violations of FOIL.