FREEDOM OF INFORMATION LAW: SOME BASICS

The key term bandied about both inside and outside of municipal government is transparency. While this term is relatively new when discussing governmental operations, in fact, the concept through the Freedom of Information Law under Public Officers Law Article 6, sections 84 to 90, has been around for years. In fact, even a cursory review of the legislative intent set forth in Section 84 leads one inexorably to the conclusion that an open government where documents are readily available to the public is critical to the democratic ideals in the State of New York.

> "The people's right to know the process of governmental decision-making and to review the documents and statistics leading to determinations is basic to our society. Access to such information should not be thwarted by shrouding it with the cloak of secrecy or confidentiality." *Public Officers Law Section 84*

Municipal lawyers must, therefore, consistent with their professional obligations to their clients, be aware of these tenants and be prepared to advise their municipal clients on both the procedures involved with an outside request for documents and what types of documents must be disclosed and what can be excluded from discovery. This awareness is even more critical in light of recent legislative changes and the judicial decisions emanating from those changes which now increase the likelihood of a payment for attorneys' fees by those municipal corporations and agencies that inappropriately deny access to their records.

PROCEDURE

Public Officers Law section 87 sets forth the general procedures to be followed for the release of information pursuant to a request. Subsection on provides that each agency and public corporation must promulgate rules and regulations consistent with the requirements set

by the Committee on Open Government. That committee is part of the New York Department of State and regularly renders opinions on access to certain documents. It has been posited by some that the Committee on Open Government[i] has rarely seen a document that it does not believe to be shared in its attempts to pull back the curtains to let all the light shine in on governmental processes and decisions. Those rules must a) set forth the times and places such records will be made available; b) provide the information from whom such records may be acquired; and c) the fee for supplying copies not to exceed twenty five cents per photocopy on paper not larger than nine inches by fourteen inches, unless the fee is set in another statute, or the actual cost of reproduction.

Technology, however, has modified even this requirement. When first enacted, electronic record keeping was less prevalent and the ability to transfer documents electronically more cumbersome. Now many records are digital only and the ability to transfer them from one custodian to a party making a request is considerably easier and less expensive. That does not mean that care should not be taken to ensure that only those records requested are sent. Any digital information that is attached should be reviewed not only for accuracy with respect to the request, but also to make certain that confidential information that should not be disclosed is not inadvertently attached. How often has the "send" icon been pressed prematurely?

Many times, a request is made only for digital records or records in a particular format. These requests are regularly made by businesses interested in becoming a vendor for municipal corporations or institutions compiling and comparing data bases of different municipalities. The simple rule is that if the information can be easily transferred electronically, then the

record custodian is obligated to do so. Having said this, however, there a small municipalities which either do not digitize all of their documents and the law does not yet require that they do so. In those instances, the records, even if still in paper form, must be offered for production. It is not the obligation of the municipality to undertake an unreasonable expense to create digital records simply because they have been requested in that form by a third party. The key, of course, is the reasonableness of the request and the expense in providing digital records. *Public Officers Law section 87(5).*

> "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. Records provided in a computer format shall not be encrypted." *Public Officers Law section 87(5)(a).*

The obligation to provide electronic records through a third party is more problematic for a small municipal corporation which may not have the resources available to undertake such a project to first digitize the records, if that was the medium requested, and then maintain them in the future in that form. It may not be a simple matter of scanning the documents and providing them, but rather a fundamental change in how records are stored. That is when the cost analysis is critical.

With regard to the cost, a municipality cannot charge for the time it takes to search for a record and then can only charge for the amount of time to prepare a copy at an amount "equal to the hourly salary attributed to the lowest paid agency employee who has the necessary skill required to prepare a copy" of the record. In other words, you cannot charge for the time for a twenty year senior clerk typist when a two year clerk typist, for example, could collate and make the appropriate copies. It should be noted, however, that you cannot charge unless the

time necessary for providing the records exceeds two hours and then only after you have provided advance notice to the requestor.

There is nothing to prohibit a municipal corporation or agency from retaining the services of an outside photocopying vendor, but that may only be done when the agency's equipment is inadequate to prepare the copy. *Public Officers Law section 87 (c)(iii)*. Again, it is a matter of reasonableness with regard to whether such a need is real or merely one of ease. Furthermore, prior notice that the records will be sent out for copying must be given to the requestor.

The specific provision of which most are aware can be found in *Public Officers Law section 89(3)(a)* which provides, in pertinent part that "within five business days of the receipt of a written request for a record reasonably described" the agency[ii] must a) make the record(s) available; b) send a written acknowledgment of the request along with a reasonably approximate date when the request will either be fulfilled or denied; or c) that the request is being denied. Public Officers Law section 89(3)(a). Three distinct issues are raised under this requirement. The first is that there must only be a written response within five (5) business days of the request, not that the records must be supplied within five (5) days of the request. It may take more time to collate the records or allow for a review of the request by the agency or counsel prior to supplying any documents or information. How much time it would actually take to provide the records depends on the volume of records requested, the nature of the request and did it include documents for which disclosure may be denied, and the location of the documents. More time can be used, so long as the amount of time is reasonable under the circumstances.

The second provision is that the request must be in writing. While an oral request raised at a meeting may be convenient, a practitioner would be well advised to make sure that the municipal corporation always demands a written request, no matter how easy it would be to comply, to ensure that there can be no claims for disparate treatment when one entity or individual is forced to provide a written demand while others can simply make a telephone call or request a record in an open meeting. Demanding a written request also allows the municipality time to review the appropriateness of the request and allows for certainty with regard to exactly what is being sought. It is unwise to be arguing over what record was actually being sought when there is no written request to review.

The third provision is that the request must be "reasonably described" which will permit the agency to hone in on the search for the precise records sought. A specific description is not required but it must be something more than "any and all documents related to the park" since that request might seek records dealing with anything from maintenance of the park to rules and regulations covering park use to documents governing the acquisition of the land for the park. Under such circumstances, a request for greater specificity would be warranted. Those requests for clarification, however, should not be used to simply deny legitimate record requests by making the need for stringent specificity only to deny the request on the grounds that the record does not exist because it is called something else.

A specific form to be used, while advisable, is not mandated under the law. Nevertheless, the Committee on Open Government has prepared a form which is available on the internet that the public can use to request records. Municipalities would be well advised to create a form for use. While it cannot be required, it will ease the record keeping of the

municipality and standardize its response program which will avoid inconsistencies and missed deadlines.

An agency may also not deny access to a record simply because the volume of documents requested is voluminous or that it would be a burden on the agency and its staff to obtain them, if "the agency may engage an outside professional service to provide copying, programming or other services required to provide the copy." *Public Officers Law section 89(3)(a)*. In those instances, as discussed above, the municipal corporation should advise the requestor not only of the fact that the request will take some time to fulfill, but also the cost involved with the use of a third party vendor. The programming requirement is especially important for smaller municipalities since it may not simply result in additional costs, but also change the way that they operate.

This does not mean, however, that documents need to be created in order to comply with the law.

> "Nothing in this article shall be construed to require any entity to prepare any record not possess or maintained by such entity except…When an agency has the ability to retrieve or extract a record or data maintained in a computer storage system with reasonable effort…". *Public Officers Law section 89(3)(a)*

While an agency may not have to create something, if it is reasonably attainable through a manipulation of the computer system, such records must be produced. The key obviously is the reasonableness of obtaining potentially one portion of data from a much larger date stream. Prior to the advent of electronic information, this excuse for denial was much more frequently used than it is today.

In the event that an agency denies access to a record, the requestor has an option of appealing the denial to the "head, chief executive, or governing body" within thirty (30) days of the denial, Thereafter, the head, chief executive, governing body, or the designee must respond within ten (10) days of the receipt of the appeal explaining, in writing, the reasons for the denial if it will still be denied. Technically, the party hearing the appeal must also supply the decision to the committee on open government. The statute also refers to an automatic denial upon the failure of the agency to conform to the requirements of subdivision three of section 89.

A review of any denial may then be filed in Court under CPLR Article 78. If the basis for the denial of access is based upon one of the provisions of section 87(2), then the burden shifts to the agency on why such a denial is appropriate. A critical change has taken place in this regard of which practitioners should be aware.

Subdivision (c)(i) of section 89 provides that the Court may assess "reasonable attorney's fees and other litigation costs reasonably incurred…[when] such person has substantially prevailed, and when the agency has failed to respond to a request or appeal within the statutory time…and (ii) ***shall*** assess" when the person substantially prevails and the agency "had no reasonable basis for denying access." The requirement that the Court ***shall*** assess attorney's fees and costs if there was no reasonable basis for issuing a denial for the requested records. The intent of this mandatory provision was to encourage compliance with the existing FOIL rules and to limit the possibility of costly litigation since the payment for attorney's fees would be mandated against the municipality for lacking a legitimate basis for a denial. The converse, however, does not exist for the defending a frivolous proceeding by an

individual against a municipality under the statute in spite of the expenditure of public funds by the municipality to defend the claim.

Attorney's fees could also be awarded if the agency fails to respond to a request or appeal within the statutory time. Deference with regard to attorney's fees may nevertheless be given to agencies which have timely responded but, in good faith, erroneously withheld documents. Reliance on any deference, however, would not be prudent absent a reasonable basis for non-disclosure. That does not mean that all documents are forever subject to disclosure.

NON-DISCLOSURE

As exists under the Open Meetings Law dealing with executive sessions, exemptions exist under the Public Officers Law which permit an agency to deny access to records under only certain limited situations. Those include under section 87(2) the following classifications:

"(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;

(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; or

(j) [Deemed repealed Dec. 1, 2019, pursuant to L.1988, c. 746, § 17.] are photographs, microphotographs, videotape or other recorded images prepared under authority of section eleven hundred eleven-a of the vehicle and traffic law.

(k) [Expires and deemed repealed Dec. 1, 2019, pursuant to L.2009, c. 19, § 10; L.2009, c. 20, § 24; L.2009, c. 21, § 22; L.2009, c. 22, § 22; L.2009, c. 23, § 9; L.2009, c. 383, § 24.] are photographs, microphotographs, videotape or other recorded images prepared under authority of section eleven hundred eleven-b of the vehicle and traffic law.

(l) [Expires and deemed repealed Sept. 20, 2020, pursuant to L.2010, c. 59, pt. II, § 14.] are photographs, microphotographs, videotape or other recorded images produced by a bus lane photo device prepared under authority of section eleven hundred eleven-c of the vehicle and traffic law.

(m) [Expires and deemed repealed Aug. 30, 2018, pursuant to L.2013, c. 189, § 15.] are photographs, microphotographs, videotape or other recorded images prepared under the authority of section eleven hundred eighty-b of the vehicle and traffic law.

(n) [Expires and deemed repealed July 25, 2018, pursuant to L.2014, c. 43, § 12. See, also, par. below.] are photographs, microphotographs, videotape or other recorded images prepared under the authority of section eleven hundred eighty-c of the vehicle and traffic law.

(n) [Expires and deemed repealed Aug. 21, 2019, pursuant to L.2014, c. 99, § 15; L.2014, c. 101, § 15; L.2014, c. 123, §15. See, also, par. (n) above.] are photographs, microphotographs, videotape or other recorded images prepared under authority of section eleven hundred eleven-d of the vehicle and traffic law.

(o) [Expires and deemed repealed Sept. 12, 2020, pursuant to L.2015, c. 222, § 15.] are photographs, microphotographs, videotape or other recorded images prepared under authority of section eleven hundred eleven-e of the vehicle and traffic law."

Subsection (a) deals with specific prohibitions with respect to records found in statutes such as the Family Educational Right to Privacy Act (FERPA). Subsection (b) has been more widely used as an exemption from disclosure if disclosure would be an "unwarranted invasion of personal privacy under…[section 89(2)]." Subdivision (2) defines what constitutes personal privacy but clearly states that if it is not included in the stated definition, it is not to be considered an invasion of personal privacy no matter how embarrassing or difficult disclosure might be to the individual. That definition includes:

"i. disclosure of employment, medical or credit histories or personal references of applicants for employment;

ii. disclosure of items involving the medical or personal records of a client or patient in a medical facility;

iii. sale or release of lists of names and addresses if such lists would be used for solicitation or fund-raising purposes;

iv. 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;

v. disclosure of information of a personal nature reported in confidence to an agency and not relevant to the ordinary work of such agency; or

vi. 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; or

vii. 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." *Public Officers Law section 89(2)(b)*

The exclusions for medical information, worker compensation records, and credit history are fairly easy to understand as is an individual seeking information for a business purpose under subdivision (iii). More interesting is the language found in subsection (iv) which pertains to the disclosure of information that "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." The examination, therefore, would fall begin with whether there exists personal or economic hardship to the individual whose records are being sought. It would not end with that, however, since the agency would also have to determine if the information was relevant to the "work" of the entity requesting the information or the agency maintaining it.

In spite of this language, disclosure might still be necessary if the individual consents to its release or when the identifying information may be deleted or the person is seeking their own records or under certain real property transactions. These provisions dealing with personal privacy should also be read in conjunction with the Personal Privacy Protection Law set forth in Article 6-A of the Public Officers Law which expands the discussion with respect to individuals and their information.

Subsection (c) provides that documents related to collective bargaining negotiations are exempt from disclosure so that the privacy of the discussions may be maintained. Once the negotiations are complete, however, the contract is readily available for disclosure.

The provisions under subsections (d) dealing with trade secrets with respect to commercial enterprises and subsection (e) dealing with pending criminal matters and law enforcement procedures are more easily understood. Providing information about how the police investigate certain crimes and the names of confidential sources could impair future investigations and provide criminals with important advance information. Similarly, subsection (f) dealing with endangering the life and safety of any person could easily apply to informants or undercover officers whose life expectancy would be severely shortened if their names were released.

Much of the litigation over the years deals with subdivision (g) which deals with inter-agency or intra-agency materials. In order to be protected from disclosure the documents must not be mere statistical or factual tabulations or data. Instructions to staff that affect the public are also subject to release as opposed to instructions that deal solely with inter office activity behind the scenes.

In order to be protected under the inter-agency or intra-agency exemption, the documents cannot be final decisions. Documents that are used to make the final decisions fall within this category. This allows an agency to deliberate without outside interference or review until such time as a decision is reached. It allows an agency the opportunity to consider different options as part of the deliberative process unimpeded by public comment.

Not exempted even if used for purposes of inter-agency reviews are external audits. This would apply to both state and federal government audits of the operations of the municipal corporation or agency.

COMMITTEE ON OPEN GOVERNMENT

No review, no matter how cursory, would be complete without reference to the committee. It is the interpretation of these provisions that add substance to any review. It is not just the Courts, however, that become embroiled in controversy. The Committee on Open Government has as one of its charges to provide advisory guidelines, opinions, and information regarding FOIL to municipal corporations and agencies. That extends also to individuals seeking guidance and advisory opinions and includes the development of a form which can be used by the public to request records. Their website can be located through the Department of State at www.dos.ny.gov and it includes not only the relevant statutes, but also advisory opinions, frequently asked questions, and contact information.

CASES OF INTEREST

Lucas v. Board of Educ. Of East Ramapo Cent. School District, 68 Misc. 3d 1207 (Sup. Ct. Rockland Cty. 2017)

- In this case, the decision of the Board of Education to eliminate twenty noncompetitive bus driver positions was challenged and ultimately reversed as a violation of Open Meetings law. The Court also found the District had failed to comply with FOIL requests to access records of a confidential "executive meeting" where the decision was made.
- In addressing FOIL, court then turned to the requests brought by the petitioner, which the respondent failed to answer in a timely manner, or at all for that matter.
- The court awarded attorney's fees because regardless of the merits of the FOIL request, which were proper in any case, the respondent failed to respond and such triggered the provisions of the new law that allows for attorney fees to be collected in the event of any unreasonable delay on behalf of the respondent, holding: "the purpose in permitting an award of attorney's fees and costs in a proceeding such as this—to deter unreasonable delays and denials of access—is entirely warranted."

Matter of New York Civil Liberties Union v. N.Y.C. Police Dept.¸148 A.D.3d 642 (1st Dep't. 2017)

- This case discusses the contentious issue of Civil Rights Law § 50-a, concerning the personnel records of police officers.
- This case reversed a lower court decision granting an Article 78 motion to compel the disclosure of police disciplinary records under FOIL. The court found that Public Officers

Law § 87(2)(a) allows FOIL exemptions for categories of information that are specifically exempted by statute, which in this case was accomplished by Civ. Rights Law § 50-a.

- In this case, though NYPD disciplinary trials were open to the public, the resulting decisions were still under the "protective cloak" of Civ. Rights Law § 50-a. The court relied primarily on *Matter of Short v. Board of Mgrs. Of Nassau Cty. Med. Ctr.*, 57 N.Y.2d 399 (1982) and *Matter of Karlin v. McMahon*, 96 N.Y.2d 842 (2001), which established and affirmed the principles of exemption at common law.
- Summarily, a respondent agencies previous disclosure of potentially exempt material did not waive the right to claim an exemption from FOIL disclosure created by statute. While recognizing compelling policy interests, the court reiterated that it was bound by the court of appeals, but barring a reversal from the court of appeals or a new law from the legislature, they were unable to find for the claimant.
- This case is currently pending in the Court of Appeals

Green v. Annucci, 70 N.Y.S.2d 746 (Sup. Ct. Albany Cty. 2017)

- In this case, a prisoner filed a FOIL request seeking footage of an incident involving a Dept. of Corrections officer. The NYS Dept. of Corrections as respondent claimed a rule 50-a exemption, alleging that this video was a "personnel record" which would be used to evaluate the performance of the officer, and that release would subject the DOC officer to embarrassment or had the potential for abuse.
- The court ruled that this was not an appropriate exemption under Rule 50-a, and that the tape of the incident should be disclosed. However, the court also declined to award attorney's fees "under POL § 89 (4) (c) (i) as the agency had a reasonable basis for denying access given the novelty of the video recording issue," though they stated that they would reevaluate this decision if respondent did not comply with the order. They did appear to treat the petitioner as though they had substantially prevailed.
- The court recognizes that the issue of video with respect to law enforcement was a novel one and increasingly common question arising in claims against the DOC and other law enforcement, and for this reason appears to have declined to award attorney's fees in this instance, without precluding the award from subsequent actions.

O'Donnell v. New York City Police Department, 65 N.Y.S.3d 492 (Sup. Ct. N.Y. Cty. 2017)

- A retired police officer filed a FOIL request to gain access to records of a high profile arrest he had made while an officer in 1993. The NYPD initially disclosed only a portion of the records he asked for, and then failed to make a timely response to a subsequent appeal for the rest of the records. The petitioner then brought the FOIL action in this case.
- The court ruled that the petitioner had exhausted his administrative remedies when his appeal/request was not met with a timely response, and he was able to bring this action without waiting for a response from the NYPD.

- The court sided with the respondent, holding that affidavits showing that they had performed a diligent search for the records requested demonstrated that they no longer possessed the records they had yet to produce, also citing an order allowing them to destroy older arrest records. Thus, they held that the FOIL action was moot, and the NYPD had produced all the records it possessed.
- Still, the court *did* award attorney's fees, the petitioner substantially prevailed and received all existing records only after this action was commenced when the respondent failed to make a timely reply, *and* because the respondent failed to initially make a timely reply.

Cobado v. Benziger, July 5, 2018 N.Y. Slip Op. 04996.

- A prisoner requested documents under FOIL, and after two requests were not answered during the statutory period, he brought an article 78 motion. After he brought that motion, his request was substantially fulfilled. The Supreme Court of Westchester County ruled against him when he brought his action for legal fees, determining that the proceedings were moot because he had substantially been satisfied, though a portion of the documents were exempt, a decision also upheld by the lower court. The Third Department agreed that the petitioner received all documents to which he was entitled but determined that he was not categorically barred from receiving legal fees just because his request was substantially satisfied before his proceedings went to court. Because the State Police, the agency in question, delayed the response outside of the statutory period, he was entitled to legal fees, at the discretion of the court. The matter was remitted for deliberation on the subject, but fees would still be subject to the discretion of the court.

Energy & Environmental Legal Institute v. Attorney General of State, June 7, 2018 N.Y. Slip Op. 04102.

- Petitioner's FOIL request sought to access any email conversations with eight people, including certain terms, but otherwise "failed to establish a reasonable likelihood that such accounts contain any records responsive to this particular FOIL request." The inter-agency exemption from FOIL was invoked, and no discussion of attorney fees occurred, presumably because the petitioner did not prevail.

Luongo v. Records Access Officer, 2018 WL 2325774 (May 23, 2018)

- Petitioner objected to the blanket exemptions claimed by the Civilian Complaint Review Board of the NYPD following the death of Eric Garner. The court reiterated the strong presumption against FOIL exemptions in favor of the public, but upheld the CCRB's decision to withhold complaint records as exempt personnel files. The court found "substantial and realistic potential of the requested material for the abusive use against the officer," which was reason enough to deny the FOIL request.

- This case found that summaries of personnel files were sufficiently within the statutory exemptions under Rule 50-a that they were exempt from FOIL.
- No attorney fees were granted because the petitioner lost and could not be said to have substantially prevailed.

White v. Annuci, 161 A.D.3d 1428 (May 17, 2018)

- A prisoner, confined to "keep lock" for thirty days after fighting, could not bring a FOIL request before exhausting his administrative remedies.

Competitive Enterprise Institute v. AG of New York, 161 A.D.3d 1283 (May 3, 2018)

- This case carefully states that as long as a government agency had a reasonable basis for denying FOIL petition/appeal, even if the records are subsequently ordered to be disclosed, there should be no attorney fees assessed against the agency.
- "substantially prevailing" is defined here as the petitioner receiving all, or presumably the majority of information requested, and here, the respondent failed to demonstrate that the information requested was protected by "attorney work product" privilege
- The court awarded attorney's fees in this case, but reduced them because they disagreed with the lower court's finding that the respondent had "stonewalled" the court and failed to adequately cooperate. However, the court reasserted that generally speaking, awarding attorney fees to a prevailing petitioner is within the discretion of a court and will only be overturned in the event of clear abuse of that discretion.

Rauh v. de Blasio, 75 N.Y.S.3d 15, (May 1, 2018)

- Petitioners were awarded attorney fees after they substantially prevailed against the Mayor of NYC in a FOIL action seeking records of communications from the mayor's office with outside consultants.
- In this case, the court ruled that the intra-agency/inter-agency exemptions did not apply because the mayor was communicating with a private consultant, and this falls outside of that exemption.
- This exemption could only apply if the private organization was actually retained by the governmental agency in question, and was acting as an agent of the municipality/organization in question.
- In this matter, the lower court awarded attorney fees, and referred the matter to a "special referee" to hear and report on the amount of fees to be awarded. This was all affirmed, without costs on the instant appeal.

Kosmider v. Whitney, 160 A.D.3d 1151, (April 2018)

- This case involved a FOIL request for electronic impressions of voter records.
- The court here determined that this request is governed by FOIL law, not election law, and that paper and electronic ballots will be treated differently under the election law when it does apply

- The dissent enthusiastically objects to treating electronic voting records as distinct from paper voting records
- Petitioner did ultimately win access to the voting records, though there were no discussions of attorney fees, presumably because this was a relatively novel issue of law.

Gartner v. NYS Attorney General's Office

- The AG's office, again claiming attorney client privilege as an exemption to a FOIL request failed to meet the burden of proof to establish that relevant pages of legal documents were exempt from the FOIL request.
- However, no costs were awarded in this case.

Abdur-Rashid v. NYC PD

- In this case the petitioner failed to win his action seeking the disclosure of any surveillance and investigation targeting him
- The request he made would have required the disclosure of broad information involving NYPD investigations and other federal law enforcement agencies, and that the request was both trying to access a FOIL exempt class of information, and too vague.
- The petitioner attempted to argue that by declining to disclose the information, the NYPD admitted there was specific information pertaining to their client and then attempted to file a FOIL request specifically regarding that now "known" info, since the information had been identified as exempt.
- The court declined to allow this, saying that declining to disclose information was not tantamount to acknowledging that it exists, and that once an area of statutory exemption was identified for particular information, there was no further "balancing of interests" to determine whether or not the information should be disclosed.

Fichera v. NYS Dept. of Conservation, 159 A.D.3d 1493, (March 16, 2018)

- This action involved the review of a zoning variance granted to a construction company, allowing them to conduct a limited mining operation on their property in Cayuga County
- The variance was granted, but reversed in this case because it did not go through the proper procedure with the county for a variance of this type on this property
- The petitioner which sought and won the reversal did not succeed on their FOIL petition and costs were not awarded, despite the fact that the town may have violated FOIL provisions or the Open Meetings Law art. 7
    - "technical violations in the mode or manner of the Town's responses to the FOIL requests would not warrant the imposition of costs or counsel fees." Basically, a basic statutory violation, in good faith, does not warrant imposing FOIL fee shifting provisions for attorney fees.

Free Market Environmental Law Clinic v. AG of New York, 159 A.D.3d 467, (March 8, 2018)

- The Appellate Division declined to question the scope of the AG's authority and declined to hear the appeal from the petitioner, stating succinctly that the information in question was compiled pursuant to law enforcement purpose and protected by an exemption, for which the AG met there burden of proof to establish.

Smith v. NYS Office of the A.G., 159 A.D.3d 1090 (March 1, 2018)

- The petitioners' FOIL claim was barred by res judicata, since a prior judgment on the same FOIL request had already determined that the content of the AG's private email did not contain responsive documents to the request
- The subject matter of this request pertained to the investigation of Elliot Spitzer and a renewed request
- Judgment affirmed without costs

Wright v. Woodard, 158 A.D.3d 958, (February 15. 2018)

- The petitioner initiated an action, appeal and then lawsuit to gain access to a fingerprint card, and mug shot photos from an arrest. His requests were partially granted and the agency turned over the information/records that they had, though they were unable to locate the complete record of the information that the petitioner requested
- The petitioners FOIL claim was then dismissed as moot, because after a diligent search, the agency certified that it does not have possession of the requested records that remained, and could not be held accountable for disclosing documents that they did not have in their possession

Empire Center for Pub. Policy, Inc. v. N.Y.C. Office of Payroll Admin., 158 A.D.3d 529, (February 15, 2018)

- The Empire Center was granted a FOIL petition, with attorney fees and costs to compel the disclosure of information from the agency
- The agency agreed to compile information by a certain date. Nearing that date, the petitioner filed an administrative appeal to enforce compliance with their requests.
- The petitioner did not exhaust administrative records, and the agency did not effectively refuse to disclose the information, so the appeal was denied.

Empire State Beer Distributors, Inc. v. NYS Liquor Authority

- A petition for un-redacted copies of the SLA stipulations entered into with Costco and BJ's was successfully defeated when the companies intervened.
- The information, though not FOIL exempt, would have caused the companies to suffer a "competitive injury" which did not "rest on a speculative conclusion that disclosure might potentially case harm," by leading to negative publicity.
- The intervening companies met the burden of proof to prove the injury and defeat the request

STATUTE

§84. Legislative declaration.

The legislature hereby finds 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.

As state and local government services increase and public problems become more sophisticated and complex and therefore harder to solve, and with the resultant increase in revenues and expenditures, it is incumbent upon the state and its localities to extend public accountability wherever and whenever feasible.

The people's right to know the process of governmental decision-making and to review the documents and statistics leading to determinations is basic to our society. Access to such information should not be thwarted by shrouding it with the cloak of secrecy or confidentiality. The legislature therefore declares that government is the public's business and that the public, individually and collectively and represented by a free press, should have access to the records of government in accordance with the provisions of this article.

§85. Short title. This article shall be known and may be cited as the "Freedom of Information Law."

§86. Definitions. As used in this article, unless the context requires otherwise.

1. "Judiciary" means the courts of the state, including any municipal or district court, whether or not of record.

2. "State legislature" means the legislature of the state of New York, including any committee, subcommittee, joint committee, select committee, or commission thereof.

3. "Agency" means 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.

4. "Record" means 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.

5. "Critical infrastructure" means systems, assets, places or things, whether physical or virtual, so vital to the state that the disruption, incapacitation or destruction of such systems, assets, places or things could jeopardize the health, safety, welfare or security of the state, its residents or its economy.

§87. Access to agency records.

1. (a) Within sixty days after the effective date of this article, the governing body of each public corporation shall promulgate uniform rules and regulations for all agencies in such public corporation pursuant to such general rules and regulations as may be promulgated by the committee on open government in conformity with the provisions of this article, pertaining to the administration of this article.

(b) Each agency shall promulgate rules and regulations, in conformity with this article and applicable rules and regulations promulgated pursuant to the provisions of paragraph (a) of this subdivision, and pursuant to such general rules and regulations as may be promulgated by the committee on open government in conformity with the provisions of this article, pertaining to the availability of records and procedures to be followed, including, but not limited to:

i. the times and places such records are available;

ii. the persons from whom such records may be obtained; and

iii. the fees for copies of records which shall not exceed twenty-five cents per photocopy not in excess of nine inches by fourteen inches, or the actual cost of reproducing any other record in accordance with the provisions of paragraph (c) of this subdivision, except when a different fee is otherwise prescribed by statute.

c. In determining the actual cost of reproducing a record, an agency may include only:

i. an amount equal to the hourly salary attributed to the lowest paid agency employee who has the necessary skill required to prepare a copy of the requested record;

ii. the actual cost of the storage devices or media provided to the person making the request in complying with such request;

iii. the actual cost to the agency of engaging an outside professional service to prepare a copy of a record, but only when an agency`s information technology equipment is inadequate to prepare a copy, if such service is used to prepare the copy; and

iv. preparing a copy shall not include search time or administrative costs, and no fee shall be charged unless at least two hours of agency employee time is needed to prepare a copy of the record requested. A person requesting a record shall be informed of the estimated cost of preparing a copy of the record if more than two hours of an

agency employee`s time is needed, or if an outside professional service would be retained to prepare a copy of the record.

2. Each agency shall, in accordance with its published rules, make available for public inspection and copying all records, except that such agency may deny access to records or portions thereof that:

(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;

(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; or

(j) [Deemed repealed Dec. 1, 2019, pursuant to L.1988, c. 746, § 17.] are photographs, microphotographs, videotape or other recorded images prepared under authority of section eleven hundred eleven-a of the vehicle and traffic law.

(k) [Expires and deemed repealed Dec. 1, 2019, pursuant to L.2009, c. 19, § 10; L.2009, c. 20, § 24; L.2009, c. 21, § 22; L.2009, c. 22, § 22; L.2009, c. 23, § 9; L.2009, c. 383, § 24.] are photographs, microphotographs, videotape or other recorded images prepared under authority of section eleven hundred eleven-b of the vehicle and traffic law.

(l) [Expires and deemed repealed Sept. 20, 2020, pursuant to L.2010, c. 59, pt. II, § 14.] are photographs, microphotographs, videotape or other recorded images produced by a bus lane photo device prepared under authority of section eleven hundred eleven-c of the vehicle and traffic law.

(m) [Expires and deemed repealed Aug. 30, 2018, pursuant to L.2013, c. 189, § 15.] are photographs, microphotographs, videotape or other recorded images prepared under the authority of section eleven hundred eighty-b of the vehicle and traffic law.

(n) [Expires and deemed repealed July 25, 2018, pursuant to L.2014, c. 43, § 12. See, also, par. below.] are photographs, microphotographs, videotape or other recorded images prepared under the authority of section eleven hundred eighty-c of the vehicle and traffic law.

(n) [Expires and deemed repealed Aug. 21, 2019, pursuant to L.2014, c. 99, § 15; L.2014, c. 101, § 15; L.2014, c. 123, §15. See, also, par. (n) above.] are photographs, microphotographs, videotape or other recorded images prepared under authority of section eleven hundred eleven-d of the vehicle and traffic law.

(o) [Expires and deemed repealed Sept. 12, 2020, pursuant to L.2015, c. 222, § 15.] are photographs, microphotographs, videotape or other recorded images prepared under authority of section eleven hundred eleven-e of the vehicle and traffic law.

3. Each agency shall maintain:

(a) a record of the final vote of each member in every agency proceeding in which the member votes;

(b) a record setting forth the name, public office address, title and salary of every officer or employee of the agency; and

(c) a reasonably detailed current list by subject matter, of all records in the possession of the agency, whether or not available under this article. Each agency shall update its subject matter list annually, and the date of the most recent update shall be conspicuously indicated on the list. Each state agency as defined in subdivision four of this section that maintains a website shall post its current list on its website and such posting shall be linked to the website of the committee on open government. Any such agency that does not maintain a website shall arrange to have its list posted on the website of the committee on open government.

4. (a) Each state agency which maintains records containing trade secrets, to which access may be denied pursuant to paragraph (d) of subdivision two of this section, shall promulgate regulations in conformity with the provisions of subdivision five of section eighty-nine of this article pertaining to such records, including, but not limited to the following:

(1) the manner of identifying the records or parts;

(2) the manner of identifying persons within the agency to whose custody the records or parts will be charged and for whose inspection and study the records will be made available;

(3) the manner of safeguarding against any unauthorized access to the records.

(b) As used in this subdivision the term "agency" or "state agency" means only a state department, board, bureau, division, council or office and any public corporation the majority of whose members are appointed by the governor.

(c) Each state agency that maintains a website shall post information related to this article and article six-A of this chapter on its website. Such information shall include, at a minimum, contact information for the persons from whom records of the agency may be obtained, the times and places such records are available for inspection and copying, and information on how to request records in person, by mail, and, if the agency accepts requests for records electronically, by e-mail. This posting shall be linked to the website of the committee on open government.

5.(a) 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. Records provided in a computer format shall not be encrypted.

(b) No agency shall enter into or renew a contract for the creation or maintenance of records if such contract impairs the right of the public to inspect or copy the agency`s records.

§88. Access to state legislative records.

1. The temporary president of the senate and the speaker of the assembly shall promulgate rules and regulations for their respective houses in conformity with the provisions of this article, pertaining to the availability, location and nature of records, including, but not limited to:

(a) the times and places such records are available;

(b) the persons from whom such records may be obtained;

(c) the fees for copies of such records, which shall not exceed twenty-five cents per photocopy not in excess of nine inches by fourteen inches, or the actual cost of reproducing any other record, except when a different fee is otherwise prescribed by law.

2. The state legislature shall, in accordance with its published rules, make available for public inspection and copying:

(a) bills and amendments thereto, fiscal notes, introducers' bill memoranda, resolutions and amendments thereto, and index records;

(b) messages received from the governor or the other house of the legislature, and home rule messages;

(c) legislative notification of the proposed adoption of rules by an agency;

(d) transcripts or minutes, if prepared, and journal records of public sessions including meetings of committees and subcommittees and public hearings, with the records of attendance of members thereat and records of any votes taken;

(e) internal or external audits and statistical or factual tabulations of, or with respect to, material otherwise available for public inspection and copying pursuant to this section or any other applicable provision of law;

(f) administrative staff manuals and instructions to staff that affect members of the public;

(g) final reports and formal opinions submitted to the legislature;

(h) final reports or recommendations and minority or dissenting reports and opinions of members of committees, subcommittees, or commissions of the legislature;

(i) any other files, records, papers or documents required by law to be made available for public inspection and copying.

(j) external audits conducted pursuant to section ninety-two of the legislative law and schedules issued pursuant to subdivision two of section ninety of the legislative law.

3. Each house shall maintain and make available for public inspection and copying:

(a) a record of votes of each member in every session and every committee and subcommittee meeting in which the member votes;

(b) a record setting forth the name, public office address, title, and salary of every officer or employee; and

(c) a current list, reasonably detailed, by subject matter of any records required to be made available for public inspection and copying pursuant to this section.

§89. General provisions relating to access to records; certain cases. The provisions of this section apply to access to all records, except as hereinafter specified:

1. (a) The committee on open government is continued and shall consist of the lieutenant governor or the delegate of such officer, the secretary of state or the delegate of such officer, whose office shall act as secretariat for the committee, the commissioner of the office of general services or the delegate of such officer, the director of the budget or the delegate of such officer, and seven other persons, none of whom shall hold any other state or local public office except the representative of local governments as set forth herein, to be appointed as follows: five by the governor, at least two of whom are or have been representatives of the news media, one of whom shall be a representative of local government who, at the time of appointment, is serving as a duly elected officer of a local government, one by the temporary president of the senate, and one by the speaker of the assembly. The persons appointed by the temporary president of the senate and the speaker of the assembly shall be appointed to serve, respectively, until the expiration of the terms of office of the temporary president and the speaker to which the temporary president and speaker were elected. The four persons presently serving by appointment of the governor for fixed terms shall continue to serve until the expiration of their respective terms. Thereafter, their respective successors shall be appointed for terms of four years. The member representing local government shall be appointed for a term of four years, so long as such member shall remain a duly elected officer of a local government. The committee shall hold no less than two meetings annually, but may meet at any time. The members of the committee shall be entitled to reimbursement for actual expenses incurred in the discharge of their duties.

(b) The committee shall:

i. furnish to any agency advisory guidelines, opinions or other appropriate information regarding this article;

ii. furnish to any person advisory opinions or other appropriate information regarding this article;

iii. promulgate rules and regulations with respect to the implementation of subdivision one and paragraph (c) of subdivision three of section eighty-seven of this article;

iv. request from any agency such assistance, services and information as will enable the committee to effectively carry out its powers and duties; and

v. develop a form, which shall be made available on the internet, that may be used by the public to request a record; and

vi. report on its activities and findings regarding articles six and seven of this chapter, including recommendations for changes in the law, to the governor and the legislature annually, on or before December fifteenth.

2. (a) The committee on open government may promulgate guidelines regarding deletion of identifying details or withholding of records otherwise available under this article to prevent unwarranted invasions of personal privacy. In the absence of such guidelines, an agency may delete identifying details when it makes records available.

(b) An unwarranted invasion of personal privacy includes, but shall not be limited to:

i. disclosure of employment, medical or credit histories or personal references of applicants for employment;

ii. disclosure of items involving the medical or personal records of a client or patient in a medical facility;

iii. sale or release of lists of names and addresses if such lists would be used for solicitation or fund-raising purposes;

iv. 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;

v. disclosure of information of a personal nature reported in confidence to an agency and not relevant to the ordinary work of such agency; or

vi. 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; or

vii. 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.

(c) Unless otherwise provided by this article, disclosure shall not be construed to constitute an unwarranted invasion of personal privacy pursuant to paragraphs (a) and (b) of this subdivision:

i. when identifying details are deleted;

ii. when the person to whom a record pertains consents in writing to disclosure;

iii. when upon presenting reasonable proof of identity' a person seeks access to records pertaining to him or her; or

iv. when a record or group of records relates to the right, title or interest in real property, or relates to the inventory, status or characteristics of real property, in which case disclosure and providing copies of such record or group of records shall not be deemed an unwarranted invasion of personal privacy, provided that nothing herein shall be construed to authorize the 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".

2-a. Nothing in this article shall permit disclosure which constitutes an unwarranted invasion of personal privacy as defined in subdivision two of this section if such disclosure is prohibited under section ninety-six of this chapter.

3. (a) Each 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 acknowledgment 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, including, where appropriate, a statement that access to the record will be determined in accordance with subdivision five of this section. An agency shall not 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 because the agency lacks sufficient staffing or on any other basis if the agency may engage an outside professional service to provide copying, programming or other services required to provide the copy, the costs of which the agency may recover pursuant to paragraph (c) of subdivision one of section eighty-seven of this article. An agency may require a person requesting lists of names and addresses to provide a written certification that such person will not use such lists of names and addresses for solicitation or fund-raising purposes and will not sell, give or otherwise make available such lists of names and addresses to any other person for the purpose of allowing that person to use such lists of

names and addresses for solicitation or fund-raising purposes. If an agency determines to grant a request in whole or in part, and if circumstances prevent disclosure to the person requesting the record or records within twenty business days from the date of the acknowledgement of the receipt of the request, the agency shall state, in writing, both the reason for the inability to grant the request within twenty business days and a date certain within a reasonable period, depending on the circumstances, when the request will be granted in whole or 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. Nothing in this article shall be construed to require any entity to prepare any record not possessed or maintained by such entity except the records specified in subdivision three of section eighty-seven and subdivision three of section eighty-eight of this article. 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.

(b) All entities shall, provided such entity has reasonable means available, accept requests for records submitted in the form of electronic mail and shall respond to such requests by electronic mail, using forms, to the extent practicable, consistent with the form or forms developed by the committee on open government pursuant to subdivision one of this section and provided that the written requests do not seek a response in some other form.

4. (a) Except as provided in subdivision five of this section, any person denied access to a record may within thirty days appeal in writing such denial to the head, chief executive or governing body of the entity, or the person therefor designated by such head, chief executive, or governing body, who shall within ten business days of the receipt of such appeal fully explain in writing to the person requesting the record the reasons for further denial, or provide access to the record sought. In addition, each agency shall immediately forward to the committee on open government a copy of such appeal when received by the agency and the ensuing determination thereon. Failure by an agency to conform to the provisions of subdivision three of this section shall constitute a denial.

(b) Except as provided in subdivision five of this section, a person denied access to a record in an appeal determination under the provisions of paragraph (a) of this subdivision may bring a proceeding for review of such denial pursuant to article seventy-eight of the civil practice law and rules. In the event that access to any record is denied pursuant to the provisions of subdivision two of section eighty-seven of this article, the agency involved shall have the burden of proving that such record falls within the provisions of such subdivision two.

Failure by an agency to conform to the provisions of paragraph (a) of this subdivision shall constitute a denial.

(c) The court in such a proceeding:

(i) may assess, against such agency involved, reasonable attorney's fees and other litigation costs reasonably incurred by such person in any case under the provisions of this section in which such person has substantially prevailed, and when the agency failed to respond to a request or appeal within the statutory time; and

(ii) shall assess, against such agency involved, reasonable attorney's fees and other litigation costs reasonably incurred by such person in any case under the provisions of this section in which such person has substantially prevailed and the court finds that the agency had no reasonable basis for denying access.

(d) (i) Appeal to the appellate division of the supreme court must be made in accordance with subdivision (a) of section fifty-five hundred thirteen of the civil practice law and rules.

(ii) An appeal from an agency taken from an order of the court requiring disclosure of any or all records sought:

(A) shall be given preference;

(B) shall be brought on for argument on such terms and conditions as the presiding justice may direct, upon application of any party to the proceeding; and

(C) shall be deemed abandoned if the agency fails to serve and file a record and brief within sixty days after the date of service upon the petitioner of the notice of appeal, unless consent to further extension is given by all parties, or unless further extension is granted by the court upon such terms as may be just and upon good cause shown.

5. (a) (1) A person acting pursuant to law or regulation who, subsequent to the effective date of this subdivision, submits any information to any state agency may, at the time of submission, request that the agency except such information from disclosure under paragraph (d) of subdivision two of section eighty-seven of this article. Where the request itself contains information which if disclosed would defeat the purpose for which the exception is sought, such information shall also be excepted from disclosure.

(1-a) A person or entity who submits or otherwise makes available any records to any agency, may, at any time, identify those records or portions thereof that may contain critical infrastructure information, and request that the agency that maintains such

records except such information from disclosure under subdivision two of section eighty-seven of this article. Where the request itself contains information which if disclosed would defeat the purpose for which the exception is sought, such information shall also be excepted from disclosure.

(2) The request for an exception shall be in writing and state the reasons why the information should be excepted from disclosure.

(3) Information submitted as provided in subparagraphs one and one-a of this paragraph shall be excepted from disclosure and be maintained apart by the agency from all other records until fifteen days after the entitlement to such exception has been finally determined or such further time as ordered by a court of competent jurisdiction.

(b) On the initiative of the agency at any time, or upon the request of any person for a record excepted from disclosure pursuant to this subdivision, the agency shall:

(1) inform the person who requested the exception of the agency's intention to determine whether such exception should be granted or continued;

(2) permit the person who requested the exception, within ten business days of receipt of notification from the agency, to submit a written statement of the necessity for the granting or continuation of such exception;

(3) within seven business days of receipt of such written statement, or within seven business days of the expiration of the period prescribed for submission of such statement, issue a written determination granting, continuing or terminating such exception and stating the reasons therefor; copies of such determination shall be served upon the person, if any, requesting the record, the person who requested the exception, and the committee on open government.

(c) A denial of an exception from disclosure under paragraph (b) of this subdivision may be appealed by the person submitting the information and a denial of access to the record may be appealed by the person requesting the record in accordance with this subdivision.

(1) Within seven business days of receipt of written notice denying the request, the person may file a written appeal from the determination of the agency with the head of the agency, the chief executive officer or governing body or their designated representatives.

(2) The appeal shall be determined within ten business days of the receipt of the appeal. Written notice of the determination shall be served upon the person, if any, requesting the record, the person who requested the exception and the committee on public

access to records. The notice shall contain a statement of the reasons for the determination.

(d) A proceeding to review an adverse determination pursuant to paragraph (c) of this subdivision may be commenced pursuant to article seventy-eight of the civil practice law and rules. Such proceeding, when brought by a person seeking an exception from disclosure pursuant to this subdivision, must be commenced within fifteen days of the service of the written notice containing the adverse determination provided for in subparagraph two of paragraph (c) of this subdivision.

(e) The person requesting an exception from disclosure pursuant to this subdivision shall in all proceedings have the burden of proving entitlement to the exception.

(f) Where the agency denies access to a record pursuant to paragraph (d) of subdivision two of section eighty-seven of this article, the agency shall have the burden of proving that the record falls within the provisions of such exception.

(g) Nothing in this subdivision shall be construed to deny any person access, pursuant to the remaining provisions of this article, to any record or part excepted from disclosure upon the express written consent of the person who had requested the exception.

(h) As used in this subdivision the term "agency" or "state agency" means only a state department, board, bureau, division, council or office and any public corporation the majority of whose members are appointed by the governor.

6. Nothing in this article shall be construed to limit or abridge any otherwise available right of access at law or in equity of any party to records.

7. Nothing in this article shall require the disclosure of the home address of an officer or employee, former officer or employee, or of a retiree of a public employees' retirement system; nor shall anything in this article require the disclosure of the name or home address of a beneficiary of a public employees' retirement system or of an applicant for appointment to public employment; provided however, that nothing in this subdivision shall limit or abridge the right of an employee organization, certified or recognized for any collective negotiating unit of an employer pursuant to article fourteen of the civil service law, to obtain the name or home address of any officer, employee or retiree of such employer, if such name or home address is otherwise available under this article.

8. Any person who, with intent to prevent the public inspection of a record pursuant to this article, willfully conceals or destroys any such record shall be guilty of a violation.

9. When records maintained electronically include items of information that would be available under this article, as well as items of information that may be withheld, an agency in designing its information retrieval methods, whenever practicable and reasonable, shall do so in a

manner that permits the segregation and retrieval of available items in order to provide maximum public access.

§90. Severability.

If any provision of this article or the application thereof to any person or circumstances is adjudged invalid by a court of competent jurisdiction, such judgment shall not affect or impair the validity of the other provisions of the article or the application thereof to other persons and circumstances.

[i i] Committee on Open Government, New York State Department of State, One Commerce Plaza, 99 Washington Avenue, Suite 650, Albany, NY 12231

[ii] Under Public Officers Law section 86(2), the term agency is broadly defined to include virtually every state and local body, except the judiciary and the state legislature.