New York Public Welfare Association
138th Annual Summer Conference
Freedom of Information Law: Best Practices and Developments
Monday, July 16, 2007
1:30 – 3:00 p.m.

AGENDA

1:30-1:50: Overview of Freedom of Information Law

1:50-2:10: Discussion of Exemptions to Disclosure of Records

2:10-2:30: Case Study: Best Practices

2:30-2:50: FOIL Issues in the Children and Family Services Context

2:50-3:00: Question and Answer

PRESENTER BIOGRAPHIES

CHARLES CARSON

Is an Assistant Deputy Counsel in the Bureau of House Counsel at the New York State Office of Children and Family Services (OCFS). He has worked in that bureau since OCFS was created in January of 1998 and has been the bureau supervisor for the past nine years. (Staff of that bureau have been known to express the view that it seems like much, much longer.) Before the creation of OCFS, he worked for the former New York State Department of Social Services in the field of child welfare law, having started with that agency in 1982. He is a graduate of Albany Law School and the State University of New York at Albany (not necessarily in that order) and was admitted to the bar in 1983. Attempts to remove him from bars sometimes prove difficult. What can we say about Mr. Carson? Scholar, athlete, humanitarian, Nobel Prize winner ... Yes, all of these things could be said of him. None of them would be remotely true, of course, but they could certainly be said. What could more truthfully be said is that Mr. Carson has been involved in child welfare law, including confidentiality and Freedom of Information Law (FOIL) issues, since 1983. He provides legal consultation to OCFS on FOIL issues on a regular basis, has worked on litigation matters involving FOIL, and has provided training on confidentiality issues. Although he has never been the FOIL officer for OCFS, Mr. Carson was once the named defendant in a suit brought against OCFS for denial of a FOIL request. His attempts to convince his supervisors that this represented a de facto promotion to the position of FOIL officer were singularly unsuccessful.

LINDA HUNT

Is a graduate of University of Michigan Law School; Associate Attorney and long-term OTDA employee; provide legal advice to OTDA program staff and attorneys concerning access to records under the Freedom of Information Law (FOIL); draft responses to FOIL requests and appeals submitted to OTDA's Records Access Officer and General Counsel; provide legal assistance to the Attorney General's Office in FOIL litigation brought against OTDA.

ALICIA MARCIANO SULLIVAN

Is a Senior Attorney with the New York State Office of Temporary and Disability Assistance. Ms. Sullivan provides legal support to the Temporary Assistance and Home Energy Assistance programs. Prior to joining the Office of Temporary and Disability Assistance, Ms. Sullivan was an Associate at Wilson, Elser, Moskowitz, Edelman & Dicker, LLP, an Albany based lobbying firm and an Associate at Sullivan, Cunningham, Keenan, Mraz & Lemire, a general practice firm which specialized in Workers' Compensation and disability benefits. Ms. Sullivan earned her B.A. in 1992 from the State University of New York at Cortland and her J.D. at Albany Law School in 1999. She is also a board director of the Campus Children's Center, Inc., a not-for-profit child care organization in the Capital Region.

KERRY DELANEY

Is a Senior Attorney with the New York State Office of Temporary and Disability Assistance. Ms. Delaney provides legal support to the Welfare-to-Work, SSI and TANF programs. Prior to joining the Office of Temporary and Disability Assistance, Ms. Delaney served as an Appellate Court Attorney at the New York State Supreme Court, Appellate Division, Third Department. Ms. Delaney earned her B.A. from the State University of New York at Albany, and is a *summa cum laude* graduate of Albany Law School, where she served as the Executive Editor for Lead Articles on the Albany Law Review; a student editor on the Government Law and Policy Journal; a Student Editor of the Albany Law School Center for Judicial Process and held a Dean Thomas Sponslor Honors Teaching Fellowship.

New York State Freedom of Information Law (FOIL)
Summer 2007 Update

Kerry

Panelists

Kerry A. Delaney, Esq., New York State Office of Temporary and Disability Assistance
Linda S. Hunt, Esq., New York State Office of Temporary and Disability Assistance
Alicia M. Sullivan, Esq., New York State Office of Temporary and Disability Assistance

I. Introduction

A. Freedom of Information Law, found atPublic Officers Law, Article 6, §§ 84-90
B. Purpose is Transparency in Government

II. Which entities are subject to FOIL requirements?

A. "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."

-In some parts "agency" only applies to a state agency

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

III. What materials are subject to disclosure?

A. "Record": 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.

B. All agency records are presumed subject to disclosure under FOIL. It is the agency's responsibility to establish that the material sought falls within an enumerated exception. Records of the State Legislature, on the other hand, are only available if they fall into one of the enumerated categories.

C. Exceptions to disclosure of agency records:

(1) Records which are specifically exempted from disclosure by State or federal statute;

(2) Records which, if disclosed, would constitute an unwarranted invasion of personal privacy under § 89 (2):

(a) An unwarranted invasion of personal privacy 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 commercial 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.

(b) Such information will not be considered an unwarranted invasion of personal privacy:
(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.

b. 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) if disclosed would impair present or imminent contract awards or collective bargaining negotiations;

(4) 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;

(5) are compiled for law enforcement purposes and which, if disclosed, would:
(a) interfere with law enforcement investigations or judicial proceedings;
(b) deprive a person of a right to a fair trial or impartial adjudication;
(c) identify a confidential source or disclose confidential

information relating to a criminal investigation; or
(d) reveal criminal investigative techniques or procedures, except routine techniques and procedures;

(6) if disclosed could endanger the life or safety of any person;

(7) are inter-agency or intra-agency materials which are not:
(a) statistical or factual tabulations or data;
(b) instructions to staff that affect the public;
(c) final agency policy or determinations; or
(d) external audits, including but not limited to audits performed by the comptroller and the federal government; or

(8) are examination questions or answers which are requested prior to the final administration of such questions;

(9) if disclosed, would jeopardize an agency's capacity to guarantee the security of its information technology assets, such assets encompassing both electronic information systems and infrastructures; or

(10) are photographs, microphotographs, videotape or other recorded images prepared under authority of section eleven hundred eleven-a of the vehicle and traffic law.

(D) "Opt-Out Provision": 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.

"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.

(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.

III. Access to State Legislative Materials

A. Access to State legislative records is limited to a list set forth in Public Officers Law §88:

(1) bills and amendments, fiscal notes, introducers' bill memoranda, resolutions and amendments, and index records;
(2) messages received from the Governor or the other house of the legislature, and home rule messages;
(3) legislative notification of the proposed adoption of rules by an agency;
(4) 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;
(5) 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;
(6) administrative staff manuals and instructions to staff that affect members of the public;
(7) final reports and formal opinions submitted to the legislature;
(8) final reports or recommendations and minority or dissenting reports and opinions of members of committees, subcommittees, or commissions of the legislature;
(9) any other files, records, papers or documents required by law to be made available for public inspection and copying.

B. Furthermore, each house shall maintain and make available for public inspection and copying the following:

(1) a record of votes of each member in every session and every committee and subcommittee meeting in which the member votes;
(2) a record setting forth the name, public office address, title, and salary of every officer or employee; and
(3) 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.

C. While the legislature is only required to produce documents in accordance with the above list, recent court decisions have indicated the trend towards liberal interpretation in construing the FOIL statute with regard to the State legislature.

(1) Capital Newspapers v Bruno and Silver (S.C. Albany Co., Oct. 23, 2006). Member Items

IV. FOIL Request Procedure

A. Agency Request

C. 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, except when a different fee is otherwise prescribed by statute.

Each agency shall maintain (applies only to state department, board, bureau, division, council or office and any public corporation the majority of whose members are appointed by the governor) :

(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 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.

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. 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.
(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.

(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 public inspection of a record pursuant to this article, willfully conceals or destroys any such record shall be guilty of a violation.

B. State Legislature Request

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

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. 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.
(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.

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 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, when:

i. the agency had no reasonable basis for denying access; or

ii. the agency failed to respond to a request or appeal within the statutory time.

VI. Resources

A. For further information, contact: Committee on Open Government, NYS Department of State, 41 State Street, Albany, NY 12231

Functions of the Committee:

(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.

* Italicized language effective October 24, 2006

Alicia

FREEDOM OF INFORMATION LAW PRESENTATION (FOIL)
New York Public Welfare Association Summer Conference 7/16/07

GENERAL RULE: Records are disclosable unless they fit an exemption under POL § 87(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 an agency's capacity to guarantee the security of its information technology assets, such assets encompassing both electronic information systems and infrastructures; or
(j) are photographs, microphotographs, videotape or other recorded images prepared under authority of section eleven hundred eleven-a of the vehicle and traffic law.

(a) **Specifically exempted from disclosure by state or federal statute**

Confidentiality statutes (i.e. SSL 136, 372, 422) - LINDA AND CHARLIE WILL ADDRESS THIS IN MORE DETAIL LATER IN THE PRESENTATION

New York News Inc. v. Grinker, 537 NYS2d 770 (1989) Petitioner requested records regarding child abuse case from respondent, who wanted to disclose, but was forbidden from disclosing by Commissioner of State Department of Social Services, citing §§372 and 422 of Social Services Law. Petitioner sought an order declaring that respondent has the power to disclose. Despite disclosure of some records through "leaks", court held that "such breaches by agency or court personnel do not abrogate the confidentiality interest inherent in SSL [§422]. The statute and underlying policy do not permit disclosure". Accordingly, the records were exempted from disclosure by statute under §87(2)(a) of the FOIL.

Rabinowitz v. Hammons, 228 AD2d 369 (1996) Academic researcher brought Article 78 petition seeking disclosure of records under Freedom of Information Law (FOIL). The Supreme Court, New York County, Collazo, J., granted petition for disclosure. Health and Mental Health Services appealed. The Supreme Court, Appellate Division, held that government properly declined to disclose medical evaluation records, even in redacted form. Reversed and petition dismissed. Medical evaluations provided by Visiting Psychiatric Service, a unit of Office of Health and Mental Health Services, fell within exception to Freedom of Information Law (FOIL) barring disclosure by social service officials of information and communications relating to persons receiving public assistance or care, and, thus, government properly declined to disclose records, even in redacted form. McKinney's Social Service Law § 136, subd. 1; McKinney's Public Health Law § 18; McKinney's Public Officer's Law, § 87, subd. 2(a)

GENERAL PROPOSITION CASE – 87(2)(g) interagency material

Gould v. New York City Police Department, 89 NY2d 267 (1996)

Rule: All government records are thus presumptively open for public inspection and copying unless they fall within one of the enumerated exemptions of Public Officers Law § 87(2). To ensure maximum access to government documents, the **"exemptions are to be narrowly construed, with the burden resting on the agency to demonstrate that the requested material indeed qualifies for exemption**" (Matter of Hanig v. State of New York Dept. of Motor Vehicles, 79 N.Y.2d 106, 109, 580 N.Y.S.2d 715, 588 N.E.2d 750; see, Public Officers Law § 89[4][b]). As this Court has stated, "[o]nly where the material requested falls squarely within the ambit of one of these statutory exemptions may disclosure be withheld" (Matter of Fink v. Lefkowitz, 47 N.Y.2d 567, 571, 419 N.Y.S.2d 467, 393 N.E.2d 463).

Facts: Case was brought by criminal defendants to obtain documents relating to his arrest from the New York City Police Department. In response, the Police Department furnished arrest, complaint and ballistic reports, but withheld complaint follow-up reports on the ground that the reports are exempt from FOIL production as intra-agency material and withheld police activity logs on the ground that the logs are the officers' personal property.

Holding: The complaint follow-up reports are not categorically exempt from disclosure as intra-agency material and that the activity logs are agency records subject to the provisions of FOIL. Consequently, the proceedings were remitted to the Supreme Court to determine whether the Police Department can make a particularized showing that a statutory exemption applies to justify nondisclosure of the requested documents.

(b) if disclosed would constitute an unwarranted invasion of personal privacy

Johnson v. New York City Police Department, 257 AD2d 343 (1999) Petitioner brought Article 78 proceeding after city police department denied access under Freedom of Information Law (FOIL) to complaint follow-up reports, known as "DD-5s," relating to fatal shooting for which petitioner received first-degree manslaughter conviction. The Supreme Court, New York County, Lebedeff, J., denied petition. Petitioner appealed. The Supreme Court, Appellate Division, affirmed denial of petition but remanded for determination as to whether other materials existed that were not exempt, 220 A.D.2d 320, 632 N.Y.S.2d 568. On remand, the Supreme Court, New York County, Diane Lebedeff, J., granted motion for reconsideration and ordered that DD-5s be produced. Department appealed. The Supreme Court, Appellate Division, Ellerin, P.J., held that: (1) personal privacy provisions of FOIL do not warrant a blanket exemption from disclosure of all DD-5s, but they do require an evaluation of privacy issues; (2) public safety provisions of FOIL likewise do not confer a blanket exemption from disclosure of DD-5s; (3) invocation of public safety exemption from disclosure of DD-5s did not require a showing that petitioner had threatened witnesses; and (4) remand was required for in camera review of requested information

These concerns are reflected in Public Officers Law § 87(2)(b), which permits an agency to deny access to a document, or portion of a document, if disclosure would result in an unwarranted invasion of personal privacy, which, under § 89(2)(b) may include, though is not 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 commercial 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; or
> (v) disclosure of information of a personal nature reported in confidence to ****19** an agency and not relevant to the ordinary work of such agency.

Disclosure of certain records concerning public employees:

Hawley v. Village of Penn Yan, 35 AD3d 1270 (2006)

Facts: Petitioner commenced this CPLR article 78 proceeding seeking a judgment ordering respondent **Village** Board of Trustees of the **Village** of **Penn Yan** to comply with his request under the Freedom of

Information Law ([FOIL] Public Officers Law § 84 *et seq.*) for an unredacted list of the telephone calls made and received by respondent Mayor during a two-month period on a cellular telephone paid for by respondent **Village** of **Penn Yan**. In response to that request, petitioner received the cellular telephone bills for that two-month period, with all but one of the telephone numbers redacted. Contrary to petitioner's contention, Supreme Court properly granted the petition only in part, granting petitioner "the right to examine all requested telephone records, excluding unlisted wired and wireless numbers." **Holding:** The Supreme Court, Appellate Division, held that unlisted telephone numbers were exempt from disclosure.

Reasoning: What constitutes an unwarranted invasion of personal privacy is measured by what would be offensive and objectionable to a reasonable [person] of ordinary sensibilities.... This determination requires balancing the competing interests of public access and individual privacy" (*Matter of Dobranski v. Houper*, 154 A.D.2d 736, 737, 546 N.Y.S.2d 180; *see Matter of Pennington v. Clark*, 16 A.D.3d 1049, 1051-1052, 791 N.Y.S.2d 774, *lv. denied* 5 N.Y.3d 712, 806 N.Y.S.2d 162, 840 N.E.2d 131). "[I]n the situation in which a person chooses to have an unlisted phone number, he or she is likely suggesting, in essence, that disclosure of the number would, in his or her view, be unnecessarily intrusive or result in an unwarranted invasion of personal privacy" (N.Y. Dept. of State Comm. on Open Government, Advisory Op. 9197; *see also* Advisory Op. 8740). We therefore conclude that petitioner is not entitled to disclosure of the unlisted telephone numbers.

(c) if disclosed would impair present or imminent contract awards or collective bargaining negotiations

CAT*ASI, Inc. v. New York State Insurance Dept., 195 Misc2d 456 (2002) Records--Freedom of Information Law--Disclosure of Winning Bid Proposal Petitioner, the unsuccessful bidder to provide licensing testing services to respondent State Insurance Department, is entitled to disclosure under the Freedom of Information Law (FOIL) of a copy of the winning proposal, including all attachments. Respondent failed to demonstrate that the requested documents should be exempt from FOIL disclosure (*see* Public Officers Law § 87 [2]) on the ground that releasing the documents would undermine further potential negotiations that might be required for the Comptroller's approval. Once a contract is conditionally awarded to a bidder, the terms of the successful bidder's response to the request for proposal are no longer "competitively sensitive." Furthermore, petitioner is entitled to disclosure of bid evaluation and tabulation materials containing backup factual and statistical data to the final determination. However, intra-agency predecisional materials, including subjective comments, opinions and recommendations by respondent's employees in making the award determination are exempt from disclosure and may be redacted. Disclosure of the contents of the successful bid proposal and the basis of the determination to accept the successful bid proposal by the agency together with its findings, reports and memoranda is consistent with the legislative purposes of FOIL.

(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;

New York Times Co. v. City of New York Fire Department, 4 NY3d 477 (2005)

Facts: Newspaper and journalist brought Article 78 proceeding against New York City Fire Department challenging department's denial of requests made pursuant to Freedom of Information Law (FOIL) for materials related to the September 11, 2001 attacks on the World Trade Center, and for audio tapes and transcripts of 911 calls. The Supreme Court, New York County, Richard Braun, J., denied victims' family members leave to intervene, and directed disclosure of redacted interviews and 911 tapes. Appeal was taken. The Supreme Court, Appellate Division, 3 A.D.3d 340, 770 N.Y.S.2d 324, affirmed as modified, and leave to appeal was granted.

Holding: The Court of Appeals, R.S. Smith, J., held that: (1) FOIL's privacy exception applied to tapes and transcripts of calls made to Department's 911 emergency service; (2) communications between Department dispatchers and other Department employees were subject to disclosure; (3) FOIL's privacy and intra-agency exceptions did not apply to tapes and transcripts of interviews conducted by Department with firefighters; and (4) FOIL's law enforcement exception did not apply to records that United States Department of Justice claimed would possibly be used in upcoming trial of suspected terrorist.

(f) if disclosed could endanger the life or safety of any person;

John H. v. Goord, 27 AD3d 798 (2006) Petitioner was not entitled, pursuant to Freedom of Information Law (Public Officers Law art 6), to investigative reports, interviews and related documents generated in response to his allegation that he was sexually assaulted by correction officer while incarcerated at correctional facility--although exemptions contained in Public Officers Law § 87 (2) (e) (iii) and (iv) were inapplicable because participating witnesses did not qualify as "confidential source[s]," and records did not "reveal any source or disclose any information which would be deemed confidential [or] reveal any nonroutine criminal investigative techniques or procedures," documents were exempt under section 87 (2) (f) inasmuch as disclosure could endanger life or safety of 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

(iii. final agency policy)Matter of Xerox Corp. v Town of Webster, 107 AD2d 1035(1985) (1) Opinions and recommendations that would, if prepared by agency employees, be exempt from disclosure under the Freedom of Information Law (FOIL) as "intra-agency materials" (Public Officers Law § 87 [2] [g]), do not lose their exempt status simply because they are prepared for the agency, at its request, by an outside consultant. Respondents' final determination being to take no action with respect to property revaluation, the consultant's opinion cannot be considered a final agency determination subject to disclosure under Public Officers Law § 87 (2) (g) (iii), and the fact that respondents ultimately took no action does not divest the reports of their quality as "intra-agency materials" since FOIL protects against disclosure of predecisional memoranda or other nonfinal recommendations, whether or not action is taken. However, to the extent that real estate appraisal reports prepared for respondents by a private consulting firm in connection with possible revaluation of appellant's property after new construction contain "statistical or factual tabulations or data" (Public Officers Law § 87 [2] [g] [i]), or other material subject to production, they should be redacted and made available to appellant.

(h) are examination questions or answers which are requested prior to the final administration of such questions;

(i) if disclosed, would jeopardize an agency's capacity to guarantee the security of its information technology assets, such assets encompassing both electronic information systems and infrastructures; or

Lockheed Martin v. NYS Dept. of Social Services, 256 AD2d 847 (1998)

Private corporation that contracted with Office of Temporary and Disability Assistance (OTDA) to develop and operate a centralized system for the collection and disbursement of support payments in connection with the child support enforcement program brought article 78 proceeding to review OTDA's denial of its request for a Freedom of Information Law (FOIL) exemption. The Supreme Court, Albany County, Teresi, J., dismissed application, and corporation appealed. The Supreme Court, Appellate Division, Cardona, P.J., held that corporation waived right to claim FOIL exemption for technical and cost portions of its proposal. Affirmed.

(j) are photographs, microphotographs, videotape or other recorded images prepared under authority of section eleven hundred eleven-a of the vehicle and traffic law.

Wemhoff v. District of Columbia,887 AD2d 1004 (2005)

Background: After attorney's request under the Freedom of Information Act for records concerning the identity and addresses of motorists who received traffic violation citations as a result of being photographed by a " red light camera" at a particular intersection was denied, attorney filed action seeking declaratory and injunctive relief compelling the District to provide the requested information.

The Superior Court, Frederick H. Weisberg, J., granted District's motion to dismiss the complaint. Attorney appealed.

Holdings: The Court of Appeals, Reid, J., held that: (1) attorney could not gain access to requested records by relying on provision of the Motor Vehicle Safety Responsibility Act which authorized disclosure of driver operating records; (2) attorney could not gain access to requested records by relying on the " investigation in anticipation of litigation" exception of the Driver's Privacy Protection Act (DPPA); and (3) acquiring personal information from motor vehicle records for the purpose of finding and soliciting clients for a lawsuit is not a " permissible use" within the meaning of the DPPA.

LINDA

FREEDOM OF INFORMATION LAW PRESENTATION (FOIL)
New York Public Welfare Association Summer Conference 7/16/07

1. GENERAL RULE: Records are disclosable unless they fit an exemption under POL § 87(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;

2. Confidentiality Statutes

A. Social Services Law §136 prohibits disclosure of names and addresses and amount of assistance of recipients of public assistance and care, except to "official required to have such information properly to discharge ... his duties"

I. Purpose of statute governing confidentiality of the names and addresses of recipients of public assistance is to protect the privacy of such recipients by restricting disclosure of their names and addresses only as provided in the statute. New York Times Co. v. City of New York, 1998, 176 Misc.2d 872, 673 N.Y.S.2d 569.

II. Exceptions: a/r for fair hearing;
Access by the subject of case files - state regulations 18 NYCRR §357.3, provide in relevant part that:

"(c) Disclosure to applicant, recipient, or persons acting in his behalf. (1) The case record shall be available for examination at any reasonable time by the applicant or recipient or his authorized representative upon reasonable notice to the local district. The only exceptions to access are:

(i) those materials to which access is governed by separate statutes, such as child welfare, foster case, adoption or child abuse or neglect or any records maintained for the purposes of the Child Care Review Services;

(ii) those materials being maintained separate from public assistance files for purposes of criminal prosecution and referral to the district attorney's office; and

(iii) the county attorney or welfare attorney's files.

a. bona fide news organization; law enforcement purposes

B. Other laws: SSL §369 Medicaid records, and child abuse, e tc., to be discussed by Charlie Carson

3. Relevant FOIL Decisions

A. Short v. Board of Managers of Nassau County Medical Center57 N.Y.2d 399, 456 N.Y.S.2d 724 Nov 18, 1982

Petitioner sought twenty-nine medical records concerning claims for Medicaid reimbursement for abortions with identifying details deleted; Court of Appeals held that "the statutory authority to delete identifying details as a means to remove records from what would otherwise be an exception to disclosure mandated by the freedom of information law extends only to records whose disclosure without deletion would constitute an unwarranted invasion of personal privacy, and does not extend to records excepted in consequences of specific exemption from disclosure by state or federal statute"; therefore, since records were exempted from disclosure by Public Health Law and Social Services Law, confidentiality was required and deletion of identifying details in the Freedom of Information Law "restricts the rights of the agency if it so chooses to grant access to records within any of the statutory exemptions, with or without deletion of identifying details".

B. Rabinowitz v. Hammons, 644 NYS2d 726, 228 AD 369 (1996)

Petitioner, an academic researcher, sought intake referral forms in redacted form from the Visiting Psychiatric Service, a unit of the Office of Health and Mental Health Services. Agency withheld pursuant to §§136 of the Social Services Law and 18 of the Public Health Law. Supreme Court ordered disclosure following deletion of personal and identifying information. Appellate Division reversed, citing §87(2)(a) of FOIL and Short and holding that the records are exempt from disclosure in their entirety.

3. Actual FOIL Case: Jackson v. Doar, et. al. Supreme Court Albany County

On November 5, 2004, OAH notified petitioner that it had turned over to him all materials pertaining to both FH 4167737J and FH 42069272.

Upon administrative appeal, respondent Robitzek held that the appeal was moot because OAH has provided all the material that was requested. Petitioner then commenced this proceeding to challenge that determination, arguing that OAH has not fully complied with his FOIL request. Additionally, petitioner claims that, because of this noncompliance, he has suffered loss of Social Service benefits. Petitioner claims that he did not have the needed documentation for further OLD A hearings. Here, respondents have demonstrated that OTDA provided petitioner with the requested material on three separate occasions and further accommodated petitioner by hand-delivering the materials to him. Accordingly, OTDA has demonstrated that it complied with Public Officer's Law § 89 (see Matter of' New York Ass 'n of Homes and Servs. for the Aging, 13 AD3dat959). Moreover, to the extent that petitioner claims materials are missing, OTDA certified that it does not possess any further materials other than those already provided (see Matter of New York Ass 'n of Homes and Servs. for the Aging, 13 AD3d at 959).

Based on the foregoing, this Court agrees with respondents that OTDA complied with the statutory requirements and has no further materials it can provide to petitioner. Thus, the relief requested by petitioner has already been provided and this proceeding is moot (see generally Matter of Rattley, 96 NY2d at 875). Because of this decision, this Court declines to address the remaining arguments presented by the parties.

A. Attachments include respondent's supporting affidavit to the case and an advisory opinion re fees.

4. Miscellaneous:

5. A. public employees enjoy lesser degree of privacy: performance ratings and tasks, time sheets, portions of resumes relevant to duties, portions of checks (excluding SSN, personal exemptions) etc. are disclosable.

B. Status of requester (inmate) and reason for request irrelevant.

C. Pre-decisional, policy deliberative means opinions and matters under discussion. If a document stamped "draft" is relied on, it is a final policy or determination.

D. Must redact opinions and disclose facts and final agency policy or determinations.

1. Story of a Request by a Client

In 2003, the Committee on Open Government issued an Advisory Opinion in response to a request from a public assistance recipient regarding OTDA's authority to assess fees for copies of records sought under the Freedom of Information or Personal Privacy Protection Laws. neither of those statutes makes reference to fee waivers, and that it has been held that an agency may charge its established fee for copies even though the applicant for records is indigent [Whiteheadv. Morgenthau, 552 NYS2d 518 (1990)]. The Office, by means of practice and through its regulations, has determined to waive copying fees when a request is made by person involved in a hearing and the records are pertinent to the proceeding, or when a "data subject" seeking records pursuant to the Personal Privacy Protection Law "is a person applying for or receiving public assistance or care or food stamp assistance." The Committee on Open Government stated that the Office may charge fees in all other circumstances in which copies of records are requested. Moreover, it has been held that an agency may require payment of fees in advance of its preparation of photocopies when a request is made under the Freedom of Information Law (Sambucci v. McGuire. Supreme Court, New York County, November 4, 1982).

The client also asked whether OTDA's Counsel, "can legally order others or instruct others to obstruct the physical delivery of a FOIL Request by [the client] or others acting at [the client's] behest." The Committee on Open Government expressed the view that an agency has the inherent power to take action necessary to ensure the safety of its employees and to prevent disruption in the workplace. The Advisory Opinion stated: "In addition, it is my understanding that your exclusion from the premises of the Office has not diminished your ability to request records. On the contrary, I was informed that an 800 telephone number may be used to request records under the Freedom of Information Law or in relation to a hearing, and that verbal requests in those instances are accepted." The recent amendment of the FOIL to permit individuals to request and obtain records via e-mail, such as computers at public libraries, would further eliminate the need for clients to physically deliver FOIL requests.

Another FOIL request by this client presented the question of what must an agency do to comply with FOIL disclosure requirements. This same client requested all fair hearing records pertaining to him, which were hand-delivered to him on Office premises after he notified OTDA that he was having trouble getting his mail. The Office of Administrative Hearings included additional documents newly received documents from a fair hearing. After a determination in a subsequent fair hearing, the Office mailed that decision to him. The Records Access Officer determined that the appeal of the FOIL request was moot because all of the records requested had been provided. The Supreme Court for Albany held that OTDA had fully complied with the FOIL respondents have demonstrated that OTDA provided petitioner with the requested material on three separate occasions and further accommodated petitioner by hand-delivering the materials to him. The Court concluded that OTDA demonstrated that it complied with the FOIL requirements and had no further documents to disclose.

The Courts do not always construe FOIL in favor of the requester. In Jackson v. Wing, Supreme Court, Albany County, June 13, 1996, Petitioner had made repeated requests and initiated numerous proceedings. The court found that his conduct "has been utterly vexatious, and at times, abusive" and therefore enjoined him from entering the premises of the Department of Law and from commencing any further actions under FOIL in any jurisdiction against the state or Albany County without permission of the court.

2. What are records?

Section 86(4) of that statute defines the term "record" expansively to include: "any information kept, held, filed, produced, 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."

[Babigian v. Evans, 427 NYS2d 688, 691 (1980); aff'd 97 AD2d 992 (1983); see also, Szikszay v. Buelow, 436 NYS2d558 (1981) -- The definition of "record" includes specific reference to computer tapes and discs, and it was held that "[i]information is increasingly being stored in computers and access to such data should not be restricted merely because it is not in printed form".

FOIL-AO-15893 – The Advisory Opinion concluded that email kept, transmitted or received by a town official in relation to the performance of his or her duties is subject to the Freedom of Information Law, even if the official "uses his private email address" and his own computer.

Westchester-Rockland Newspapers v. Kimball, 50 NY2d 575, 581 (1980) -- the Court of Appeals dealt squarely with the scope of the term "record", in which the matter involved documents pertaining to a lottery sponsored by a fire department. Although the agency contended that the documents did not pertain to the performance of its official duties, i.e., fighting fires, but rather to a "nongovernmental" activity, the Court rejected the claim of a "governmental versus nongovernmental dichotomy" and found that the documents constituted "records" subject to rights of access granted by the Law. Moreover, the Court determined that:

"The statutory definition of 'record' makes nothing turn on the purpose for which it relates. This conclusion accords with the spirit as well as the letter of the statute. For not only are the expanding boundaries of governmental activity increasingly difficult to draw, but in perception, if not in actuality, there is bound to be considerable crossover between governmental and nongovernmental activities, especially where both are carried on by the same person or persons."

Encore College Bookstores, Inc. v. Auxiliary Service Corporation of the State University, 87 NY2d 410 (1995) -- A branch of the State University (SUNY) contracted with the Auxiliary Service Corp., a not-for-profit corporation created to conduct various functions

for SUNY, including operation of a campus bookstore. When request was made for booklist kept by the bookstore, the not-for-profit said it was not subject to FOIL, and SUNY said that it did not have possession of the list and that FOIL did not apply. Court of Appeals held that SUNY is an "agency", and citing definition of "record", found that the booklist was "kept" or "held" by the bookstore for SUNY and was an "agency record" subject to FOIL.

Buffalo Broadcasting Co., Inc. v. New York State Department of Correctional Services, 552 NYS2d 712, 155 AD2d 106 (1990) -- Television station sought videotapes taken at Attica in 1987 and 1988, and tapes relating to uprising at Coxsackie Correctional Facility, all of which were taken after the uprising; agency said tapes of Coxsackie were transferred to State Police; Court held that transfer of tapes did not relieve agency of responsibility under FOIL, for definition of "record" includes information "produced" by an agency; held that conclusory allegations regarding unwarranted invasions of personal privacy and interference with law enforcement investigations were insufficient, particularly since agency had not reviewed the tapes; held that inmate "has no legitimate expectation of privacy from any and all public portrayal of his person in the facility", and that a blanket denial on security claims under §87(2)(f) is inadequate to sustain burden of proof; ordered agency to redact portions of tape that would "invade an inmate's expectation of privacy or create a serious safety consideration", with a written justification to permit court to determine applicability of claimed exemptions. See Lonski, Bensing, Dobranski Baynes v. Fairport Central School District, Supreme Court, Monroe County, November 1, 2006 - - Union president attempted to block disclosure pursuant to FOIL following request for emails stored on school district computer relating to union activities. Court held that emails sought are clearly "records" and that union lacked standing, "has no remedy" and or basis for bringing a "preemptive proceeding to prevent disclosure."

Capital Newspapers v. Whalen, 69 NY 2d 246, 253 (1987)]. The Court determined that"...the procedure permitting an unreviewable prescreening of documents - which respondents urge us to engraft on the statute - could be used by an uncooperative and obdurate public official or agency to block an entirely legitimate request. There would be no way to prevent a custodian of records from removing a public record from FOIL's reach by simply labeling it 'purely private.' Such a construction, which would thwart the entire objective of FOIL by creating an easy means of avoiding compliance, should be rejected" (id., 254).

2A. When does request "reasonably describe" records?

21 NYCRR 1401.2[b][2] and [3]) -- the regulations promulgated by the Committee on Open Government, which have the force and effect of law, state that an agency's designated records access officer has the duty of assuring that agency personnel "assist persons seeking record to identify the records sought, if necessary, and when appropriate, indicate the manner in which the records are filed, retrieved or generated to assist persons in reasonably describing records" and further, "to contact persons seeking records when a request is voluminous or when locating the records sought involves substantial effort, so

that agency personnel may ascertain the nature of records of primary interest and attempt to reasonably reduce the volume of the records requested".

In Konigsberg v. Coughlin [68 NY2d 245 (1986)], the Court of Appeals held that a request reasonably describes the record sought when agency staff has the ability, with reasonable effort, to locate and identify the records sought. FOIL-AO-16073 – Request to Delaware County Board of Supervisors, to which access was denied to 13 categories of records on the ground that your request is "too vague and indefinite." County attorney allegedly unwilling to discuss any specific items. The Advisory Opinion states in part: "While we are unfamiliar with the record keeping systems of the County, to the extent that the records sought can be located with reasonable effort, we believe that the request would have met the requirement of reasonably describing the records. Ruberti, Girvin & Ferlazzo v. Division of State Police [218 AD2d 494, 641 NYS2d 411 (1996)], one element of the decision pertained to a request for a certain group of personnel records, and the agency argued that it was not required to search its files those requested "because such records do not exist in a 'central file' and, further, that FOIL does not require that it review every litigation or personnel file in search of such information" (id., 415). Nevertheless, citing Konigsberg, the court determined that: "Although the record before this court contains conflicting proof regarding the nature of the files actually maintained by respondent in this regard, an agency seeking to avoid disclosure cannot, as respondent essentially has done here, evade the broad disclosure provisions FOIL by merely asserting that compliance could potentially require the review of hundreds of records" (id.).

3. FOIL Procedures

A 1997 Advisory Opinion addressed whether Albany County violated FOIL procedural requirements. A County Resolution which provided: "All requests to inspect and/or copy public records must be submitted in writing to the County Clerk, Albany County Records Access Officer, on request forms provided by the County Clerk..." Mr. Jackson asked whether he could request County government records only from the County Clerk, or whether he could request records from other county officials. The Advisory Opinion concluded that based on FOIL §89 and model regulations promulgated by the Committee on Open Government, the records access officer must "coordinate" an agency's response to requests. The opinion stated that requests may be made to County officials generally. When an official receives a request, he or she, in accordance with the direction provided by the records access officer, must respond in a manner consistent with the Freedom of Information Law, or forward the request to the records access officer.

Held v. Town of Harrison, Supreme Court, Westchester County, December 12, 1996 -- Court granted leave to reargue, stating that proceeding was "mistakenly dismissed on the basis that petitioner failed to exhaust her administrative remedies" because Town never designated an appeals officer or was advised of right to appeal as required by §1401.7 (a) of Committee's regulations; ordered disclosure to extent that records exist. Also held that town determination that no records exist "is belied by documentary evidence submitted by petitioner."

Housing Works, Inc. v. Guiliani, Supreme Court, New York County, NYLJ, December 15, 1998 –Petitioner encountered series of delays and failures to respond to request, despite repeated efforts of petitioner, appealed to records access officer and asked that appeal be forwarded to appropriate person. Held that agency "neither complied with the time limits provided in [§89(3)], nor with [the records access officer's] statement of the approximate date ('within ten days') for a response. Instead respondents have kept petitioner waiting for more than nine months..." Failure to name appeals officer not sufficient to claim that petitioner failed to exhaust administrative remedies.

Committee opinion, records access officer is not required to answer questions or respond to interrogatories.

4. Retrieval v. Creation of a New Record In the Matter of LOCATOR SERVICES GROUP, LTD., respondent, v. SUFFOLK COUNTY COMPTROLLER, et al., appellants. 2007 WL 1365994 (N.Y.A.D. 2 Dept.), 2007 N.Y. Slip Op. 04122 Supreme Court, Appellate Division, Second Department, New York. May 8, 2007. In a proceeding pursuant to CPLR article 78 to review a determination of Joseph Sawicki, Jr., dated January 6, 2005, which denied the petitioner's request under the Freedom of Information Law (Public Officers Law art 6), for "the original check number, check date, payee's name and address, and amount concerning all general expense, vendor checks, contract payments, refunds for overpayments, and all other payments, that are greater payments than $1,000, that have not been negotiated, and were originally issued between September 1, 2000, and January 31, 2004," the appeal is from so much of a judgment of the Supreme Court, Suffolk County (Berler, J.), dated November 22, 2005, as granted the petition to the extent of directing the Suffolk County Comptroller, Joseph Sawicki, Jr., and the County of Suffolk to "provide lists of all checks greater than $1,000 that have not been negotiated, and which were originally issued between September 1, 2000, and January 31, 2004[and] copies of the computer screens showing the payee's names and addresses for those specific checks designated by petitioner's counsel and which were originally issued to non-individual payees". ORDERED that the judgment is affirmed insofar as appealed from, with costs. In order to access the information sought, the County would only be performing queries within its database, utilizing an existing program known as the Open Check Header Inquiry. Under these circumstances, the County was not required to create new records, or develop a program to comply with the petitioner's FOIL request.

New York Public Interest Research Group v. Cohen, 729 NYS2d 379; 188 Misc.2d 658 (2001) --Database concerning childhood blood level screening included both accessible and deniable items, and NYPIRG sought, in electronic format, only available portions of database. Agency contended that it could not prepare the data "in an electronic format, with individual identifying information redacted, without creating a unique computer program, which the agency is not required to prepare pursuant to Public Officers Law section 89(3)", but agreed to print out the information at a cost of twenty-five cents per page and redact deniable information "by hand; in that instance, there would be approximately 50,000pages. Expert witnesses testified that agency "would only be

performing queries within [the database], utilizing existing programs and software", and it was "undisputed that providing the requested information in electronic format would save time, money, labor and other resources – maximizing the potential of the computer age." Court found that "It makes little sense to implement computer systems that are faster and have massive capacity for storage, yet limit access to and dissemination of the material by emphasizing the physical format of a record....Denying petitioner's request based on such little inconvenience would violate" FOIL's policy of maximum access to records. Also found that "To sustain respondents' positions would mean that any time the computer is programmed to provide less than all the information stored therein, a new record would have to be prepared. Here all that is involved is that DOH is being asked to provide less than all of the available information. I find that in providing such limited information DOH is providing data from records 'possessed or maintained' by it. There is no reason to differentiate between data redacted by a computer and data redacted manually insofar as whether or not the redacted information is a record 'possessed or maintained' by the agency. Moreover, rationality is lacking for a policy that denies a FOIL request for data in electronic form when to redact the confidential information would require only a few hours, whereas to perform the redaction manually would take weeks or months...and probably would not be as accurate as computer generated redactions."

Day v. Town Board of Town of Milton, Supreme Court, Saratoga County, April 27, 1992 Held that public employees' W-2 forms are available after deleting personal information, i.e., social security numbers; Coalition of Landlords, Homeowners and Merchants v. County of Suffolk, Supreme Court, Suffolk County, February 14, 2005 - Issue involved "the capacity to retrieve the information sought by petitioner from the Suffolk County Clerk's Office and the Suffolk county RPTSA without the necessity of creating a new record." Hearing was held and credible testimony established that agency would be involved in creating a record. "According to the uncontroverted proof", the record sought "would require approximately 171 days (or 34 weeks) worth or technical 'man hours'", and that "the issue is not simply one of merely redacting confidential with keystroke or two...nor is the issue one of merely 'changing technology'...The evidence is clear that the agencies in question would be required to create a record at considerable expense to the tax payers."

5. Exemptions Construed the Court of Appeals reiterated its general view of the intent of the Freedom of Information Law in Gould v. New York City Police Department [89 NY2d 267 (1996)], stating that: "To ensure maximum access to government records, the 'exemptions are to be narrowly construed, with the burden resting on the agency to demonstrate that the requested material indeed qualifies for exemption' (Matter of Hanig v. State of New York Dept. of Motor Vehicles, 79 N.Y.2d 106, 109, 580 N.Y.S.2d715, 588 N.E.2d 750 see, Public Officers Law § 89[4][b]). As this Court has stated, '[o]only where the material requested falls squarely within the ambit of one of these statutory exemptions may disclosure be withheld' (Matter of Fink v. Lefkowitz, 47 N.Y.2d, 567, 571, 419 N.Y.S.2d 467, 393 N.E.2d 463)"(id., 275).If the court is unable to determine whether withheld documents fall entirely within the scope of the asserted exemption, it should conduct an in camera inspection of representative documents and order disclosure

of all nonexempt, appropriately redacted material (see, Matter of Xerox Corp. v. Town of Webster, 65 N.Y.2d 131, 133, 490 N.Y.S. 2d, 488, 480 N.E.2d 74; Matter of Farbman & Sons v. New York City Health & Hosps. Corp., supra, 62 N.Y.2d, at 83, 476 N.Y.S.2d 69, 464 N.E.2d 437)" (id.). The Court also dealt with the issue of what constitutes "factual data" that must be disclosed under §87(2)(g)(i). In its consideration of the matter, the Court found that: "...Although the term 'factual data' is not defined by statute, the meaning of the term can be discerned from the purpose underlying the intra-agency exemption, which is 'to protect the deliberative process of the government by ensuring that persons in an advisory role [will] be able to express their opinions freely to agency decision makers' (Matter of Xerox Corp. v. Town of Webster, 65 NY2d 131, 132 [quoting Matter of Sea Crest Constr. Corp. v. Stubing, 82 AD2d 546, 549]) Non-exempt if Requested material consists of 'statistical or factual tabulations or data' (Public Officers Law 87[2][g][I]. Factual data, therefore, simply means objective information, in contrast to opinions, ideas, or advice exchanged as part of the consultative or deliberative process of government decision making (see, Matter of Johnson Newspaper Corp. v. Stainkamp, 94 AD2d 825, 827, affd on op below, 61 NY2d 958; Matter of Miracle Mile Assocs. v. Yudelson, 68 AD2d 176, 181-182)" (id., 276-277). 5A.Records exempted from disclosure by another federal or state statute – Confidentiality 87(2)(a) Short v. Board of Managers of Nassau County Medical Center, 57 NY2d 399 (1982) -- Petitioner sought twenty-nine medical records with identifying details deleted; Court of Appeals held that "the statutory authority to delete identifying details as a means to remove records from what would otherwise be an exception to disclosure mandated by the freedom of information law extends only to records whose disclosure without deletion would constitute an unwarranted invasion of personal privacy, and does not extend to records excepted in consequences of specific exemption from disclosure by state or federal statute"; therefore, since records were exempted from disclosure by Public Health Law and Social Services Law, confidentiality was required and deletion of identifying details in the Freedom of Information Law "restricts the rights of the agency if it so chooses to grant access to records within any of the statutory exemptions, with or without deletion of identifying details".

Rabinowitz v. Hammons, 644 NYS2d 726, 228 AD 369 (1996) -- Petitioner, an academic researcher, sought intake referral forms in redacted form from the Visiting Psychiatric Service, a unit of the Office of Health and Mental Health Services. Agency withheld pursuant to §§136 of the Social Services Law and 18 of the Public Health Law. Supreme Court ordered disclosure following deletion of personal and identifying information. Appellate Division reversed, citing §87(2)(a) of FOIL and Short and holding that the records are exempt from disclosure in their entirety.

New York News v. Grinker, 537 NYS2d 770 (1989) --Petitioner requested records regarding child abuse case from respondent, who wanted to disclose, but was forbidden from disclosing by Commissioner of State Department of Social Services, citing §§372 and 422 of Social Services Law. Petitioner sought an order declaring that respondent has the power to disclose. Despite disclosure of some records through "leaks", court held that "such breaches by agency or court personnel do not abrogate the confidentiality interest inherent in SSL [§422]. The statute and underlying policy do not permit disclosure".

Accordingly, the records were exempted from disclosure by statute under §87(2)(a) of the FOIL.

Newsday, Inc. v. Commission on Quality of Care for the Mentally Disabled, Supreme Court, Albany County, December 22, 1992 --Central issue related to child abuse records that are confidential under §422 of Social Services Law, and an exception to that statute authorizing disclosure to "any person engaged in a bona fide research purpose." Request was made by reporter, who contended that she engaged in bona fide research. Court disagreed and held that "bona fide research purpose" should be construed to mean "academic, administrative or scientific research for the purpose of ascertaining the causes of child abuse and methods of alleviating or eliminating the problem."

Gannett Co., Inc. v. County of Ontario, 661 NYS2d 920 (1997) --Case involving "Elisa's Law"; father of the deceased children convicted of murder and other charges and Gannett sought records relating to the family from Department of Social Services in addition to report furnished under Social Services Law, §20(9); held that governing statute is §422-a of Social Services and that §422-a is "an exemption to FOIL"; also held that denial of information subject to discretionary disclosure without offering specific reasons represented failure to comply with §422-a; due to sensitive nature of information, court granted access subject to in camera inspection.

Wise v. Battistoni, 617 NYS2d 506, 208 AD2d 755 (1994) –Court upheld initial denial of access for social services records concerning petitioner's daughter, citing §87(2)(a) of the FOIL and §372(3) and (4) of the Social Services Law. Exception: FOIL-AO-16155 - Specifically, you asked whether records reflective of criminal and civil litigation initiated by the New York City Department of Social Services against recipients of public assistance are accessible under the Freedom of Information Law. You wrote that you are "researching cases in which recipients allegedly defrauded or misled the government by obtaining Medicaid or other public assistance benefits after failing to disclose true financial assets." You added that you are particularly interested in obtaining "the names and addresses of the defendants/recipients - and dollar amounts owed..." SSL §136 Subdivision (4), which is pertinent to the matter, states in relevant part that: "Nothing in this or the other subdivisions of this section shall be deemed to prohibit bona fide news media from disseminating news, in the ordinary course of their lawful business, relating to the identity of persons charged with the commission of crimes or offenses involving their application for or receipt of public assistance and care, including the names and addresses of such applicants..." As I understand the foregoing, while records pertaining to persons who have applied for or have received public assistance are confidential, except when the records relate "to the identity of persons charged with the commission of crimes or offenses involving their application for or receipt of public assistance and care..." In short, when a record is made available through a public judicial proceeding, unless it is later sealed, in my opinion, nothing in the Freedom of Information Law would serve to enable an agency to deny access to that record. In consideration of the foregoing, it appears that litigation files containing the information of your interest maintained by the Department of Social Services that have been used in or are accessible from a court are accessible under the Freedom of Information Law. Access by the

subject of case files - state regulations 18 NYCRR §357.3, provide in relevant part that: "(c) Disclosure to applicant, recipient, or persons acting in his behalf. (1) The case record shall be available for examination at any reasonable time by the applicant or recipient or his authorized representative upon reasonable notice to the local district. The only exceptions to access are:

> (i) those materials to which access is governed by separate statutes, such as child welfare, foster case, adoption or child abuse or neglect or any record maintained for the purposes of the Child Care Review Services;
>
> (ii) those materials being maintained separate from public assistance files for purposes of criminal prosecution and referral to the district attorney's office; and
>
> (iii) the county attorney or welfare attorney's files.

(2) Information may be released to a person, a public official, or another social agency from whom the applicant or recipient has requested a particular service when it may properly be assumed that the client has requested the inquirer to act in his behalf and when such information is related to the particular service requested."

6. Disclosure of certain records Concerning Public Employees not exempted as unwarranted invasion of personal privacy (87(2)(b). Hawley v. Village of Penn Yan, Supreme Court, Yates County, November 30, 2004 - - Bills pertaining to mayor's use of village cell phone were disclosed after deletion of all phone numbers. Court held that agency could not meet burden of proving that disclosure of numbers called would constitute an unwarranted invasion of privacy, citing opinion of Committee.

Based on judicial decisions, it is clear that public officers and employees enjoy a lesser degree of privacy than others, for it has been found in various contexts that those individuals are required to be more accountable than others. The courts have found that, as a general rule, records that are relevant to the performance of the official duties of a public officer or employee are available, for disclosure in such instances would result in a permissible rather than an unwarranted invasion of personal privacy [see e.g., Farrell v. Village Board of Trustees, 372 NYS 2d 905 (1975); Gannett Co. v. County of Monroe, 59 AD 2d 309 (1977), aff'd 45 NY 2d 954 (1978); Sinicropi v. County of Nassau, 76 AD 2d 838 (1980); Geneva Printing Co. and Donald C. Hadley v. Village of Lyons, Sup. Ct., Wayne Cty., March 25, 1981; Montes v. State, 406 NYS 2d 664 (Court of Claims, 1978); Powhida v. City of Albany, 147 AD 2d 236 (1989); Scaccia v. NYS Division of State Police, 530 NYS 2d 309, 138 AD 2d 50 (1988); Steinmetz v. Board of Education, East Moriches, Sup. Ct., SuffolkCty., NYLJ, Oct. 30, 1980); Capital Newspapers v. Burns, supra. Archdeacon v. Town of Oyster Bay, Supreme Court, Nassau County, NYLJ, Feb. 28, 2006 – Citing opinion of Committee, court held that financial disclosure statements filed with Town are available for inspection and copying, despite local law indicating that the statements were available for inspection only. Agreed with Committee opinion that FOIL governs, not Executive Law, which pertains to State Ethics Commission.

Conversely, to the extent that items relating to public officers or employees are irrelevant to the performance of their official duties, it has been found that disclosure would indeed constitute an unwarranted invasion of personal privacy [see.g, Matter of Wool, Sup. Ct., Nassau Cty., NYLJ, Nov. 22, 1977, dealing with membership in a union; Minerva v. Village of Valley Stream, Sup. Ct., Nassau Cty., May 20, 1981, involving the back of a check payable to a municipal attorney that could indicate how that person spends his/her money; Selig v. Sielaff, 200 AD 2d 298 (1994), concerning disclosure of social security numbers]. While statistical records involving attendance of public employees (i.e., time sheets) are available, citing Capital Newspapers v. Burns, "medical reason" for absence, "medical condition and/or treatment for disabilities" would constitute an unwarranted invasion of personal privacy if disclosed, citing Committee opinion it has been held by the Appellate Division that disclosure of a public employee's educational background would not constitute an unwarranted invasion of personal privacy and must be disclosed [see Ruberti, Girvin & Ferlazzo v. NYS Division of State Police, 641 NYS 2d 411, 218 AD 2d 494 (1996)]. Kwasnik v. City of New York and City University of New York, 691 NYS2d 525, 262 AD2d 171 (1999Petitioner sought records regarding employment of six CUNY employees; court cited and agreed with Committee opinion that public employment history and portion of resumes and applications indicating that employment criteria have been met must be disclosed; many employment records reviewed in camera; rejected claim that petitioner failed to exhaust administrative remedies because agency failed to inform petitioner of right to appeal, citing Barrett; held that request reasonably described and "is not impermissibly vague simply because the [the petitioner] is unaware of the specific document upon which that information was recorded", even though review might involve hundreds of records, citing Ruberti. Appellate Division affirmed lower court decisions, citing opinions of committee. Buffalo News v. Buffalo Municipal Housing Authority, 558 NYS3d 364, 163 AD2d 830 (1990) --Newspaper sought employee payroll, attendance and disciplinary records, including employee name, job title, charges brought, disposition of charges, penalty imposed, and level of adjudication; held that records sought are available, except portions containing "medical information or family situation which is not relevant to the work of the agency." See Sinicropi, ScacciaFOIL-AO-15989 May 31, 2006, the email addresses of public employees may be withheld. Viruses and related reasons, the disclosure of e-mail addresses, which in turn could result in an inability to carry out critical governmental functions, could jeopardize the lives and safety of members of the public, as well as government employees, and adversely impact an agency's operations.

7. Attorney's Fees

The law was changed following a lawsuit by a nursing home, Beechwood Restorative Care Center v. Signor, 11 AD3d 987, 784 NYS2d 750, 5 NY3d 435 (2005) - - Applicant, a nursing home closed by the Department of Health, requested records and was largely ignored. Beechwood submitted 17 voluminous FOIL requests to the State Department of Health in connection with its federal litigation against DOH employees after DOH revoked Beechwood's operating certificate, closed the skilled nursing facility and imposed a $54,000 civil penalty. Closing of the facility resulted in several newspaper articles, and applicant applied for award of attorney's fees. Although the closing of the

facility might have been of significant interest to the public, the records sought, i.e., those involving employee training, job descriptions, correspondence with DOH and the like, would not be of significant interest to the general public.

Although DOH produced hundreds of pages of documents relating to some of the requests, Beechwood filed a lawsuit alleging that DOH had failed to respond to 12 additional FOIL requests (containing 78 itemized demands) and seeking attorneys' fees under the FOIL. DOH delivered over 350 pages of additional records to Beechwood before the Supreme Court issued its ruling. The Supreme Court upheld all of the exemptions claimed by DOH but ordered DOH to further search for records responsive to 48 demands, concluding that Beechwood had "rebutted [DOH's] certification that a diligent search has been conducted and all responsive documents have been located." The Supreme Court denied Beechwood's application for attorney's fees, concluding that Beechwood had failed to meet its burden of establishing that the particular records disclosed were clearly of significant interest to the general public. The Court of Appeals also rejected Beechwood's request for an award of attorney's fees on the basis that the records were not clearly of significant interest to the general public.

As the justification for the bill correctly states, the Court of Appeals stated: "DOH's failure to follow FOIL's requirements necessitated this lawsuit, a result that could have been avoided had DOH discharged its statutorily-mandated disclosure obligations in a more thorough and timely fashion. DOH's delay in conducting a comprehensive search for the requested records triggered the question whether Beechwood could recover attorney's fees expended in this litigation."

This law will not prevent courts from denying attorney's fees in future cases. Instead of denying attorney's fees on the basis that the record was not of clearly significant interest to the general public, courts will instead hold that the FOIL requester failed to show that the agency lacked a reasonable basis in law for withholding the records, as the Appellate Division did in Beechwood. Agencies will likely continue to prevail over requests for attorney's fees and establish that they have a reasonable basis for denying access, where, as in Beechwood, courts uphold the agency's claims that documents are exempted from disclosure under the FOIL. In addition, it is likely that agencies can establish a reasonable basis for denying access where a voluminous amount of records are sought, where there is a need for clarification of various items requested and where the requester already possesses a number of documents it is requesting.

An award of attorney's fees just before the law was changed: Miller v. NYS Department of Environmental Conservation, Supreme Court, Albany County, June 21, 2006 - - Issue involved award of attorney's fees and whether petitioner "substantially prevailed." Court found that condition was met because agency took 12 weeks to provide first set of documents and 15 ½ to provide remainder and did so only after commencement of judicial proceeding.

8. E-mail

FOIL-AO-16279 - The Advisory Opinion states in part: "With respect to scanning 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 any effort additional to an alternative method of responding, it would be required to scan the records. For example, when copy machines are equipped with scanning technology that can create electronic copies of records as easily as paper copies, and the agency would not be required to perform any additional task in order to create an electronic record as opposed to a paper copy, we believe that the agency is required to do so. Further, it appears in that instance that transferring a paper record into electronic format would diminish the amount of work imposed upon the agency in consideration of the absence of any need to collect and account for money owed or paid for preparing paper copies, and the availability of the record in electronic format for future use."

FOIL WORKSHOP

Charlie

Records – if it's a list of questions, not covered by FOIL. If it's a request to talk to someone, not covered by FOIL

Don't have to create documents – except with data stored electronically – if can be done easily or with reasonable effort, required to produce it

Confidentiality – POL Section 87(2)(a) – records specifically exempted from disclosure by state or federal law

- Not records specifically exempted from FOIL – refers to records that are confidential

- Child welfare – lot of confidential records –SCR/CPS/IAB (422(4)(A) and 422(5) of the SSL); foster care (372(3) and (4) of the SSL); preventive (18 NYCRR 423.7); adoption (114 of DRL; adult protective (473-e of SSL)

- Day care – regulations make information concerning children confidential (e.g., 18 NYCRR 418-1.15(a)(5))

  complainants to complaint line – not confidential, as such – use personal privacy and safety

- IAB – Children's Rights case

- PSA – Orr case

- Section 422-a of SSL – Limited public disclosure of CPS cases

  Situations are: subject charged with a crime; law enforcement agency or official, DA, other investigative agency or judge disclosed in a report required to be disclosed as part of public duties; subject made knowing

public disclosure of report; or fatality or near fatality. (Near fatality means physician has certified that child is in serious or critical condition.)

Must determine that disclosure would not be contrary to best interests of child, siblings or other children in household

Info to be shared – during investigation – can only say it's under investigation

Unfounded- can only say investigation complete and it's unfounded

Indicated – can share name of child; CPS determination; what actions taken by CPS/services provided to child and family; if previous indicated reports; CPS actions taken in response to previous reports; whether district provided services to child or family prior to all reports; other extraordinary or pertinent information that commissioner determines can be disclosed consistent with public interest

Can't share mental health, clinical or medical records or information except as directly related to cause of abuse or maltreatment (and mental health only after consultation with local mental health commissioner)

Unwarranted Invasion of Personal Privacy – POL Section 87(2)(b) – disclosure would constitute an unwarranted invasion of personal privacy under Section 89(2) of the POL

POL 89(2) – includes but not limited to employment, medical or credit histories; medical or personal records of client or patient in medical facility; lists of names and addresses for commercial or fund-raising purposes; where disclosure would result in economic or personal hardship and info is not relevant to work of agency maintaining or requesting it; reported in confidence to

an agency and not relevant to work of agency; info in worker's comp record

We use it as part of rationale for day care complainants

Contract awards – POL Section 87(2)(c) – disclosure would impair present or imminent contract awards or collective bargaining negotiations

- Once contracts final – available under FOIL
- Once award final – winning proposals available under FOIL (losing ones – unclear)
- Reviewers' names and scores available, but comments on rating sheets not available

Safety – POL Section 87(2)(f) – disclosure could endanger life or safety of any person

Other part of rationale for not providing names of day care complainants

Inter-agency/intra-agency materials – POL Section 87(2)(g) – inter-agency or intra-agency materials which are not

- Statistical or factual tabulations or data
- Instructions to staff that affect the public
- Final agency policy or determinations
- External audits (including OSC and federal)

IT Protection – POL section 87(2)(i) – disclosure would jeopardize agency's capacity to guarantee security of information technology systems and infrastructure

FREEDOM OF INFORMATION LAW

UPDATED 8/24/06

PUBLIC OFFICERS LAW, ARTICLE 6
SECTIONS 84-90
FREEDOM OF INFORMATION LAW

§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, except when a different fee is otherwise prescribed by statute.

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 an agency's capacity to guarantee the security of its information technology assets, such assets encompassing both electronic information systems and infrastructures; or
(j) are photographs, microphotographs, videotape or other recorded images prepared under authority of section eleven hundred eleven-a 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.

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.

§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.

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 government 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 commercial 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.
(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.

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. 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.
(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 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, when:

i. the agency had no reasonable basis for denying access; or
ii. the agency failed to respond to a request or appeal within the statutory time.

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 public inspection of a record pursuant to this article, willfully conceals or destroys any such record shall be guilty of a violation.

§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.

For further information, contact: Committee on Open Government, NYS Department of State, 41 State Street, Albany, NY 12231

* Italicized language effective October 24, 2006

C

OFFICIAL COMPILATION OF CODES, RULES AND REGULATIONS OF THE STATE OF NEW YORK
TITLE 18. DEPARTMENT OF SOCIAL SERVICES
CHAPTER II. REGULATIONS OF THE DEPARTMENT OF SOCIAL SERVICES
SUBCHAPTER B. PUBLIC ASSISTANCE
ARTICLE 1. DETERMINATION OF ELIGIBILITY -- GENERAL
PART 358. FAIR HEARINGS: AID TO DEPENDENT CHILDREN, HOME RELIEF, MEDICAL ASSISTANCE, EMERGENCY ASSISTANCE TO AGED, BLIND OR DISABLED PERSONS, EMERGENCY ASSISTANCE TO NEEDY FAMILIES WITH CHILDREN, FOOD STAMPS, FOOD ASSISTANCE, HOME ENERGY ASSISTANCE AND SERVICES
SUBPART 358-3. RIGHTS AND OBLIGATIONS OF APPLICANTS AND RECIPIENTS AND SPONSORS OF ALIENS
Text is current through June 15, 2003.

Section 358-3.7 Examination of case record before the fair hearing.

(a)

(1) At any reasonable time before the date of your fair hearing and also at the fair hearing, you or your authorized representative have the right to examine the contents of your case record and all documents and records to be used by the social services agency at your fair hearing.

(2) Except as provided in paragraph (3) of this subdivision, the only exceptions to access to your case record are:

(i) those materials to which access is governed by separate statutes, such as records regarding child welfare, foster care, adoption or child abuse or neglect or any records maintained for the purposes of the Child Care Review Service; and

(ii) those materials being maintained separately from public assistance files for the purposes of criminal prosecution and referral to the district attorney's office. This exception applies only to records which are part of an active and ongoing investigatory action; and

(iii) the county attorney or county welfare attorney's files.

(3) Case records secured by the Commission for the Visually Handicapped or by a local rehabilitation agency acting on behalf of such commission will not ordinarily be made available for examination since they contain information secured from outside sources; however, particular extracts will be furnished to you or your authorized representative when provision of such information will be beneficial to you. The case record, or any part thereof, admitted as evidence in a fair hearing shall be available for review by you or your authorized representative.

(b)

(1) Upon request, you have a right to be provided at a reasonable time before the date of the hearing, at no charge, with copies of all documents which the social services agency will present at the fair hearing in support of its determination. If the request for copies of documents which the social services agency will present at the hearing is made less than five business days before the hearing, the social services agency must provide you with such copies no later than

at the time of the hearing. If you or your representative request that such documents be mailed, such documents must be mailed within a reasonable time from the date of the request; provided however, if there is insufficient time for such documents to be mailed and received before the scheduled date of the hearing such documents may be presented at the hearing instead of being mailed;

(2) Upon request, you have the right to be provided at a reasonable time before the date of the hearing, at no charge, with copies of any additional documents which you identify and request for purposes of preparing for your fair hearing. If the request for copies of documents is made less than five business days before the hearing, the social services agency must provide you with such copies no later than at the time of the hearing. If you or your representative request that such documents be mailed, such documents must be mailed within a reasonable time from the date of the request; provided however, if there is insufficient time for such documents to be mailed and received before the scheduled date of the hearing such documents may be presented at the hearing instead of being mailed;

(3) Your request for copies of documents pursuant to paragraphs (1) and (2) of this subdivision may at your option be made in writing, or orally, including by telephone.

(4) If the social services agency fails to comply with the requirements of this subdivision the hearing officer may adjourn the case, allow a brief recess for the appellant to review the documents, preclude the introduction of the documents where a delay would be prejudicial to the appellant, or take other appropriate action to ensure that the appellant is not harmed by the agency's failure to comply with these requirements.

Historical Note

Sec. filed Dec. 23, 1988; amds. filed: Nov. 29, 1989; Oct. 29, 1997 eff. Nov. 19, 1997. Amended (b)(1), (2) and (4).

<General Materials (GM) - References, Annotations, or Tables>

18 NY ADC 358-3.7
END OF DOCUMENT

C New York News v. Grinker:

New York News Inc. v. Grinker
N.Y.Sup.,1989.

Supreme Court, New York County, New York.
NEW YORK NEWS INC. and Ellen Tumposky, Petitioners,
v.
William GRINKER, Administrator of Human Resources of the City of New York and Cesar Perales, Commissioner of Social Services of the State of New York.
Jan. 25, 1989.

Newspaper writer researcher sought disclosure under freedom of information law of state agency records pertaining to child abuse investigation. The Supreme Court, New York County, Cahn, J., held that confidential state agency records pertaining to deceased child abuse victim were exempt from disclosure, in that release was not possible without violation of statutorily imposed confidentiality.

Ordered accordingly.

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***326 **770** Coudert Brothers by Kevin W. Georing and P. Rivka Schochet, New York City, for petitioners.
Peter L. Zimroth, Corp. ***327** Counsel of the City of New York by Daniel Turbow, New York City, for William Grinker.
Robert Abrams, Atty. Gen. of the State of New York by Robert H. Schack, New York City, for Cesar Perales.
HERMAN CAHN, Justice.
This is an application, pursuant to CPLR Article 78, for an order permitting and requiring Human Resources Administration (" HRA") to disclose to Petitioners records and information pertaining to agency actions in the case of Jessica Cortez, victim of child abuse who was recently killed.

Petitioner New York News publishes a newspaper, " The Daily News" (" Daily News") along with writer-researcher Ellen Tumposky, (" Tumposky") seek the disclosure of the agency records pursuant to the Freedom of Information Law, Public Officers Law § 84 *et seq* (" FOIL"). Respondent William Grinker (" Grinker") is the Administrator of the New York City Human Resources Administration. Respondent Cesar Perales (" Perales") is the Commissioner of the Department of Social Services (" DSS") of the State of New York.

Tumposky asserts that she seeks to obtain research information regarding the actions of HRA, DSS and other city and state agencies in connection with Jessica Cortez ****771** and her family and the people with whom she lived, in order to inform the public of governmental actions and promote public accountability in child abuse cases. She has already written several articles on this subject which have been published in the Daily News. The issue of child abuse is of great public interest and has been the subject of much recent press coverage. At a press conference on December 20, 1988, Grinker announced that none of the information and official records in question would be disclosed to the public because Perales had forbidden him to make them available. Grinker indicated that he desired to make such disclosure, but was not permitted to do so.

Perales issued a press release stating that Grinker is precluded from releasing the information to the public based on §§ 372 and 422 of the Social Services Law, both of which contain provisions mandating confidentiality. Petitioners then instituted this proceeding in which they seek an order from the court declaring that Respondents have the power to release ***328** to the public the files and records of the deceased juvenile, Jessica Cortez. In the alternative, they seek an order compelling Respondents to release the information in question.

[1] The purpose of FOIL is to promote the public's right to know the process of governmental decision-making, and to be kept aware of governmental actions. The law must be liberally construed to grant maximum public access to governmental records. (*See, Lucas v. Pastor,* 117 A.D.2d 736, 498 N.Y.S.2d

461 [1986]). FOIL was enacted to enhance, to the fullest permissible extent, access of public and news media to records and information in possession of state and local governmental agencies. (*See, American Broadcasting Companies, Inc. v. Siebert,* 110 Misc.2d 744, 442 N.Y.S.2d 855 [1981]). FOIL also contains provisions to protect legitimate government interests in keeping certain information confidential. Specifically, the law contains exemptions for information specifically exempted from disclosure by state or federal statute [§ 87 2.(a)]. (*See Marino, The New York Freedom of Information Law,* 43 Fordham L.Rev. 83 [1974]).

Perales claims that § 372 and § 422 of the Social Services Law mandate confidentiality here, thus precluding respondents from releasing the information sought by petitioners. Confidentiality in child abuse investigations and complaints furthers an important governmental and societal interest. It insures that the subject of the reports and their families be spared unnecessary embarrassment and encourages the frank disclosure of information by persons having information that a child is or may be abused; it protects the identity of sources and persons who cooperate in an investigation, who might otherwise be reluctant to come forward and cooperate in a child protective situation. Disclosure of sources of information could have a chilling effect, thus hampering agency efforts in providing services to distressed families. Social Services Law § 372 applies to the confidentiality of records relating to foster care. Jessica Cortez, the child involved here, was never subject to foster care, thus making § 372 irrelevant to the instant proceedings. (*See, Howell v. N.Y.C. Human Resources Administration,* 112 Misc.2d 351, 447 N.Y.S.2d 96 [1981] and *In re Darnel,* 77 Misc.2d 1008, 355 N.Y.S.2d 308 [1974]).

[2] § 422 of the Social Services Law pertaining to a statewide central register of child abuse and maltreatment reports is the applicable statute. Due to the potentially sensitive nature of the reports, there is a very strong public policy of confidentiality expressed in § 422(4) (*See,* ***329***Matter of Damon A.R.,* 112 Misc.2d 520, 522, 447 N.Y.S.2d 237, 239 [Family Ct.N.Y.Co.1982]). Strict confidentiality is provided for except under certain enumerated exceptions [§ 422(4)(a)-(t)].

Tumposky argues that as a research writer and investigator into the child welfare system, she is entitled to an exemption under clause (h) thereof which provides confidential information to " any person engaged in a bona fide research purpose, provided, however, that no information identifying the subjects of the report shall ****772*** be made available to the researcher unless it is absolutely essential to the research purpose and the department gives prior approval." It is simply not possible to release the materials sought, and keep the requisite confidentiality. The court has examined them, and even with redaction of names, etc., the persons mentioned in the report will have their identities revealed. In these circumstances, the public's interest in confidentiality, as enunciated in the statute, must prevail.

Grinker, concedes that HRA possesses several documents (" Documents") that he claims are not privileged under S.S.L. § 422. This decision focuses on two such documents examined by the court in camera. One document is a two page summary of HRA activities pertaining to individuals and family involved in the Cortez case. The other is a letter from Commissioner Grinker to Commissioner Perales outlining these activities, and outlining his views as to agency matters. Grinker argues that since Jessica Cortez is no longer alive, and since her case has attracted great public interest, including allegations that relate to HRA's actions in the case, and some material has apparently already been disclosed to the press by members of her family, as well as by others in governmental offices not covered by the provisions of Sect. 422 SSL (*See,* Turbow Affirmation p. 5), he should be permitted to release the documents. HRA maintains that these documents (" Summary Documents") do not contain any information which can any longer be deemed confidential (*See* Turbow Affirmation p. 6). Further, he implicitly argues that the information he seeks to disclose will correct misinformation already revealed to the public.

[3] Even though it is apparent from gleaning through published newspaper stories that " leaks" of confidential agency reports or family court proceedings have indeed appeared in print, such breaches by agency or court personnel do not abrogate the confidentiality interest inherent in SSL § 422. The statute and underlying policy do not permit disclosure. The court finds the argument unavailing, ***330*** that because confidential information is already in the public domain due to various sources, that the records concerning the Cortez case are therefore outside the confidentiality requirement of SSL § 422.

FOIL " exempts from the wealth of material discoverable thereunder, information which is deemed confidential under any existing statute [P.O.L. § 87(2)(a)]" and having determined that the full disclosure sought by petitioners is barred by the limited confidentiality requirements of Social Services Law § 422, petitioners' efforts to require full disclosure of all records pertaining to the deceased juvenile Jessica Cortez must be rejected. (*See, Newsday, Inc. v. Sise,* 120 A.D.2d 8, 15, 507 N.Y.S.2d 182 [2nd Dept 1986]).

The court has jurisdiction to review petitioners' motion notwithstanding petitioners' failure to make formal application to the agency itself for a ruling pursuant to P.O.L. § 89 3. and 4(a) or to appeal the agency's first decision. Petitioners' failure to file a request pursuant to FOIL or an agency appeal is excused with respect to the aforementioned letter and documents because, based upon public statements by HRA and DSS, it can fairly be said that such a request would be futile. (*See, Matter of Pasik v. State Board of Law Examiners,* 114 Misc.2d 397, 451 N.Y.S.2d 570 (Sup.Ct.N.Y.Co.1982), *modified on other grounds,* 102 A.D.2d 395, 478 N.Y.S.2d 270 [1st Dept.1984]).

The court directs that only the letter from Commissioner Grinker be released to the petitioner. Those parts of the letter that relate to a specific child, either living or deceased, or pertaining to any specific agency action will be redacted to protect the privacy of all individuals involved and to assure compliance with SSL Sect. 422(4). This will impose safeguards to limit, the loss of confidentiality. (*See, Sam v. Sanders,* 80 A.D.2d 758, 436 N.Y.S.2d 301 (1st Dept 1981); *Matter of Carla L.,* 45 A.D.2d 375, 357 N.Y.S.2d 987 [1 st Dept 1974]). The other document, the two-page summary, does not lend itself to redaction and will not be released due to the overriding interest in confidentiality. As to the other documents**773 pertaining to the case of Jessica Cortez, they are not yet ripe for decision, but will be dealt with in a separate brief decision.

N.Y.Sup.,1989.
New York News Inc. v. Grinker
142 Misc.2d 325, 537 N.Y.S.2d 770, 16 Media L. Rep. 1218

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57 N.Y.2d 399, 442 N.E.2d 1235, 456 N.Y.S.2d 724, 8 Media L. Rep. 2584

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Court of Appeals of New York.
In the Matter of John SHORT, Respondent-Appellant,
v.
BOARD OF MANAGERS OF the NASSAU COUNTY MEDICAL CENTER, Appellant-Respondent.
Nov. 18, 1982.

Parties cross appealed from judgment of the Supreme Court, Nassau County, L. Kingsley Smith, J., permitting access to certain but not all records of county medical center. The Supreme Court, Appellate Division, 85 A.D.2d 606, 444 N.Y.S.2d 686, affirmed, and appeal was taken. The Court of Appeals, Jones, J., held that disclosure of 29 medical records as well of interagency memorandum, except as to statistical or factual tabulations or data, was denied.
Reversed.
Cooke, C.J., filed opinion dissenting in part.

West Headnotes

[1] KeyCite Notes

326 Records
326II Public Access
326II(B) General Statutory Disclosure Requirements
326k61 Proceedings for Disclosure
326k66 k. In Camera Inspection; Excision or Deletion. Most Cited Cases

Statutory authority to delete identifying details as means to remove records from what would otherwise be exception to disclosure mandated by Freedom of Information Law extends only to records whose disclosure without deletion would constitute unwarranted invasion of personal privacy, and does not extend to records excepted in consequence of specific exemptions from disclosure by state or federal statute. McKinney's Public Officers Law § 60 et seq.

[2] KeyCite Notes

326 Records
326II Public Access
326II(B) General Statutory Disclosure Requirements
326k61 Proceedings for Disclosure
326k66 k. In Camera Inspection; Excision or Deletion. Most Cited Cases

Nothing in the Freedom of Information Law restricts right of agency if it so chooses to grant access to records within any of statutory exceptions, with or without deletion of identifying details. McKinney's Public Officers Law § 60 et seq.

[3] KeyCite Notes

326 Records
326II Public Access

326II(B) General Statutory Disclosure Requirements
326k53 Matters Subject to Disclosure; Exemptions
326k57 k. Internal Memoranda or Letters; Executive Privilege. Most Cited Cases

326 Records KeyCite Notes
326II Public Access
326II(B) General Statutory Disclosure Requirements
326k53 Matters Subject to Disclosure; Exemptions
326k58 k. Personal Privacy Considerations in General; Personnel Matters. Most Cited Cases

Disclosure of 29 medical records, as well as interagency memorandum, except as to statistical or factual tabulations or data, was denied since records were not "otherwise available" inasmuch as they were specifically exempted from disclosure by state or federal law wholly without reference to invasion of privacy. McKinney's Public Officers Law §§ 87, subd. 2(a), 89, subd. 2; McKinney's Public Health Law §§ 2803-c, 2803-c, subd. 3, par. f., 2805-g; McKinney's Social Services Law § 369, subd. 3.

***400** ***724** ****1235** Peter J. Mastaglio, Garden City, for respondent-appellant.
Edward G. McCabe, County Atty. (William S. Norden, Deputy County Atty., of counsel), for appellant-respondent.

***401** OPINION OF THE COURT

JONES, Judge.

[1] The statutory authority to delete identifying details as a means to remove ***725** records from what would otherwise be an exception to the disclosure mandated by the Freedom of Information Law extends only ****1236** to records whose disclosure without deletion would constitute an unwarranted invasion of personal privacy, and does not extend to records excepted in consequence of specific exemption from disclosure by State or Federal statute. Disclosure of the 29 medical records sought by petitioner, as well as of the interagency memorandum, except as to statistical or factual tabulations or data, is denied.

Pursuant to the provisions of the Freedom of Information Law (Public Officers Law, art. 6), petitioner requested the Nassau County Commissioner of Social Services to furnish him with copies of 29 medical records of the Nassau County Medical Center relating to claims for Medicaid reimbursement for abortions performed during the period February through April, 1972, and a copy of a memorandum dated July 19, 1972 from the medical center to a Deputy County Attorney with regard to the performance of medically related abortions at the medical center during 1972. This ***402** request was forwarded to the medical center where it was denied. Petitioner thereupon instituted the present action pursuant to the provisions of the Freedom of Information Law to compel the medical center to furnish him with the records which he desired.

Supreme Court directed disclosure of the 29 medical records, but only after deletion of personal identifying details, the extent of such deletion to be determined by the medical center. Disclosure of the July 19, 1972 memorandum was denied. The medical center then appealed to the Appellate Division from so much of the judgment of Supreme Court as directed disclosure of the 29 medical records after deletion of all identifying details, and petitioner cross-appealed from so much of the judgment as denied disclosure of the July 19, 1972 memorandum. The Appellate Division, 85 A.D.2d 606, 444 N.Y.S.2d 686, affirmed the judgment of Supreme Court. On cross appeals to our court we now reverse that determination.

As to the 29 individual medical records there should be a reversal and denial of disclosure. Section 87 (subd. 2, par. [a]) of the Public Officers Law authorizes the agency to deny access to records that "are specifically exempted from disclosure by state or federal statute".[FN1] The medical center refers to various statutory and regulatory provisions which it contends bring the 29 medical records within this exception.*403 For present purposes it suffices to cite the following provisions:

FN1. Subdivision 2 of section 87 provides in full:

"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 maintained for the regulation of commercial enterprise 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 would 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; or

"iii. final agency policy or determinations; or

"(h) are examination questions or answers which are requested prior to the final administration of such questions."

"Every patient shall have the right to have privacy in treatment and in caring for ***726 personal needs, confidentiality in the treatment of personal and medical records, and security in storing personal possessions" **1237 (Public Health Law, § 2803-c, subd. 3, par. f).

"The commissioner shall adopt such regulations as may be necessary to give effect to the provisions of this section and to preserve the confidentiality of medical, social, personal or

financial records of patients" (Public Health Law, § 2805-g, subd. 3).

"Any inconsistent provision of this chapter or other law notwithstanding, all information received by public welfare and public health officials and service officers concerning applicants for and recipients of medical assistance may be disclosed or used only for purposes directly connected with the administration of medical assistance for needy persons" (Social Services Law, § 369, subd. 3).

Neither petitioner nor the courts below have seriously contended that the medical records sought do not initially come within the exception of section 87 (subd. 2, par. [a]). It has been the position of both and continues to be the position of petitioner, however, that the records sought are removed from that exception when all personal identifying data have been deleted.[FN2] We cannot agree with this latter proposition.

FN2. Subdivision 2 of section 89 provides:

"2. (a) The committee on public access to records 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 commercial 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; or

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

"(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."

[2] *404 The Legislature in amending and recasting the Freedom of Information law in 1977 (L.1977, ch. 933) has prescribed eight categories of records as to which agencies may deny public access (section 87, subd. 2, pars. [a]-[h]). The statute is framed to empower the agency to deny access to the specified records. Nothing in the Freedom of Information Law, however, restricts the right of the agency if it so chooses to grant access to records within any of the

statutory exceptions, with or without deletion of identifying details (cf. *Chrysler Corp. v. Brown*, 441 U.S. 281, 99 S.Ct. 1705, 60 L.Ed.2d 208).

One of the eight categorial exceptions, the second, prescribed in paragraph (b), is records or portions thereof that "if disclosed would constitute an unwarranted invasion of personal privacy under the provisions of subdivision two of section eighty-nine of this article". The exceptions to disclosure prescribed in the other paragraphs (a) and (c) to (h) are independent and may be invoked by agencies whether or not disclosure would constitute an unwarranted invasion of privacy; as to these, invasion of privacy is irrelevant. Phrased otherwise, the circumstance that it could be demonstrated in a particular instance that disclosure would involve no invasion of privacy would not serve to remove records from inclusion in any of these other seven categorial exceptions.

It is in subdivision 2 of section 89-which treats of the category of unwarranted invasions of personal privacy-that provision is ***727 made for "deletion of identifying details". This subdivision contains no reference to **1238 records excepted *405 from mandatory disclosure under any of the other seven categories, and there is no counterpart to this subdivision in which provision for deletion is made with respect to records sheltered from disclosure under any of the other seven categories.

It thus appears that the Legislature made provision for deletion as a means to "sanitize" records only within the single specified category. Under familiar canons of construction, the explicit authorization of the deletion device with respect to this one category of records imports a legislative intention to restrict the deletion device to that single category. Had it been intended to authorize deletions to subject records in any of the other seven categorial exceptions to public disclosure the verbiage to achieve that result was readily available.

[3] If there were doubt as to the significance to be attached for present purposes to this statutory design, all doubt is removed when attention is focused on the language of section 89 (subd. 2, par. [a]) (the paragraph which makes provision for the use of deletion). That paragraph explicitly is made applicable to the deletion of identifying details or withholding "of records otherwise available" under the statute to prevent unwarranted invasions of personal privacy. Thus, provision is made for deletion from records that would be open to public disclosure but for the fact that their disclosure (without deletion) would constitute an unwarranted invasion of personal privacy. What is intended and accomplished by subdivision 2 of section 89 is provision of a means by which the single obstacle to disclosure-the invasion of personal privacy-may be overcome, i.e., by deleting identifying details. This concept and operating principle of selective deletion can have no application, however, to the 29 medical records sought by petitioner here. They are not "otherwise available" inasmuch as they are "specifically exempted from disclosure by state or federal statute" (§ 87, subd. 2, par. [a]) wholly without reference to invasion of privacy.

The 29 medical records sought by petitioner, even if identifying details were to be deleted, would not cease to be "medical records" protected under sections 2803-c and 2805-g of the Public Health Law or "information" sheltered *406 by section 369 of the Social Services Law; their classification would remain the same, bringing them squarely within the exception of section 87 (subd. 2, par. [a]), of the Public Officers Law. That an underlying purpose-that of preservation of individual confidentiality-may be served by deletion of identifying details is perhaps a predicate on which to ground an argument to the Legislature that the statute should be amended to extend the use of deletion to remove records from other categories of exception in addition to that for unwarranted invasion of personal privacy; it provides no basis, however, for judicial revision of the statute.[FN3]

FN3. Although it may reasonably be assumed that concern for protection of the privacy of individual patients was a major consideration behind the Legislature's enactment of sections 2803-c and 2805-g of the Public Health Law and section 369 of the Social Services Law prescribing confidentiality of medical records it would be unwarranted on the record before us to assume that this was the exclusive motive for the legislation. To the extent that the Legislature may have had other concurrent objectives, we cannot, of course, determine whether such objectives would be frustrated by disclosure, notwithstanding deletion of identifying details.

With respect to the memorandum of July 19, 1972, petitioner on appeal to us acknowledges that it falls within the exception of "inter-agency or intra-agency materials" prescribed in section 87 (subd. 2, par. [a]) and now limits his request to "statistical or factual tabulations or data" to be found in the memorandum which would be subject to disclosure under clause i of paragraph (g). The case should be returned to Supreme Court with directions to that court to conduct an *in camera* inspection of the memorandum and its four attachments to determine whether there are any such statistical or factual tabulations or data, and if so to order disclosure thereof to petitioner.

***728 For the reasons stated, the order of the Appellate Division should be reversed, without costs, the request for disclosure of the **1239 29 medical records denied, and the case returned to Supreme Court for an *in camera* inspection of the memorandum dated July 19, 1972 and order of disclosure, if appropriate.

COOKE, Chief Judge (dissenting in part).
I respectfully dissent from that part of the majority decision which denies the request for disclosure of the 29 medical records, *407 and I vote to modify. The court has the discretionary power to order the patients' records disclosed with identifying information deleted. This would protect the privacy of the individuals while serving the purpose of the Freedom of Information Law: to encourage "the understanding and participation of the public in government", "to extend public accountability wherever and whenever feasible", and to forestall thwarting "[t]he people's right to know the process of governmental decision-making * * * by shrouding [the underlying documents and statistics] with the cloak of secrecy or confidentiality" (Public Officers Law, § 84). To deny such a power to the courts in this context is tantamount to granting to the agency an unlimited power to withhold records.

JASEN, GABRIELLI, FUCHSBERG and MEYER, JJ., concur with JONES, J.

COOKE, C.J., dissents in part and votes to modify in a separate opinion.

WACHTLER, J., taking no part.

Order reversed, without costs, request for disclosure of 29 medical records denied, and matter remitted to Supreme Court, Nassau County, for further proceedings in accordance with the opinion herein.

N.Y.,1982.
Short v. Board of Managers of Nassau County Medical Center
57 N.Y.2d 399, 442 N.E.2d 1235, 456 N.Y.S.2d 724, 8 Media L. Rep. 2584

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194 Misc. 557, 87 N.Y.S.2d 406

View New York Official Reports version

Surrogate's Court, Onondaga County, New York.
In re EDWARDS' ESTATE.
Sept. 17, 1947.

Proceeding in the matter of the final judicial settlement of the accounts of Caroline Walker Edwards, James H. Slocum, Patrick J. Sullivan and Fred B. Persse, as executors of the estate of Daniel M. Edwards, deceased, for additional executor's commissions opposed by E. Winston Rodormer and others. On motion of respondents for summary judgment.
Motion granted.
Decree affirmed, 274 App.Div. 1022, 86 N.Y.S.2d 653.

West Headnotes

[1] KeyCite Notes

⇐162 Executors and Administrators
⇐162XI Accounting and Settlement
⇐162XI(E) Stating, Settling, Opening, and Review
⇐162k512 Operation and Effect
⇐162k513 In General
⇐162k513(12) k. Rights and Liabilities of Executor or Administrator in General. Most Cited Cases

Proceedings judicially settling accounts of executors without an award of executors' disbursing commissions, wherein no claim was made that assets of estate had any value either to be appraised or used as a basis for calculating commissions, and subsequent decree discharging executors as such and directing them to deliver to themselves as trustees assets in their hands, wherein no award of commissions was made, were res judicata in subsequent proceeding to preclude executors from recovering additional executors' commissions after value of assets of estate increased substantially.

[2] KeyCite Notes

⇐162 Executors and Administrators
⇐162XI Accounting and Settlement
⇐162XI(D) Compensation
⇐162k492 k. Waiver of Right. Most Cited Cases

Executors waived right to additional disbursing commissions by failing to claim that right when it was available to them.

[3] KeyCite Notes

219 Interest
219I Rights and Liabilities in General
219k22 Judgments
219k22(7) k. Judgments Against Persons in Fiduciary Capacities. Most Cited Cases

Decree awarding commissions to executors did not create an interest bearing judgment.

[4] KeyCite Notes

162 Executors and Administrators
162XI Accounting and Settlement
162XI(D) Compensation
162k496 Amount and Computation of Compensation
162k496(1) k. In General. Most Cited Cases

Where agreement entered into between executors and others interested in estate providing for executors' commissions fixed by decree, did not provide that commissions which were due and owing were to pay interest, executors could not recover interest thereunder.

***407 *558** Hancock, Dorr, Ryan & Shove, of Syracuse, for petitioner James H. Slocum.
John C. Boland, of Syracuse, for petitioner Bertha C. Persse.
Moser, Johnson & Reif, of Rochester, for respondents E. Winston Rodormer, and others.

MILLFORD, Surrogate.
The petitioners, Patrick J. Sullivan, James H. Slocum and Bertha C. Persse, as Executrix of the last will and testament of Fred B. Persse, deceased, as Executors of the last Will and Testament of Daniel M. Edwards, deceased, filed claims for additional executors' commissions.

A motion for summary judgment under Rule 113 of the Rules of Civil Practice was brought by the respondents, E. Winston Rodormer, Donald R. Knaus, Trustees under the will of Daniel M . Edwards, deceased, Dorothy E. Slocum, Mary E. Rodormer, Barbara E. Slocum, Daniel E. Slocum and E. Winston Rodormer,***559** General Guardian of George W. Rodormer, Robert E. Rodormer, Susan Rodormer and Mary Rodormer, legatees, beneficiaries and remaindermen under the will of said Daniel M. Edwards, deceased.

Rule 113 of the Rules, of Civil Practice provides, in substance, that, when an answer is served in a proceeding to recover a liquidated claim on a contract arising from a judgment in which there is no triable issue of fact necessary to a decision, or when the answer sets forth a defense which is sufficient as a matter of law, where the defense is founded upon facts established by documentary evidence or official record, the petition may be dismissed by summary judgment.

The petitions present three claims for executors' commissions. One is for the immediate payment of $57,963.78, with interest thereon from January 22, 1936, to October 15, 1937. Another is a claim for interest upon $70,463.78, from May 15, 1935, (the date of the decree allowing executors' receiving commissions), to January 22, 1936, (the date upon which a payment of

$12,500.00 was made to each executor), together with interest upon the balance of $57,963.78, from January 22, 1936, ***408** to date. Another is a claim for executors' disbursing commissions for turning over the assets of the estate as executors to themselves, as trustees, as of January 18, 1938, the date of the decree which directed the executors to turn over the assets to themselves, as trustees.

Daniel M. Edwards died a resident of the City of Syracuse, New York, on May 29, 1929, and Letters Testamentary were issued out of the Surrogate's Court of the County of Onondaga on June 19, 1929, to Patrick J. Sullivan, James H. Slocum, Fred B. Persse (now deceased), and Caroline Walker Edwards (now deceased), all of whom were named as executors and trustees in the will of Daniel M. Edwards, deceased.

Daniel M. Edwards, the decedent, was the owner, at the time of his death, of all the common and preferred stock of E. W. Edwards & Son, a corporation operating department stores in the cities of Syracuse, Rochester and Buffalo. He was also the owner of all of the capital stock of Murray Realty Company, a real estate holding company which owns the properties in which E. W. Edwards & Son operates its stores.

Subsequent to the probate of decedent's will, appraisers were duly appointed to appraise the value of the estate, and the value placed upon the total estate was $8,358,244.62. The stock of E. W. Edwards & Son and Murray Realty Company was valued at $8,337,142.00. The value of these assets was appreciably*560 affected by the economic depression which commenced almost immediately after the testator's death.

The State of New York inheritance tax was fixed by a decree of the Surrogate of Onondaga County in the sum of $923,041.49. The Federal estate tax was fixed at $1,836,847.14. These taxes the estate was unable to pay, and, on January 21, 1936, the Federal Government brought an action against the executors and sought to have a receiver appointed to administer the assets of the estate. On January 22, 1936, the executors transferred all of the stock in E. W. Edwards & Son and the Murray Realty Company to the Fayne Realty Company. The consideration paid for the transfer was $50,440.00. From this sum of money the executors paid the sum of $440.00 expenses of the transfer and divided the balance among themselves, paying to each executor the sum of $12,500.00. Some time after this transfer the inheritance and estate taxes were compromised, the Federal Government accepting the sum of $50,000.00, and the State Government accepting the sum of $50,000.00 in compromise of the taxes. Following this compromise of the inheritance and estate taxes the stock of E. W. Edwards & Son and Murray Realty Company was re-transferred to the executors and the sum of $67,500.00 was paid and an agreement was entered into, on or about October 16, 1937, with everybody interested in the estate with the exception of Walker E. Edwards, which provided, among other things, that the balance of commissions fixed by the decree of May 15, 1935, be provided for as follows: 'It is agreed that the claims which Caroline Walker Edwards, Patrick J. Sullivan, James B. Slocum and ***409** Fred B. Persse have against the estate of Daniel M. Edwards, deceased, be fixed at $58,000.00 each, and that the Executors and Trustees agree to pay said sums within but not in excess of ten years as hereinafter provided, payment thereof to be secured as hereinafter agreed.'

The executors filed in this Court a petition and account on August 6, 1934, which account was judicially settled by a decree made and entered May 15, 1935. By that decree commissions were awarded to each of the executors in the sum of $40,463.78. In Schedule 'A' attached to and made a part of said decree are these words, 'total commissions to the date of this accounting.' It appears that the commissions awarded by that decree were based upon the value of the estate

as of the date of death. That value as fixed by the appraisers appointed by this Court was $8,358,244.62. On October 29, 1937, the executors filed in this Court a petition and an amended and supplemental account. ***561*** The assets in said amended and supplemental account were set forth as follows:

'SCHEDULE A.

4,300 shares capital stock of Murray Realty Co-value unascertainable

6,500 shares preferred stock of E. W. Edwards & Son-value unascertainable

14,700 shares common stock of E. W. Edwards & Son-value unascertainable

5/18 interest in five vacant lots and a 3-family dwelling house in Johnstown, New York, having a value of not in excess of $2,500.00'

Petitioners, Sullivan, Slocum and the deceased Persse, by their verified account of October 29, 1937, represented to the Surrogate and to all of the beneficiaries that the stock was unascertainable in value, and they petitioned the Surrogate to settle the account on that basis. The Surrogate settled the accounts as presented and made no award of executors' disbursing commissions as no claim was made that any value existed either to be appraised or used as a basis for calculating commissions.

By a subsequent decree made and entered on January 18, 1938, the executors were discharged as such and directed to deliver to themselves, as trustees, the assets in their hands. There was no award of commissions in that decree.

From an examination of the records in this office relative to the estate of Daniel M. Edwards, deceased, it appears that, at the time of fixing the said executors' commissions, the estate was experiencing difficulties, and for a number of years no income was available,-in fact, in 1937 the estate was insolvent. It apparently from then on was a hard, hard struggle until war conditions and the so-called prosperous era for the country, which accompanied the war conditions, bolstered and continued to bolster the value of the estate until today the value is very substantial. Surely, the executors did not foresee today's value back in 1937 when ***410*** the stocks of the two corporations had passed into other hands, when the estate was insolvent. Could it be the unexpected affluence of the estate prompted these claims for additional executors' commissions? From the date of the execution of the agreement on October 16, 1937, there has been no proceeding save the one now pending, instituted with the award of commissions in view.

[1] From an examination of the records, facts and circumstances as evidenced by the records before me in this estate, I am of the opinion that the claim for executors' disbursing commissions is precluded by reason of the doctrine of Res Judicata.

562 Several accountings have been had and several decrees have been entered judicially settling the accounts of the executors, and no appeal has ever been taken from any such decrees. The only claim heretofore made for commissions was the one made and granted in the accounting proceeding and decree therein entered which awarded the sum of $70,463.78 as commissions to the executors on or about May 15, 1935.

[2]  I also am of the opinion that the executors waived their right to disbursing commissions. They failed to claim their right when such right was available to them.

Once again it appears to me that the unexpected affluence of the estate prompts these present claims for executors' disbursing commissions.

[3]  As to interest upon the unpaid portion of the commissions awarded by the decree of May 15, 1935, I am of the opinion that the decree does not create an interest bearing judgment in favor of the petitioners.

[4]  The executors did not provide in the agreement entered into on or about the 16th day of October, 1937, that the commissions which were due and owing were to bear interest.

Respondents' motion for summary judgment dismissing the petition herein is granted.

N.Y.Sur. 1947
IN RE EDWARDS' ESTATE
194 Misc. 557, 87 N.Y.S.2d 406

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Rabinowitz v. Hammons:

228 A.D.2d 369, 644 N.Y.S.2d 726

Supreme Court, Appellate Division, First Department, New York.
In re Application of Dr. Jonathan RABINOWITZ, Petitioner-Respondent,
For an Order, etc.,
v.
Marva HAMMONS, etc., Respondent-Appellant,
American Public Health Association, Amicus Curiae.
June 27, 1996.

Academic researcher brought Article 78 petition seeking disclosure of records under Freedom of Information Law (FOIL). The Supreme Court, New York County, Collazo, J., granted petition for disclosure. Health and Mental Health Services appealed. The Supreme Court, Appellate Division, held that government properly declined to disclose medical evaluation records, even in redacted form.
Reversed and petition dismissed.

Medical evaluations provided by Visiting Psychiatric Service, a unit of Office of Health and Mental Health Services, fell within exception to Freedom of Information Law (FOIL) barring disclosure by social service officials of information and communications relating to persons receiving public assistance or care, and, thus, government properly declined to disclose records, even in redacted form. McKinney's Social Service Law § 136, subd. 1; McKinney's Public Health Law § 18; McKinney's Public Officer's Law, § 87, subd. 2(a).

***726** Derek J.T. Adler, Petitioner-Respondent.
Janet L. Zaleon, Herbert Semmel, for Respondent-Appellant.

Before MURPHY, P.J., and SULLIVAN, WALLACH, NARDELLI and TOM, JJ.

MEMORANDUM DECISION.
***369** Order, Supreme Court, New York County (Salvador Collazo, J.), entered March 23, 1995, in a proceeding pursuant to CPLR Article 78, which granted petitioner's application for disclosure of certain records maintained by respondent pursuant to the Freedom of Information Law (FOIL), unanimously reversed, on the law, and the petition dismissed, without costs.

Petitioner, an academic researcher, commenced this proceeding to review respondent's denial of a FOIL request which sought disclosure, in redacted form, of approximately 1900 intake referral forms maintained by the Visiting Psychiatric Service (VPS), a unit of respondent's Office of Health and Mental Health Services, in order to perform a statistical study of decision-making. The VPS provides psychiatric care and crisis intervention to clients, and employs the records at issue-including demographic information, biopsychosocial histories, and a comprehensive description of client problems-to evaluate patients and make psychiatric referrals. The records are maintained by psychiatric social workers and a registered nurse. Because the VPS views candid conversation with its clients as essential for effective diagnosis, it has always considered the privacy and confidentiality of its patients to be inviolate, and has treated the intake forms as confidential medical records. Consequently, respondent denied petitioner's FOIL request on the ground that various statutes, including Public Health Law § 18(6) and Social Services Law § 136(2), specifically exempt such medical records from disclosure. On review, the motion court rejected this argument, granted the petition, and ordered respondent to provide the requested records after redacting all personal and identifying information which they contained.

We reverse. Public Officers Law § 87(2)(a) provides that an agency may deny access to records or portions of records that ***727** "are specifically exempted from disclosure by state or federal

statute". The medical records sought by petitioner in this case ***370** are exempted from disclosure by Public Health Law § 18, which permits disclosure of such records to third parties only where authorized by the medical client or otherwise required by law (subd. [6]), and which permits a health care provider to deny even a "qualified person" access to medical information about identifiable patients in cases where the provider determines that disclosure "can reasonably be expected to cause substantial and identifiable harm to the subject or others which would outweigh the qualified person's right of access to the information", or "the material requested is personal notes and observations" (subd. [3][d][i], [ii]). Moreover, Social Services Law § 136(1) bars disclosure by social service officials of information and communications relating to persons receiving "public assistance or care", except to the commissioner of social services or his authorized representative. In our view, the medical evaluation provided to VPS clients by social service officials is a type of public care within the scope of that statute. Consequently, respondents properly declined to disclose these medical records, even in redacted form (Public Officers Law § 87[2][a]; *Matter of Short v. Board of Mgrs.*, 57 N.Y.2d 399, 456 N.Y.S.2d 724, 442 N.E.2d 1235).

We have considered petitioner's remaining arguments and find them to be without merit.

Motion to file an *Amicus Curiae* brief granted.

N.Y.A.D. 1 Dept.,1996.
Rabinowitz v. Hammons
228 A.D.2d 369, 644 N.Y.S.2d 726

Court of Appeals of New York.
In the Matter of THE NEW YORK TIMES COMPANY et al., Appellants-Respondents,
and
Catherine T. Regenhard et al., Intervenors-Appellants,
v.
CITY OF NEW YORK FIRE DEPARTMENT, Respondent-Appellant.

March 24, 2005.

Background: Newspaper and journalist brought Article 78 proceeding against New York City Fire Department challenging department's denial of requests made pursuant to Freedom of Information Law (FOIL) for materials related to the September 11, 2001 attacks on the World Trade Center, and for audio tapes and transcripts of 911 calls. The Supreme Court, New York County, Richard Braun, J., denied victims' family members leave to intervene, and directed disclosure of redacted interviews and 911 tapes. Appeal was taken. The Supreme Court, Appellate Division, 3 A.D.3d 340, 770 N.Y.S.2d 324, affirmed as modified, and leave to appeal was granted.

Holdings: The Court of Appeals, R.S. Smith, J., held that:
(1) FOIL's privacy exception applied to tapes and transcripts of calls made to Department's 911 emergency service;
(2) communications between Department dispatchers and other Department employees were subject to disclosure;
(3) FOIL's privacy and intra-agency exceptions did not apply to tapes and transcripts of interviews conducted by Department with firefighters; and
(4) FOIL's law enforcement exception did not apply to records that United States Department of Justice claimed would possibly be used in upcoming trial of suspected terrorist.
Affirmed as modified.

Rosenblatt, J., filed dissenting opinion.

***303** David E. McCraw, New York City, for appellants-respondents.

Michael A. Cardozo, Corporation Counsel, New York City (John Hogrogian, Lawrence S. Kahn, Pamela Seider Dolgow and Marilyn Richter of counsel), for respondent-appellant.

Norman Siegel, New York City, and Kramer Levin Naftalis & Frankel LLP (Thomas H. Moreland, Ilyssa B. Sena and Jennifer Jones of counsel) for intervenors-appellants.

*482 **267 OPINION OF THE COURT

R.S. SMITH, J.

The issue here is whether the New York City Fire Department is required by the Freedom of Information Law (FOIL) to disclose tapes and transcripts of certain conversations that occurred on and shortly after September 11, 2001. Supreme Court and the Appellate Division held that FOIL ***304 **268 requires disclosure of some, but not all, of the materials in dispute. We affirm most of the rulings below, but we modify the Appellate Division's order in two respects.

Facts and Procedural History

Some four months after the September 11 attacks on the World Trade Center, Jim Dwyer, a New York Times reporter, requested "various records" from the Fire Department. In the two requests that are still disputed, he asked for:

> "All transcripts of interviews conducted by the department with members of the FDNY concerning the events of Sept. 11, 2001. (These might be called 'oral histories.') ...
>
> "Any and all tapes and transcripts of any and all radio communications involving any FDNY personnel on Sept. 11, starting from 8:46 AM."

The Fire Department denied the first of the above requests, and also denied the second in large part. As a result, three categories of tapes and transcripts are now at issue. They contain: (1) calls made on September 11 to the Department's 911 emergency service; (2) calls made on the same day on the Fire Department's internal communications system, involving Department dispatchers and other employees, which are referred to as "dispatch calls"; and (3) "oral histories," consisting of interviews with firefighters in the days following September 11.

The New York Times and Dwyer brought this CPLR article 78 proceeding to compel disclosure. Later, family members of eight men who died at the World Trade Center were permitted to intervene in support of the Times's and Dwyer's position. No family member of anyone else killed in the September 11 attacks has appeared on either side.

Supreme Court ordered disclosure of tapes and transcripts containing: (1) the 911 calls, to the extent that the words recorded are those of public employees and of the eight men whose *483 survivors sought disclosure, but redacted to delete the words of other people who called 911; (2) the dispatch calls, redacted to delete the opinions and recommendations of Fire Department employees; and (3) the oral histories, redacted to delete opinions and recommendations and the "personal expressions of feelings" of the interviewees. The Appellate Division affirmed these rulings, except that it ordered the "personal expressions of feelings" in the oral histories disclosed. We granted both sides' motions for leave to appeal.

In this Court, the Times, Dwyer and the intervenors seek disclosure of all materials in all three categories. The Fire Department asks us to affirm the Appellate Division's order with two exceptions: It asks us to "reinstate" Supreme Court's ruling by authorizing the redaction from the oral histories of "passages recounting moments of high emotion and revealing personal details," and it asks that disclosure be denied as to six records said by the United States Department of Justice to be possible exhibits in the impending federal criminal trial of Zacarias Moussaoui, who is alleged to have had a role in the September 11 attacks.

We now affirm the Appellate Division's order with two modifications: (1) we direct that the entire oral histories be disclosed, except for specifically-identified portions that can be shown likely to cause serious pain or embarrassment to an interviewee; and (2) we direct that the Department of Justice be given a chance to demonstrate that disclosure of the six potential exhibits would interfere with the Moussaoui case, or would deprive either the United States Government or Moussaoui of a fair trial.

***305 **269 Discussion

FOIL requires state and municipal agencies to "make available for public inspection and copying all records," subject to 10 exceptions (Public Officers Law § 87[2]). Here, the Fire Department relies on three of those exceptions--the "privacy," "law enforcement" and "intra-agency" exceptions. To the extent they are relevant here, these exceptions permit agencies to

"deny access to records or portions thereof that:

...

"(b) if disclosed would constitute an unwarranted invasion of personal privacy under the provisions of *484 subdivision two of section eighty-nine of this article;

...

"(e) are compiled for law enforcement purposes and which, if disclosed, would:

"i. interfere with law enforcement investigations or judicial proceedings; [or]

"ii. deprive a person of a right to a fair trial or impartial adjudication; ...

"(g) are inter-agency or intra-agency materials which are not:

"i. statistical or factual tabulations or data; [or]

"ii. instructions to staff that affect the public." (*Id.*)

The Fire Department contends that the privacy exception applies to the portions of the 911 calls that are in dispute; that the intra-agency exception applies to the disputed portions of the dispatch calls; and that both these exceptions apply to portions of the oral histories. The Department also contends that the law enforcement exception applies to the six potential exhibits at the Moussaoui trial, but it does not identify those six exhibits or say which categories they belong to. Thus, we first consider the application of the

privacy and intra-agency exceptions to each category of materials, and then discuss the law enforcement exception.

A. The 911 Calls

[1] The Fire Department does not now oppose disclosure of the words spoken in the 911 calls by 911 operators, or by the eight men whose families are seeking disclosure. Thus, the only issue before us is whether the disclosure of words spoken by other callers would constitute an "unwarranted invasion of personal privacy." Supreme Court and the Appellate Division both held that it would, and, in view of the extraordinary facts in this case, we agree.

We first reject the argument, advanced by the parties seeking disclosure here, that no privacy interest exists in the feelings and experiences of people no longer living. The privacy exception, it is argued, does not protect the dead, and their survivors cannot claim "privacy" for experiences and feelings that are not their own. We think this argument contradicts the common understanding of the word "privacy."

[2] Almost everyone, surely, wants to keep from public view some aspects not only of his or her own life, but of the lives of loved ***485** ones who have died. It is normal to be appalled if intimate moments in the life of one's deceased child, wife, husband or other close relative become publicly known, and an object of idle curiosity or a source of titillation. The desire to preserve the dignity of human existence even when life has passed is the sort of interest to which legal protection is given under the name of privacy. We thus hold that surviving relatives have an interest protected by FOIL in keeping private the affairs of the dead (*cf. National Archives and Records Admin. v. Favish*, 541 U.S. 157, 124 S.Ct. 1570, 158 L.Ed.2d 319 [2004]).

*****306 **270** The recognition that surviving relatives have a legally protected privacy interest, however, is only the beginning of the inquiry. We must decide whether disclosure of the tapes and transcripts of the 911 calls would injure that interest, or the comparable interest of people who called 911 and survived, and whether the injury to privacy would be "unwarranted" within the meaning of FOIL's privacy exception. Public Officers Law § 87(2)(b), which creates the privacy exception, refers to section 89(2), which contains a partial definition of "unwarranted invasion of personal privacy," but section 89(2)(b) is of little help here; it says only that "[a]n unwarranted invasion of personal privacy includes, but shall not be limited to" six specific kinds of disclosure. None of the six is relevant to this case, and so we must decide whether any invasion of privacy here is "unwarranted" by balancing the privacy interests at stake against the public interest in disclosure of the information.

The privacy interests in this case are compelling. The 911 calls at issue undoubtedly contain, in many cases, the words of people confronted, without warning, with the prospect of imminent death. Those words are likely to include expressions of the terror and agony the callers felt and of their deepest feelings about what their lives and their families meant to them. The grieving family of such a caller--or the caller, if he or she survived--might reasonably be deeply offended at the idea that these words could be heard on television or read in the New York Times.

We do not imply that there is a privacy interest of comparable strength in all tapes and transcripts of calls made to 911. Two factors make the September 11 911 calls different. First, while some other 911 callers may be in as desperate straits as those who called on September 11, many are not. Secondly, the September 11 callers were part of an event that has received ***486** and will continue to receive enormous--perhaps literally unequalled--public attention. Many millions of people have reacted, and will react, to the callers' fate with horrified fascination. Thus it is highly likely in this case--more than in almost any other imaginable--that, if the tapes and transcripts are made public, they will be replayed and republished endlessly, and that in some cases they will be exploited by media seeking to deliver sensational fare to their audience. This is the sort of invasion that the privacy exception exists to prevent.

We acknowledge that not everyone will have the same reaction to disclosure of the 911 tapes. The intervenors in this case, whose husbands and sons died at the World Trade Center, favor disclosure. They may feel, as other survivors may also, that to make their loved ones' last words public is a fitting way to

allow the world to share the callers' sufferings, to admire their courage, and to be justly enraged by the crime that killed them. This normal human emotion is no less entitled to respect than a desire for privacy. Recognizing this, the Fire Department does not challenge the lower courts' rulings that the words of the eight relatives of the intervenors be disclosed, and has assured us that it will honor similar requests made in the future by the families of other September 11 callers. That commitment must be kept. Surviving callers who want disclosure are also entitled to it (Public Officers Law § 89[2][c][ii]). But the privacy interests of those family members and surviving callers who do not want disclosure nevertheless remain powerful.

On the other hand, there is a legitimate public interest in the disclosure of these 911 calls. In general, it is desirable that the public know as much as possible about the terrible events of September 11. And ***307 **271 more specifically, as the Times and Dwyer point out, the public has a legitimate interest in knowing how well or poorly the 911 system performed on that day. The National Commission on Terrorist Attacks Upon the United States, which had access to the tapes and transcripts at issue here, identified significant flaws in the system's performance (9/11 Commission Report, at 286-287, 295, 304, 318, available on the Internet at <http://www.9-11commission.gov>, cached at < http://www.courts.state.ny.us/reporter/webdocs/fullreport.pdf>), and more public scrutiny might make these problems better understood. But the parties seeking disclosure here do not request only particular calls that may be relevant to this subject; they seek complete disclosure of all the 911 calls.

We are not persuaded that such disclosure is required by the public interest. Those requesting it have not shown that the information *487 that will be disclosed under our ruling--including the words of the 911 operators, and of callers whose survivors seek, or who themselves seek, disclosure--will be insufficient to meet the public's need to be informed. We conclude that the public interest in the words of the 911 callers is outweighed by the interest in privacy of those family members and callers who prefer that those words remain private.

B. The Dispatch Calls

[3][4] The dispatch calls are communications within the Fire Department; the only participants in the calls were Department dispatchers and other Department employees. The tapes and transcripts of these calls are therefore "intra-agency materials," and are protected from disclosure by Public Officers Law § 87(2)(g) unless they fit within one of two exclusions from the intra-agency exception: the exclusions for "statistical or factual tabulations or data" (§ 87[2][g][i]) and for "instructions to staff that affect the public" (§ 87[2][g][ii]). We interpreted the first of these exclusions in *Matter of Gould v. New York City Police Dept.*, 89 N.Y.2d 267, 277, 653 N.Y.S.2d 54, 675 N.E.2d 808 [1996], where we said that "[f]actual data ... simply means objective information, in contrast to opinions, ideas, or advice exchanged as part of the consultative or deliberative process of government decision making" (citations omitted). Here, Supreme Court and the Appellate Division ordered that the dispatch calls be disclosed to the extent they consist of factual statements or instructions affecting the public, but that they be redacted to eliminate nonfactual material--i.e., opinions and recommendations. This is, in our view, a straightforward and correct application of the statute as we interpreted it in *Gould*.

The parties seeking disclosure argue otherwise, relying on cases in which we have characterized the intra-agency exception as being applicable to " 'deliberative material,' i.e., communications exchanged for discussion purposes not constituting final policy decisions" (*Matter of Russo v. Nassau County Community Coll.*, 81 N.Y.2d 690, 699, 603 N.Y.S.2d 294, 623 N.E.2d 15 [1993], citing ***Matter of Xerox Corp. v. Town of Webster*, 65 N.Y.2d 131, 490 N.Y.S.2d 488, 480 N.E.2d 74 [1985]**). In *Russo* and ***Xerox***, however, we were concerned with materials that were arguably not "intra-agency" at all--in *Russo*, films shown by a public college to its students, and in ***Xerox***, a report prepared for a public agency by an outside consultant. In deciding that the films were not intra-agency materials, and that the report was, we relied on the facts that the films were not used by the college as part of an internal decision-making process, while the *488 report was used for just that purpose. Neither case implies that materials that fit ***308 **272 squarely within the plain meaning of " intraagency"--in this case, tapes and transcripts of internal conversations about the agency's work--are not within the scope of the intra-agency exception to FOIL.

The parties seeking disclosure also rely on our reference in *Gould* to "the consultative or deliberative

process of government decision making" (81 N.Y.2d at 277, 598 N.Y.S.2d 149, 614 N.E.2d 712). But we used those words in *Gould* simply to define the scope of the "factual data" exclusion from the intra-agency exception; we spoke of "objective information, in contrast to" exchanges that were part of "the consultative or deliberative process." (*Id.*) *Gould* does not hold, as the parties seeking disclosure seem to suggest, that the intra-agency exception shields from disclosure only formal, lengthy or profound policy discussions.

[5] The point of the intra-agency exception is to permit people within an agency to exchange opinions, advice and criticism freely and frankly, without the chilling prospect of public disclosure (*see* ***Xerox*, 65 N.Y.2d at 132, 490 N.Y.S.2d 488, 480 N.E.2d 74**, citing *Matter of Sea Crest Constr. Corp. v. Stubing*, 82 A.D.2d 546, 549, 442 N.Y.S.2d 130 [2d Dept. 1981]). This purpose applies not only to comments made in official policy meetings and well-considered memorandums, but also to suggestions and criticisms offered with little chance for reflection in moments of crisis. A Fire Department dispatcher who believes that a rescue operation is being badly handled should feel free to say so without the concern that a tape of his or her remarks will be made public.

C. The Oral Histories

[6] The record here leads us to conclude, subject to the qualification discussed below, that the oral histories are not protected from disclosure by either the privacy or the intra-agency exception. We infer from the record that the oral histories were exactly what their name implies--spoken words recorded for the benefit of posterity--and that the Department intended, and the people interviewed for these histories understood or reasonably should have understood, that the words spoken were destined for public disclosure. If this inference is correct, the privacy exception obviously has no application here. Nor does the intra-agency exception apply where, though agency employees are speaking to each other, the agency and the employees understand and intend that a tape of the conversation will be made public. The point of the intra-agency exception, as we ***489** explained above, is to permit the internal exchange of candid advice and opinions between agency employees. The exception is not applicable to words that are intended to be passed on verbatim to the world at large.

The record evidence about the purpose and origin of the oral histories comes largely from an affidavit submitted by a representative of the Fire Department. The affidavit adopts the title "oral histories," previously used in Dwyer's request, to identify these materials, and says that after September 11 the Fire Department decided "to promptly record the recollections of Fire Department personnel who were present at the World Trade Center site on that day." These recollections, the affidavit says, were collected for two purposes: "to be an invaluable historical record, in addition to assisting in any investigations or assessments of the incident."

The Fire Department's affidavit also says that all interviewees "were assured that the interviews would be held in complete confidence." This statement, if true, would be highly relevant to this case--but it was later acknowledged to be in error. The parties stipulated that the Fire Department ****273** *****309** "has withdrawn its claim that each of these interviews ('oral histories') with Fire Dept. personnel was recorded with a promise of confidentiality to the interviewee, since it has come to the [Department's] attention that only some interviews included such a promise." After the stipulation, the Fire Department made no attempt to substantiate even the claim that "some" interviewees were promised confidentiality. The Department does not now rely on the existence of any such promise.

While the record is less clear than it might be, it establishes that the interviews were intended as an "historical record"--which implies that the interviews would be disclosed to the public. If that is the case, they should not be protected from disclosure merely because they also were, as the Fire Department says, intended to be used in "investigations or assessments." The record does not show that any interviewee was given a promise of confidentiality or led to believe that his or her words would be kept secret. Thus, the best inference is that the Department intended, and the interviewees knew or should have known, that the words spoken in the interviews would become a public record. If this is not true the burden was on the Department--which is in possession of the relevant facts--to prove otherwise (*see Matter of Newsday, Inc. v. Empire State Dev. Corp.*, 98 N.Y.2d 359, 362, 746 N.Y.S.2d 855, 774 N.E.2d 1187 [2002]; ***490***Matter of Mantica v. New York State Dept. of Health*, 94 N.Y.2d 58, 61, 699 N.Y.S.2d 1, 721 N.E.2d 17 [1999]).

The Department has not met that burden.

[7] This logic leads to the conclusion that all of the oral histories are discloseable under FOIL. We add one qualification, however, because we are given pause by the Fire Department's insistence that "the oral histories contain numerous statements which are exceedingly personal in nature, describing the interviewees' intimate emotions such as fears, concern for themselves and loved ones, and horror at what they saw and heard." If indeed some firefighters made such statements in what they were led to believe was a private setting, it may be unfair to invade their privacy based solely on the inadequacy of the evidence the Department has submitted. We therefore direct that the Department be given an opportunity, on remand, to call to Supreme Court's attention specific portions of the oral histories which, in the Fire Department's view, would cause serious pain or embarrassment to interviewees if they were disclosed. Supreme Court should then consider, following an in camera inspection if necessary, whether those portions of the oral histories are subject to the privacy exception, taking into account any further evidence that may be submitted on the question of whether the interviewees thought the interviews were private.

D. The Law Enforcement Exception

[8] As to the six unidentified tapes and/or transcripts which the United States Department of Justice has said it intends to use in evidence at the trial of Zacarias Moussaoui, the issue is whether they were "compiled for law enforcement purposes" and whether their disclosure would either "interfere with law enforcement investigations or judicial proceedings" or would "deprive a person of a right to a fair trial or impartial adjudication." We agree with the courts below that, on this record, there is no showing that disclosure would interfere with the Moussaoui trial or cause any unfairness.

The materials in issue are already in the Justice Department's possession, and have been made available to Moussaoui; thus their public disclosure would not give the equivalent of discovery to either side in the ***310 **274 criminal case. Theoretically, their disclosure before Moussaoui's jury is selected might create some prejudice among potential jurors. But the items cannot, by their nature, contain anything specifically relating to Moussaoui; they relate to the September 11 events generally. Potential jurors are already exposed to an enormous mass of publicly available information *491 about the events of September 11--most of which obviously will not be offered in evidence at the Moussaoui trial. In this context, it is hard to see how the public disclosure of six items that the jury will see at trial anyway could have any significant effect on the federal court's ability to impanel an impartial jury.

In short, the record would justify affirming the Appellate Division's ruling that the law enforcement exception does not apply to the records in issue. Once again, however, we qualify our conclusion, because we are mindful of the enormous importance to the public interest of an orderly and fair trial for Moussaoui. The federal court has shown some concern about pretrial publicity; it has entered an order, binding on the parties to the Moussaoui case--though not, of course, on the Fire Department or the Times--prohibiting disclosure of "discovery materials" produced by the prosecutors to Moussaoui and his counsel. It may be that there is some good reason, not apparent from the record before us, why the disclosure of the six potential exhibits at issue here would create problems in the criminal case, and it can do no harm for the Department of Justice to have an opportunity to point out such a good reason to Supreme Court. If such a submission is made, Supreme Court should decide, in light of the additional information submitted and following an in camera inspection if necessary, whether the potential exhibits are subject to the law enforcement exception to FOIL.

Conclusion

Accordingly, the order of the Appellate Division should be modified to the extent described in this opinion, and, as modified, affirmed, without costs.

ROSENBLATT, J. (dissenting in part).

I disagree with the majority only with respect to the 911 calls. The Freedom of Information Law (FOIL) requires more disclosure. The public is well aware of the function of the 911 system and the sort of information it is designed to relay. Ordinarily, there is no reasonable expectation of privacy in a call to 911,

and the full contents are generally subject to disclosure under FOIL. [FN1]

> FN1. Other courts considering the availability of 911 calls under FOIL have uniformly required their disclosure, and the majority appears to be in agreement in the ordinary case (*see* majority op at 484, 796 N.Y.S.2d at 305, 829 N.E.2d at 269). In *State ex rel. Cincinnati Enquirer v. Hamilton County*, 75 Ohio St.3d 374, 377-378, 662 N.E.2d 334, 337 [1996], the Ohio Supreme Court held that there was no expectation of privacy in a 911 call and, accordingly, ordered the release of 911 tapes under that state's version of FOIL. It further held that the tapes became public records at the moment they were made and that their content was irrelevant (*see* 75 Ohio St.3d at 378, 662 N.E.2d at 337). In accord are *Meredith Corp. v. City of Flint* (256 Mich.App. 703, 708-709, 671 N.W.2d 101, 104-105 [2003]), *Asbury Park Press v. Lakewood Twp. Police Dept.*, 354 N.J.Super. 146, 161, 804 A.2d 1178, 1187 [Ocean County 2002] and *Brazas v. Ramsey*, 291 Ill.App.3d 104, 106-107, 224 Ill.Dec. 915, 682 N.E.2d 476, 477-478 [2d Dist. 1997], *appeal denied* 174 Ill.2d 555, 227 Ill.Dec. 2, 686 N.E.2d 1158 [1997].

Here, because of the unique nature of the attack, the Court ***492** has ordered disclosure of words spoken by the operators, while deleting the words of the callers. There is, of course, a need to balance the competing public and private interests. On the side of full disclosure lies the public's interest in a complete and coherent *****311 **275** account of what happened on September 11, 2001. FOIL's goal of making information public is inhibited when only half the conversation is divulged. The value of a response is compromised when the words that prompt the response are deleted. In some instances, the thrust of an incomplete communication can be inferred or constructed; in others it will be incoherent or even misleading.

The public interest supports disclosure broader than the Court has allowed. September 11th is a date burned in the minds of Americans, an event in which our security was profoundly violated. Precisely because of the importance of the September 11th attacks, Americans deserve to have as full an account of that event as can be responsibly furnished. Indisputably, the 911 tapes would shed light on the effectiveness of the City's disaster response. In turn, the City (and other municipalities) may adopt response plans that take into account the lessons of September 11th. This will surely save lives in the event of future disasters or emergencies. Indeed, the public report of the National Commission on Terrorist Attacks Upon the United States found various inadequacies in the City's 911 system and clearly found value in reviewing the 911 tapes (*see* 9/11 Commission Report, at 286-296, available on the Internet at <http://www.9-11commission.gov>, cached at <http:// www.courts.state.ny.us/reporter/webdocs/fullreport.pdf>).

Balanced against disclosure is FOIL's narrow exception for an "unwarranted invasion of personal privacy" (Public Officers Law § 87[2][b]; § 89[2] [b]). I agree with the Court that those who suffered the loss of loved ones could be traumatized by the disclosure of tapes that identify victims and contain dramatic, highly personal utterances different from ordinary 911 calls. Not every call, however, falls into that category. But for their connection with September 11th, many of the calls in question ***493** are ordinary 911 calls: people reporting factual information and seeking help. [FN2] Notably, the City has not provided any affidavits from survivors or victims' family members suggesting that disclosure of 911 tapes, or any other material sought, would violate their privacy. The record contains only the opposite: affidavits from nine intervenors, family members who want full disclosure. Nevertheless, I do not challenge the majority's assumption that full disclosure would cause considerable anguish to many victims' families.

> FN2. The 9/11 Commission, for instance, cites the testimony of a person who called 911 from the 31st floor of the South Tower and complained that he had been put on hold multiple times before deciding on his own to flee the building (*see* 9/11 Commission Report, *supra*, at 295).

Even so, the goals of privacy and openness can both be met by additional, limited disclosure. I would expand the majority's ruling and release a written transcript of the callers' side of the 911 conversations. [FN3] The City could redact everything that would identify nonofficial callers in calls that have some unusually personal component, such as an expression of dying wishes to be relayed to family members, as opposed to the ordinary reporting of crime scene facts. With such calls, the City should, however, be allowed to withhold any utterance that would by name or other means identify the caller. The public

interest would be served by meaningful disclosure, while the grieving families and ***312 **276 friends of the callers would be spared the agony of having their personal lives and emotions thrust into the public realm.

> FN3. *See generally* *New York Times Co. v. National Aeronautics & Space Admin.*, 920 F.2d 1002 (D.C.Cir.1990) (where the majority remanded for a balancing test to determine whether a complete transcript or tapes must be disclosed under the federal Freedom of Information Act [5 USC § 552]).

My final thought relates to the performance of the firefighters, police officers and others who spearheaded the rescue efforts. It may well be that the 911 transcripts reveal imperfections or mistakes amid the chaos. This, however, is no reason to withhold the transcripts. On the contrary, they will give the public the clearest picture of how the first responders reacted, and that picture should be as comprehensive as possible. The revelation of any deficiencies on the part of the departments or their personnel is essential to improving and enhancing lifesaving procedures. Of course, no one can rightly expect perfection and exquisite orderliness in the face of an attack as horrific as this one. Exposing mistakes may prove discomforting, but this *494 will pale in the face of the unforgettable heroics that we will always associate with September 11th. For every person critical of an error or omission, ten thousand voices will rise up in praise of the firefighters, police officers and others who risked life and limb in the line of duty.

Judges G.B. SMITH, GRAFFEO and READ concur with Judge R.S. SMITH.

Judge ROSENBLATT dissents in part in a separate opinion in which Chief Judge KAYE and Judge CIPARICK concur.

Order modified, without costs, by remitting to Supreme Court, New York County, for further proceedings in accordance with the opinion herein and, as so modified, affirmed.

4 N.Y.3d 477, 829 N.E.2d 266, 796 N.Y.S.2d 302, 33 Media L. Rep. 1535, 2005 N.Y. Slip Op. 02357

C

New York Public Interest Research Group, Inc. v. Cohen
N.Y.Sup.,2001.

Supreme Court, New York County, New York.
In the Matter of NEW YORK PUBLIC INTEREST RESEARCH GROUP, INC., Petitioner,
v.
Neal L. COHEN, as Commissioner of the New York City Department of Health, et al., Respondents.
July 16, 2001.

Article 78 proceeding was commenced, seeking to compel city department of health to disclose redacted information, in computer form, regarding lead poisoning of children. The Supreme Court, New York County, Edward H. Lehner, J., held that department could not withhold information, on grounds that creation of new record would be involved, when requested data could be made available upon completion of few hours of computer programming.

Disclosure ordered.
West Headnotes
Records 326 62

326 Records
326II Public Access
326II(B) General Statutory Disclosure Requirements
326k61 Proceedings for Disclosure
326k62 k. In General; Request and Compliance. Most Cited Cases
City health department was not excused, under Freedom of Information Law (FOIL) disclosure exception applicable when creation of new record was required, from producing in computer form redacted data regarding children's exposure to lead poisoning, available if few hours of computer programming were completed. McKinney's Public Officers Law § 89, subd. 3.

**379*658 Andrew Goldberg,Keri Powell, New York City, for petitioner.
Michael D. Hess, Corporation Counsel of New York City (Gabriel Taussig, Mark W. Muschenheim of counsel), for respondents.
Laurel W. Eisner, Elisa Velazquez for Mark Green, as New York City Public Advocate, amicus curiae.
EDWARD H. LEHNER, J.
Petitioner commenced this article 78 proceeding pursuant*659 to the Freedom of Information Law (FOIL) to compel respondents, the New York City Department of Health (DOH) and its commissioner, to provide records concerning childhood blood-lead screening. The central issue raised is whether requiring the DOH to program its computers to expunge confidential information from a list of individual **380 blood level tests amounts to mandating that the agency create a new " record," as that term is used in section 89(3) of the Public Officers Law (POL).

Facts

In 1992 the legislature enacted Title X of the Public Health Law, which requires the State Health Department (the Department) to " promulgate and enforce regulations for screening children ... for lead poisoning, and for follow up of children ... who have elevated blood lead levels" [§ 1370-a2(a)]. The Department " is authorized to promulgate regulations establishing the means by which and the intervals at which children ... shall be screened for elevated blood levels" [§ 1370-c1]. Pursuant to such authority, the Department enacted regulations requiring the annual screening of all children under six years of age [10 N.Y.C.R.R. 67-1.2].

The DOH now possess approximately two million electronic records comprising individual blood tests from 1995 to 1999. These records include: child's name; birth date; sex; race/ethnicity; address; telephone number; blood lead test result; type of test; dates of test; parent/guardian name; provider name and address; and laboratory name and address.

By letter dated October 2, 1998, an official of petitioner made the following request of the Records Access Officer at the DOH:
" In accordance with the New York State and City Freedom of Information Laws, please provide me with copies of all data, studies, records and reports concerning the 1997 data for childhood blood-lead screening levels for New York State and, in particular, for New York City."

The letter stated that petitioner was seeking this information because it wanted to provide testimony at a public hearing before the New York City Council. In response, DOH informed petitioner, by letter dated December 14, 1998, that its Lead Poisoning Prevention Program was developing a new computer system which is expected to be ready by January 1999, and " that blood lead screening data for 1997 may be available shortly thereafter" .

***660** When no data was provided, on October 14, 1999 petitioner's attorney filed an appeal with DOH's Records Access Appeals Officer, stating that petitioner deemed its request denied. On February 15, 2000, without receiving any determination from the Appeals Officers, petitioner stated that it considered the request to apply to " all documents up to the present date in the possession of the agency that relate to the screening of children for lead poisoning" .

On February 24, 2000, the Appeals Officer granted petitioner's request for records concerning children residing within New York City. However, the request for information in electronic format was denied on the following grounds:
" [S]uch records cannot be prepared in an electronic format, with individual identifying information redacted, without the Department creating a unique computer program, which the Department is not required to prepare pursuant to Public Officer's Law § 89(3)."

Instead, the agency agreed to print out the information at a cost of twenty-five cents per page, and redact the relevant confidential information by hand. Since the records consisted of approximately 50,000 pages, this would result in a charge to petitioner of $12,500.

Petitioner commenced this proceeding in June 2000, seeking the redacted information in paper and electronic format. Subsequently, it withdrew the request for paper-based records, and now seeks only the production of redacted electronic records.

On April 30, 2001, a hearing was held before me with respect to the technology ****381** involved in complying with petitioner's request. Respondents presented the testimony of Mohammad Ghani, a DOH research scientist and Robert Brackbill, the federal Centers for Disease Control " assignee" to the DOH. Mr. Ghani explained that laboratories report the results of lead tests electronically to the Department, which forwards the electronic records to DOH and other county health departments. DOH collects this raw data and stores it in the LeadQuest database. Mr. Ghani conceded that several months would be required to prepare a printed paper record with hand redaction of confidential information, while it would take only a few hours to program the computer to compile the same data. He also confirmed that computer redaction is less prone to error than manual redaction. Both Mr. Ghani and Dr. Brackbill referred to the process of providing the information to ***661** petitioner in electronic format as requiring some form of " computer programming" . Petitioner presented the testimony of Nick Egleson, a database designer, who performed a demonstration showing that the entire process of providing the redacted database in electronic format could be performed in a few hours.

Discussion

Under FOIL, respondents must make agency records available to the public for inspection and copying. FOIL defines the term " record" to include:
" [A]ny 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." [POL § 86(4)]. (emphasis supplied)

A record cannot be withheld from public disclosure unless the agency can demonstrate that it falls squarely within one of the enumerated statutory exemptions in POL § 87(2). When a document subject to FOIL contains both confidential and non-confidential information, agencies are required to prepare a redacted version with exempt material removed [*Gould v. New York City Police Department*, 89 N.Y.2d 267, 277, 653 N.Y.S.2d 54, 675 N.E.2d 808 (1996)].

However, an agency is not required to create records in order to comply with a FOIL request. POL § 89(3) provides:
" Nothing in this article shall be construed to require any entity to prepare any record not possessed or maintained by such entity" .

See, *Reubens v. Murray*, 194 A.D.2d 492, 599 N.Y.S.2d 580 (1st Dept.1993); *DiRose v. New York State Department of Correctional Services*, 216 A.D.2d 691, 627 N.Y.S.2d 850 (3rd Dept.1995).

Over twenty years ago it was recognized that " information is increasingly being stored in computers and access to such data should not be restricted merely because it is not in printed form" [*Babigian v. Evans*, 104 Misc.2d 140, 144, 427 N.Y.S.2d 688 (Sup.Ct., N.Y.Co.1980), aff'd. 97 A.D.2d 992, 469 N.Y.S.2d 834 (1983)]. See also, *Szikszay v. Buelow*, 107 Misc.2d 886, 436 N.Y.S.2d 558 (Sup.Ct., Erie Co.1981) (holding that information in computer format does not alter ***662** the right of access). In *Brownstone Publishers, Inc. v. New York City Department of Buildings*, 166 A.D.2d 294, 560 N.Y.S.2d 642 (1st Dept.1990), it was held that a public agency must make available its computer files containing statistical information in computer format if requested. FOIL does not differentiate between records that are ****382** maintained in written form and those maintained in electronic form [*Guerrier v. Hernandez-Cuebas*, 165 A.D.2d 218, 566 N.Y.S.2d 406 (3rd Dept.1991)]. Therefore, the question presented is reduced to determining whether redacting confidential information from the computerized data should be deemed the preparation of a record not " possessed or maintained" by DOH.

The witnesses at the hearing established that DOH would only be performing queries within LeadQuest, utilizing existing programs and software. It is undisputed that providing the requested information in electronic format would save time, money, labor and other resources-maximizing the potential of the computer age.

It makes little sense to implement computer systems that are faster and have massive capacity for storage, yet limit access to and dissemination of the material by emphasizing the physical format of a record. FOIL declares that the public is entitled to maximum access to public records [Fink v. Lefkowitz, 47 N.Y.2d 567, 571, 419 N.Y.S.2d 467, 393 N.E.2d 463 (1979)]. Denying petitioner's request based on such little inconvenience to the agency would violate this policy. See also, *Russo v. Nassau County Community College*, 81 N.Y.2d 690, 603 N.Y.S.2d 294, 623 N.E.2d 15 (1993).

Respondents' reliance on *Gabriels v. Curiale*, 216 A.D.2d 850, 628 N.Y.S.2d 882 (3rd Dept.1995), and *Guerrier v. Hernandez-Cuebas*, supra, is misplaced. In each case the court upheld the agency denial of a FOIL request because the records sought were not possessed or maintained by it. Here respondents acknowledge that they possess and maintain the LeadQuest database and also concede that they are obligated to produce a redacted version of the database.

The Committee on Open Government is charged with giving advisory opinions on the FOIL statute [POL § 891(b)ii]. While the opinions of the Committee are " neither binding upon the agency nor entitled to greater deference in an article 78 proceeding than is the construction of the agency" (*John P. v. Whalen*, 54 N.Y.2d 89, 96, 444 N.Y.S.2d 598, 429 N.E.2d 117), they are informative. In a May 1996 opinion, the Committee noted, " FOIL is adaptable to changing technology and is based essentially upon common sense" . Thereafter in a letter dated July 18, 1997, the executive director of the Committee, after ***663** noting that no New York court had held " that an agency is required to engage in new programming if the effort involves less time or cost than engaging in manual deletions from paper records" , observed that " it may seem more sensible, depending on the circumstances, to engage in reprogramming than the laborious task of manually deleting items from paper records." However, the executive director noted that the Committee had not as yet taken that position.

The DOH computers, as aforesaid, contain a great deal of information. To sustain respondents' positions would mean that any time the computer is programmed to provide less than all the information stored therein, a new record would have been prepared. Here all that is involved is that DOH is being asked to provide less than all of the available information. I find that in providing such limited information DOH is providing data from records " possessed or maintained" by it. There is no reason to differentiate between data redacted by a computer and data redacted manually insofar as whether or not the redacted information is a record " possessed or maintained" by the agency.

Moreover, rationality is lacking for a policy that denies a FOIL request for data in electronic form when to redact the confidential***383** information would require only a few hours, whereas to perform the redaction manually would take weeks or months (depending on the number of employees engaged), and probably would not be as accurate as computer generated redactions.

Courts in other jurisdictions have analyzed the issue presented herein. A Florida appellate court, in *Seigle v. Barry*, 422 So.2d 63 (Fla.Dist.Ct.App.1982), held that an agency not only must allow access to computerized records through the use of its existing programs, but also must create a new program to access public records in circumstances where " available programs do not access all of the public records stored in the computer's data bank" (pp. 66-67). The Illinois Supreme Court reached a similar conclusion in *Hamer v. Lentz*, 132 Ill.2d 49, 138 Ill.Dec. 222, 547 N.E.2d 191 (1989), where it held that, if necessary, the agency was required to create a computer program that would generate the requested information. The Kansas Supreme Court, in *State ex rel. Stephan v. Harder*, 230 Kan. 573, 641 P.2d 366, 374 (1982), found that when data sought was stored with confidential information, the " disclosure of the information sought, either by deleting confidential information from the existing record or by extracting the requested information***664** therefrom, does not require the ' creation' of a new record" . See also, *The Tennessean v. Electric Power Board of Nashville*, 979 S.W.2d 297 (Tenn.1998) *Menge v. City of Manchester*, 113 N.H. 533, 311 A.2d 116 (1973).

Conclusion

The petition is granted to the extent of directing respondents to produce, by October 31, 2001, the requested LeadQuest records, in electronic format with the confidential information redacted. Movant's request for attorney's fees is denied. The legal question raised in this proceeding is novel and accordingly respondents have demonstrated a reasonable basis for denying the FOIL request [POL § 89(4)(c)]. Petitioner shall pay the actual cost of reproduction. If the parties cannot agree as to such cost, an application may be made to the court for a resolution.

N.Y.Sup.,2001.
New York Public Interest Research Group, Inc. v. Cohen
188 Misc.2d 658, 729 N.Y.S.2d 379, 2001 N.Y. Slip Op. 21325

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Gould v. New York City Police Dept:

89 N.Y.2d 267, 675 N.E.2d 808, 653 N.Y.S.2d 54, 25 Media L. Rep. 1104

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Court of Appeals of New York.
In the Matter of Khalib GOULD, Appellant,
v.
NEW YORK CITY POLICE DEPARTMENT et al., Respondents.
In the Matter of Harold SCOTT, Appellant,
v.
NEW YORK CITY POLICE DEPARTMENT, Respondent.
In the Matter of Joseph F. DeFELICE ex rel., on Behalf of Christopher BARBERA, Appellant,
v.
NEW YORK CITY POLICE DEPARTMENT, Respondent.

Nov. 26, 1996.

Criminal defendant brought Article 78 petition challenging police department's denial of Freedom of Information Law (FOIL) request for police officers' memo books and complaint follow-up reports. The Supreme Court, New York County, Tolub, J., denied petition. Petitioner appealed. The Supreme Court, Appellate Division, 223 A.D.2d 468, 636 N.Y.S.2d 1009, affirmed. Petitioner appealed. In separate proceeding, criminal defendant brought Article 78 petition to compel police department's disclosure of police officer's memo book and other records under FOIL. The Supreme Court, New York County, McCooe, J., denied application. Petitioner appealed. The Supreme Court, Appellate Division, 225 A.D.2d 338, 638 N.Y.S.2d 612, affirmed. Petitioner appealed. In separate proceeding, criminal defendant filed FOIL application challenging police department's denial of access to complaint follow-up reports and police officer's memo book. The Supreme Court, New York County, Cohen, J., granted department's motion to dismiss. Applicant appealed. The Supreme Court, Appellate Division, 226 A.D.2d 176, 640 N.Y.S.2d 536, affirmed. Applicant appealed. After consolidation, the Court of Appeals, Ciparick, J., held that: (1) police complaint follow-up reports were not entitled to blanket exemption to FOIL as intraagency material; (2) police activity logs were available under FOIL; but (3) applicant's conjecture that documents existed some ten years ago was insufficient to establish existence of records sought.

Two holdings reversed, one holding affirmed as modified.

Bellacosa, J., filed dissenting opinion.

OPINION OF THE COURT

CIPARICK, Associate Judge.

The three separate proceedings on appeal all involve petitioners' efforts, pursuant to the Freedom of Information Law (FOIL), to obtain documents relating to their arrests from the New York City Police Department. In response to petitioners' FOIL requests, the Police Department furnished assorted documents to petitioners, but refused to disclose complaint *273 follow-up reports (commonly referred to as DD5's) and police activity

logs (commonly referred to as memo books). We hold that the complaint follow-up reports are not categorically exempt from disclosure as intra-agency material and that the activity logs are agency records subject to the provisions of FOIL. Consequently, we remit these proceedings to Supreme Court to determine whether the Police Department can make a particularized showing that a statutory exemption applies to justify nondisclosure of the requested documents.

I.

In Matter of Gould, 223 A.D.2d 468, 636 N.Y.S.2d 1009 attorneys for petitioner Khalib Gould submitted a FOIL request to the Police Department for all documents pertaining to his arrest and the related police investigation leading to his conviction for murder in the second degree and attempted murder in the second degree. In response, the Police Department furnished arrest, complaint and ballistic reports to Gould, but withheld complaint follow-up reports on the ground that the reports are exempt from FOIL production as intra-agency material and withheld police activity logs on the ground that the logs are the officers' personal property. Gould instituted a CPLR article 78 proceeding challenging the Police Department's decision, which was dismissed by Supreme Court. The Appellate Division unanimously affirmed.

In Matter of DeFelice, 226 A.D.2d 176, 640 N.Y.S.2d 536, petitioner Christopher Barbera, through his attorney, requested police reports relating to his 1993 arrest that led to his conviction for attempted murder in the second degree and assault in the first degree. The Police Department provided Barbera with complaint reports, property vouchers, and arrest reports, but refused to produce the requested complaint follow-up reports and activity logs. On Barbera's CPLR article 78 challenge, Supreme Court upheld the Police Department's action, finding that the complaint follow-up reports and activity logs are exempt intra-agency material. The Appellate Division unanimously affirmed.

In Matter of Scott, 225 A.D.2d 338, 638 N.Y.S.2d 612, petitioner Harold Scott, in a series of FOIL requests, sought Police Department documents relating to his 1983 arrest and subsequent conviction for rape and homicide. In response to the latest of these requests, the Police Department refused to produce police activity logs and interviews of witnesses who had testified at Scott's criminal trial on the ground that the documents are exempt from disclosure under FOIL and further informed Scott that all *274 other responsive documents had been provided to him in response to prior FOIL requests. On Scott's subsequent CPLR article 78 challenge, Supreme Court upheld the Police Department's refusal to produce the activity ***57 **811 logs, but ordered the Department to disclose the interview reports. As to Scott's request for additional documents which the Police Department certified it did not possess, Supreme Court denied the petition concluding that Scott only speculated that these documents existed. On Scott's appeal, the Appellate Division unanimously affirmed, holding that police activity logs are exempt intra-agency material and that the Police Department's certification sufficed to establish the nonexistence of other records. This Court granted leave to appeal in all three proceedings.

II.

[1] To promote open government and public accountability, the FOIL imposes a broad duty on government to make its records available to the public (see, Public Officers Law § 84 [legislative declaration]). Moreover, access to government records does not depend on the purpose for which the records are sought. We recognize that petitioners seek documents relating to their own criminal proceedings, and that disclosure of such documents is governed generally by CPL article 240 as well as the Rosario and Brady rules. However, insofar as the Criminal Procedure Law does not specifically preclude defendants from seeking these documents under FOIL, we cannot read such a categorical limitation into the statute (see, Public Officers Law § 87[2][a]; accord, Matter of Farbman & Sons v New York City Health & Hosps. Corp., 62 N.Y.2d 75, 81, 476 N.Y.S.2d 69, 464 N.E.2d 437 [absent an express provision or unequivocal legislative intent so indicating, CPLR article 31-the civil litigation disclosure article-is not a statute specifically exempting public records from disclosure under FOIL]).FN1
FN1. The dissent reads Farbman to stand primarily for the proposition that an individual's status as a litigant in an action against a governmental entity does not preclude reliance on FOIL. Although the Court did make this important point in Farbman, the Court also concluded, as an independent ground of decision, that "[g]iven FOIL's purpose, its broad implementing language, and the narrowness of its exemptions, [CPLR] article 31 cannot be read as a blanket exception from its reach. * * * Nowhere in FOIL * * * is there specific reference to records already subject to production under article 31, and no provision of FOIL bars simultaneous use of both statutes" (62 N.Y.2d, at 81, 476 N.Y.S.2d 69, 464 N.E.2d 437). Because CPL article 240 likewise fails to specifically exempt criminal-disclosure documents from FOIL, we are, just as in Farbman, not free to disregard the open-government mandate of FOIL based on what is perceived as some generalized tension between FOIL and a distinct statutory disclosure scheme.

[2] All government records are thus presumptively open for public inspection and copying unless they fall within one of *275 the enumerated exemptions of Public Officers Law § 87(2). To ensure maximum access to government documents, the "exemptions are to be narrowly construed, with the burden resting on the agency to demonstrate that the requested material indeed qualifies for exemption" (Matter of Hanig v. State of New York Dept. of Motor Vehicles, 79 N.Y.2d 106, 109, 580 N.Y.S.2d 715, 588 N.E.2d 750; see, Public Officers Law § 89[4][b]). As this Court has stated, "[o]nly where the material requested falls squarely within the ambit of one of these statutory exemptions may disclosure be withheld" (Matter of Fink v. Lefkowitz, 47 N.Y.2d 567, 571, 419 N.Y.S.2d 467, 393 N.E.2d 463).

[4] In keeping with these settled principles, blanket exemptions for particular types of documents are inimical to FOIL's policy of open government (accord, Matter of Capital Newspapers Div. of Hearst Corp. v. Burns, 67 N.Y.2d 562, 569, 505 N.Y.S.2d 576, 496 N.E.2d 665). Instead, to invoke one of the exemptions of section 87(2), the agency must articulate "particularized and specific justification" for not disclosing requested documents (Matter of Fink v. Lefkowitz, supra, 47 N.Y.2d, at 571, 419 N.Y.S.2d 467, 393 N.E.2d 463). If the court is unable to determine whether withheld documents fall

entirely within the scope of the asserted exemption, it should conduct an in camera inspection of representative documents and order disclosure of all nonexempt, appropriately redacted material (see, Matter of Xerox Corp. v. Town of Webster, 65 N.Y.2d 131, 133, 490 N.Y.S.2d 488, 480 N.E.2d 74; ***58 **812 Matter of Farbman & Sons v. New York City Health & Hosps. Corp., supra, 62 N.Y.2d, at 83, 476 N.Y.S.2d 69, 464 N.E.2d 437).

Despite these principles, the courts below relied on the case of Matter of Scott v. Chief Med. Examiner of City of N.Y., 179 A.D.2d 443, 577 N.Y.S.2d 861, lv denied 79 N.Y.2d 758, 584 N.Y.S.2d 446, 594 N.E.2d 940, cert denied 506 U.S. 891, 113 S.Ct. 259, 121 L.Ed.2d 190 as establishing a blanket exemption from FOIL disclosure for complaint follow-up reports and police activity logs. We conclude that this was error and hold, first, that the complaint follow-up reports are not entitled to a blanket exemption as intra-agency material, and, second, that the police activity logs are agency "records" available under FOIL. In addition, we hold that the Police Department adequately established the nonexistence of other documents requested by petitioner Scott. Accordingly, we reverse in Gould and DeFelice, modify in Scott, and remit in all three proceedings for Supreme Court to determine, upon an in camera inspection if necessary, whether the Police Department can make a particularized showing that any claimed exemption applies.

*276 A.

[6]  A complaint follow-up report is a form document on which a police officer "report[s] additional information concerning a previously recorded complaint" (New York City Police Dept Patrol Guide § 108-8). The courts below held that the Police Department properly withheld these reports under the intra-agency exemption, which provides that an "agency may deny access to records or portions thereof that: * * * 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" (Public Officers Law § 87[2][g]). Petitioners contend that because the complaint follow-up reports contain factual data, the exemption does not justify complete nondisclosure of the reports. We agree.

[7] Initially, we note that one court has suggested that complaint follow-up reports are exempt from disclosure because they constitute nonfinal intra-agency material, irrespective of whether the information contained in the reports is "factual data" (see, Matter of Scott v. Chief Med. Examiner of City of N.Y., 179 A.D.2d 443, 444, 577 N.Y.S.2d 861, supra [citing Public Officers Law § 87(2)(g)(iii)]). However, under a plain reading of section 87(2)(g), the exemption for intra-agency material does not apply as long as the material falls within any one of the provision's four enumerated exceptions. Thus, intra-agency documents that contain "statistical or factual tabulations or data" are subject to FOIL disclosure, whether or not embodied in a final agency policy or determination (see, Matter of Farbman & Sons v New York City Health & Hosps. Corp., 62 N.Y.2d 75, 83, 476 N.Y.S.2d 69, 464 N.E.2d 437, supra; Matter of MacRae v. Dolce, 130 A.D.2d 577, 515 N.Y.S.2d 295).

[8] The question before us, then, is whether the complaint follow-up reports contain "factual data." Although the term "factual data" is not defined by statute, the meaning of the term can be discerned from the purpose underlying the intra-agency exemption, which is " 'to protect the deliberative process of the government by ensuring that persons in an advisory role [will] be able to express their opinions freely to agency decision makers' " (Matter of Xerox Corp. v. Town of Webster, 65 N.Y.2d 131, 132, 490 N.Y.S.2d 488, 480 N.E.2d 74 [quoting Matter of Sea Crest Constr. Corp. v. Stubing, 82 A.D.2d 546, 549, 442 N.Y.S.2d 130]). Consistent with this limited aim to safeguard internal government consultations and deliberations, the exemption does not apply when the requested material consists of "statistical or factual tabulations or data" (*277 Public Officers Law § 87[2][g][i]). Factual data, therefore, simply means objective information, in contrast to opinions, ideas, or advice exchanged as part of the consultative or deliberative process of government decision making (see, Matter of Johnson Newspaper Corp. v. Stainkamp, 94 A.D.2d 825, 827, 463 N.Y.S.2d 122, mod on other grounds 61 N.Y.2d 958, 475 N.Y.S.2d 272, 463 N.E.2d 613; Matter of Miracle Mile Assocs. v. Yudelson, 68 A.D.2d 176, 181-182, 417 N.Y.S.2d 142).

Against this backdrop, we conclude that the complaint follow-up reports contain substantial***59 **813 factual information available pursuant to the provisions of FOIL. Sections of the report are devoted to such purely factual data as: the names, addresses, and physical descriptions of crime victims, witnesses, and perpetrators; a checklist that indicates whether the victims and witnesses have been interviewed and shown photos, whether crime scenes have been photographed and dusted for fingerprints, and whether neighborhood residents have been canvassed for information; and a blank space denominated "details" in which the officer records the particulars of any action taken in connection with the investigation.

[10] However, the Police Department argues that any witness statements contained in the reports, in particular, are not "factual" because there is no assurance of the statements' accuracy and reliability. We decline to read such a reliability requirement into the phrase "factual data," as the dissent would have us do, and conclude that a witness statement constitutes factual data insofar as it embodies a factual account of the witness's observations. Such a statement, moreover, is far removed from the type of internal government exchange sought to be protected by the intra-agency exemption (see, Matter of Ingram v. Axelrod, 90 A.D.2d 568, 569, 456 N.Y.S.2d 146 [ambulance records, list of interviews, and reports of interviews available under FOIL as "factual data"]). By contrast, any impressions, recommendations, or opinions recorded in the complaint follow-up report would not constitute factual data and would be exempt from disclosure. The holding herein is only that these reports are not categorically exempt as intra-agency material. Indeed, the Police Department is entitled to withhold complaint follow-up reports, or specific portions thereof, under any other applicable exemption, such as the law-enforcement exemption or the public-safety exemption, as long as the requisite particularized showing is made. In this connection, we are well aware that an indeterminate amount of data collected during a criminal investigation may find its way into police files regardless of whether it ultimately proves to be reliable, credible,*278 or

relevant. Disclosure of such documents could potentially endanger the safety of witnesses, invade personal rights, and expose confidential information of nonroutine police procedures. The statutory exemptions contained in the Public Officers Law, however, strike a balance between the public's right to open government and the inherent risks carried by disclosure of police files (see, e.g., Public Officers Law § 87[2][b], [e], [f]).

B.

[12] We next address the Police Department's refusal to disclose police activity logs. The Police Department, which is indisputably an "agency" for FOIL purposes (see, Public Officers Law § 86[3]), contends that the activity logs are the officers' personal property and, therefore, not agency "records." We disagree. Because the activity logs contain "information kept [or] held * * * for an agency," they are "records" available under FOIL (Public Officers Law § 86[4]).FN2

FN2. Although it was suggested in the courts below that police activity logs could be withheld under the privacy and intra-agency exemptions (see, Public Officers Law § 87[2][b], [g]), the Police Department does not advance these positions on appeal. Neither does the Police Department make the argument that all documents relating to law enforcement are categorically exempt from FOIL. Indeed, the Police Department acknowledges that it routinely discloses law-enforcement documents pursuant to FOIL requests, which is evidenced not only by the arrest, complaint, and ballistic reports turned over to petitioners herein, but also by the myriad lower court cases evaluating whether the Police Department justifiably withheld particular law-enforcement documents requested under FOIL.

Activity logs are the leather-bound books in which officers record all their work-related activities, including assignments received, tasks performed, and information relating to suspected violations of law. Significantly, the Police Department issues activity logs to all its officers, who are required to maintain these memo books in the course of their regular duties and to store the completed books in their lockers; the officers are obligated to surrender the activity logs to superiors for inspection upon request; and the contents of the logs are meticulously prescribed by departmental regulation (accord, ***60 **814 Matter of Washington Post Co. v. New York State Ins. Dept., 61 N.Y.2d 557, 564-565, 475 N.Y.S.2d 263, 463 N.E.2d 604 [minutes of meetings of private insurance companies, required by regulation and turned over to Insurance Department for inspection, are "records" under FOIL]). Thus, although the officers generally maintain physical possession of the activity logs, they are nevertheless "kept [or] held" by the officers for the Police Department, which places these *279 documents squarely within the statutory definition of "records" (see, Matter of Encore Coll. Bookstores v. Auxiliary Serv. Corp., 87 N.Y.2d 410, 417, 639 N.Y.S.2d 990, 663 N.E.2d 302). Subject to any applicable exemption and upon payment of the appropriate fee (see, Public Officers Law § 87[1][b][iii]), the activity logs are agency records available under the provisions of FOIL.

C.

[13] Supreme Court did not abuse its discretion in concluding that the Police Department adequately established the nonexistence of additional records requested by petitioner Scott. Once the records access officer for the Police Department certified to Supreme Court that the Police Department had provided Scott with all responsive documents in its possession, Scott was required to articulate a demonstrable factual basis to support his contention that the requested documents existed and were within the Police Department's control (see, Matter of Calvin K. v. De Francesco, 200 A.D.2d 619, 608 N.Y.S.2d 850; Matter of Ahlers v. Dillon, 143 A.D.2d 225, 226, 532 N.Y.S.2d 22). Scott's conjecture that the documents existed some 10 years ago was insufficient to warrant a hearing on the issue.

[14] Finally, we note the Police Department's argument and the dissent's concern that the requests serve not the underlying purposes of FOIL, but the quite different private interests of petitioners in obtaining documents bearing on their cases and will produce an enormous administrative burden. This argument, however, is unavailing as the statutory language imposes a broad duty to make certain records publicly available irrespective of the private interests and the attendant burdens involved. Should the Legislature see fit to do so, it might, as the dissent suggests, amend the statute to balance the rights accorded.

Accordingly, the order in Gould should be reversed, with costs, the order in DeFelice should be reversed, with costs, and the order in Scott should be modified, without costs, and, as so modified, affirmed, and all three proceedings remitted to Supreme Court for further proceedings in accordance with the opinion herein.

BELLACOSA, Judge (dissenting).
The Freedom of Information Law (FOIL) (Public Officers Law § 84 et seq.) and this Court's implementing and interpretive precedents (see, e.g., Matter of Encore Coll. Bookstores v. Auxiliary Serv. Corp., 87 N.Y.2d 410, 639 N.Y.S.2d 990, 663 N.E.2d 302; *280 Matter of Capital Newspapers Div. of Hearst Corp. v. Burns, 67 N.Y.2d 562, 505 N.Y.S.2d 576, 496 N.E.2d 665; Matter of Farbman & Sons v. New York City Health & Hosps. Corp., 62 N.Y.2d 75, 476 N.Y.S.2d 69, 464 N.E.2d 437) combine to produce an unintended and anomalous set of results in these cases (see, New York State Bankers Assn. v. Albright, 38 N.Y.2d 430, 438, 381 N.Y.S.2d 17, 343 N.E.2d 735; Doctors Council v. New York City Employees' Retirement Sys., 71 N.Y.2d 669, 675, 529 N.Y.S.2d 732, 525 N.E.2d 454).

The net practical result is a super-discovery tool affecting criminal proceedings by overarching application of FOIL. This overshadows this Court's many specific precedents governing disclosure in criminal proceedings and the specific, calibrated remedies of the CPL (art 240) (see, e.g., People v. Mobil Oil Corp., 48 N.Y.2d 192, 200, 422 N.Y.S.2d 33, 397 N.E.2d 724 [general statutory provisions apply only where particularized statutory provisions do not]; McKinney's Cons Laws of N.Y., Book 1, Statutes § 238). It

also evokes serious concern that systemic overload and inordinate delays in police departments and courts will result. Occasional FOIL efforts are more likely now to be encouraged and pursued as standard operating practice. File-by-file FOIL reviews and evaluations ***61 **815 in virtually every criminal case will be the standing orders of the day, with many personnel displaced from other direct-line duties to process and evaluate eligibility, compliance, confidentiality, privilege, safety, security, and redactions galore in connection with massive document turnovers. The validation of this new staple of discovery is not within FOIL's purpose and contemplated effectuation, though the acronym forecasts an ironic set of consequences.

For these reasons and with the shared hope that legislative attention will be alerted promptly to restore, at least prospectively, a fair and sensible balance of proportionate rights in this discovery field, I respectfully dissent and vote to affirm.

The fundamental policy underlying FOIL is the "people's right to know the process of governmental decision-making and to review the documents and statistics leading to determinations " made by government (Public Officers Law § 84 [emphasis added]). The focus of this fresh and open air reform is to provide the public with access to the same information used by public officials to arrive at official "determinations." This statutory focus should be key in interpreting the interagency exemption contained in Public Officers Law § 87(2)(g) as applied to these cases.

The petitioners here argue that criminal complaint follow-up reports (DD5's) and the personal memo books of individual police officers are subject to and not exempt from FOIL because *281 they are "statistical or factual tabulations or data" (see, Public Officers Law § 87[2][g][i]). This proffered interpretation fails to consider this subsection of the statute in its particular context and full import (New York State Bankers Assn. v. Albright, 38 N.Y.2d 430, 436-438, 381 N.Y.S.2d 17, 343 N.E.2d 735, supra). Public Officers Law § 87(2)(g) additionally subjects three other categories of interagency materials to disclosure: instructions to staff that affect the public, final agency policy or determinations, and external audits. Thus, this subsection focuses on subjecting to disclosure only those internal agency documents which pertain to official actions affecting the public generally. This limitation is further understood by reference to other subsections of the statute specifically exempting evidence compiled for law enforcement purposes in certain circumstances and where disclosure would risk life or safety (see, Public Officers Law § 87[2][e], [f]).

The latter specifications are markedly different from those here. The contents of investigatory files which contain raw information gathered for the purposes of criminal investigation, and potentially prosecution, do not constitute the type of information upon which official determinations and actions are taken in the context framed and intended by FOIL. Raw evidence acquired by the police has not been "tabulated," or processed, but simply recorded. As such, it has not been filtered or subjected to any analysis, verification or protective shielding by the relevant agency under specific regulatory guidelines.

This Court, in effect, shifts the emphasis of FOIL so that it will functionally eclipse the nuanced procedural safeguards governing disclosure in criminal matters, as such. This is done with no evidence that the Legislature ever contemplated by language or history this significant joint availability.

Matter of Farbman & Sons v. New York City Health & Hosps. Corp., 62 N.Y.2d 75, 476 N.Y.S.2d 69, 464 N.E.2d 437, supra, need not be applied so inexorably and extended in this fashion. In Farbman, this Court held that records which were subject to disclosure under FOIL could not be withheld merely because the requestor was a civil litigant against the agency, and rejected a blanket exemption from FOIL based on CPLR article 31 (id., at 78, 80-81, 476 N.Y.S.2d 69, 464 N.E.2d 437). That holding relied on especially the fact that " 'the standing of one who seeks access to records under the Freedom of Information Law is as a member of the public, and neither enhanced * * * nor restricted * * * because he is also a litigant or potential litigant' " (id., at 82, 476 N.Y.S.2d 69, 464 N.E.2d 437, quoting Matter of John P. v. Whalen, 54 N.Y.2d 89, 99, 444 N.Y.S.2d 598, 429 N.E.2d 117 [citations omitted]).

*282 In these cases, the official respondents do not seek exemption from FOIL because the petitioners are defendants in criminal proceedings, but because of the interagency ***62 **816 nature of the requested documents themselves (DD5's and officers' memo books). Interestingly and perhaps ironically, the rule of this case should entitle victims, and others, to disclosure of these same materials under a fair-game-for-all application of these enhanced FOIL principles. That may well multiply the administrative difficulty and, perhaps, even impossibility of compliance.

Substantial public policy considerations underlie the encouragement of and incentives for members of the community to be forthcoming with information serving the investigation of criminal activity and the apprehension and prosecution of criminals. Accurate and complete recordkeeping by officers is also important. Granting general access to raw observations, suppositions, notations and opinions, as in these cases, cannot well serve those overriding objectives in the criminal jurisprudence arena.

Thus, I vote to affirm in each case.

In Matter of Gould v. New York City Police Dept. and Matter of DeFelice v. New York City Police Dept.: Order reversed, with costs, and matter remitted to Supreme Court, New York County, for further proceedings in accordance with the opinion herein.

KAYE, C.J., and SIMONS, TITONE, SMITH and LEVINE, JJ., concur with CIPARICK, J.

BELLACOSA, J., dissents and votes to affirm in a separate opinion.

In Matter of Scott v. New York City Police Dept.: Order modified, without costs, and

matter remitted to Supreme Court, New York County, for further proceedings in accordance with the opinion herein and, as so modified, affirmed.

KAYE, C.J., and SIMONS, TITONE, SMITH and LEVINE, JJ., concur with CIPARICK, J.

BELLACOSA, J., dissents in part and votes to affirm in a separate opinion.

STATE OF NEW YORK
SUPREME COURT COUNTY OF RENSSELAER

In the Matter of the Application of
CHILDREN'S RIGHTS,

Petitioner,

For a Judgment Pursuant to Article 78
of the Civil Practice Law and Rules,

-against-

DECISION AND ORDER

NEW YORK STATE OFFICE OF CHILDREN & FAMILY SERVICES, and JOHN A. JOHNSON, in his official capacity as Commissioner of the New York State Office of Children & Family Services,

Respondents.

(Supreme Court, Rensselaer County, Special Term, December 22, 2004)
Index No. 212812
(RJI No. 41-0635-2004)

(Justice James B. Canfield, Presiding)

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CANFIELD, J.:

Petitioner, Children's Rights makes the novel argument that Freedom of Information Law (FOIL), Public Officers Law (POL) §§ 84 et seq., permits those seeking confidential

information both to avoid Social Services Law (SSL) §§ 422 and 422-a's procedural requirements and to thereby abrogate the statutory restrictions placed on release of confidential information.

Prior to Children's Rights' counsel Eric S. Pitchal's (Pitchal) FOIL request, Children's Rights applied for information pursuant to SSL § 422(4)(A)(h). Children's Rights withdrew its SSL § 422 application because it was unwilling to conform to the normal requirements for obtaining access to confidential information. On March 3, 2004, Pitchal made his separate FOIL request. Respondents denied Pitchal's FOIL application on the ground that the requested records involve institutional abuse investigations, which are exempt from disclosure under FOIL.

On June 1, 2004, Pitchal appealed the FOIL denial, but instead of addressing the question of whether the records were confidential, Pitchal began raising issues that would only be relevant in the event that Children's Rights had pursued its SSL § 422(4)(A)(h) application rather than withdrawing it or had made an application pursuant to SSL § 422-a. Despite the fact that neither Children's Rights nor Pitchal had a pending application for the records pursuant to SSL §§ 422(4)(A)(h) or 422-a , Pitchal argued that he and Children's Rights are entitled to the records pursuant to those sections. Pitchal also alleged unspecific "constitutional principles [that] are implicated."

Respondents denied Pitchal's appeal on the ground that POL § 87 [2][a] excepts from FOIL disclosure documents that are specifically exempted by state or federal statute and SSL § 422(4)(A) makes all reports regarding suspected child abuse and maltreatment confidential.

Respondents further notified Pitchal that Children's Rights had earlier withdrawn its SSL § 422 request for approval of a research proposal and that SSL § 422-a only provides for limited access to confidential records that are specifically requested.

The Court rejects Children's Rights' argument that it was not required to make SSL §§ 422(4) and 422-a applications for the confidential material and that it could bypass those procedures and statutory restrictions simply by making a FOIL request. FOIL does not purport to eliminate such measures for documents that are specifically exempted by statute and it makes no logical sense to reward Children's Rights and Pitchal for refusing to engage in the administrative process. A petitioner must exhaust all administrative remedies before seeking judicial review unless "an agency's action is challenged as either unconstitutional or wholly beyond its grant of power ... or when resort to an administrative remedy would be futile ...or when its pursuit would cause irreparable injury" (Watergate II Apartments v Buffalo Sewer Auth., 46 NY2d 52, 57). As noted previously, Children's Rights withdrew and never renewed its SSL § 422(4)(A)(h) application. Children's Rights also never made a request for information regarding a specific child pursuant to SSL § 422-a. Children's Rights therefore failed to exhaust its administrative remedies or obtain a final determination of its rights to the records pursuant to SSL §§ 422(4)(A)(h) or 422-a and is therefore not entitled to proceed with those parts of its challenge. Furthermore, there are no final SSL §§ 422(4)(A)(h) or 422-a determinations for the Court to review.

Even if it was assumed for the purposes of the argument that Children's Rights and/or Pitchal had exhausted their administrative remedies, the Court would reject Children's

Rights' novel argument that FOIL standards and procedures not only govern access to documents that are statutorily exempt, but promote dissemination of such exempt documents. Social Services Law § 422(4)(A) makes confidential all reports made regarding suspected child abuse and maltreatment, information obtained, reports written or photographs taken concerning such reports. FOIL expressly excepts governmental records which, like the records at issue, are "specifically exempted from disclosure by state or federal statute" (POL § 87 [2][a]). FOIL makes no provision for public access to documents that are exempt from disclosure.

Children's Rights' conclusory statement that "[u]pon information and belief, the requested records are not exempt from public disclosure" has not been supported. Aside from reiterating their unsupported conclusion, Children's Rights and Pitchal have failed to demonstrate that any of the records they seek are outside of the statutory exemption. By their failure to support their thesis, Children's Rights and Pitchal have implicitly conceded that the material they seek falls within SSL § 422(4)(A), and is therefore confidential and exempt from disclosure pursuant to FOIL.

The baselessness of Children's Rights' position becomes even more apparent when one considers Pitchal's desperate resort to trading on the supposed expertise of Children's Rights as a basis for asking for special treatment under FOIL. FOIL was enacted to foster the public's "inherent right to know" the workings of government (Matter of Fink v Lefkowitz, 47 NY2d 567, 571). The status or interest of a person requesting documents or records under FOIL is irrelevant (Farbman & Sons, Inc. v New York City Hlth. & Hosps.

Corp., 62 NY2d 75, 80-81; Matter of John P. v Whalen, 54 NY2d 89, 99). Furthermore, a FOIL requester is only entitled to receive documents that any other FOIL requester would ordinarily receive (Gould v New York City Police Dept., 89 NY2d 267, 274). Children's Rights' argument for special treatment is not only inconsistent with FOIL, but it implicitly recognizes that members of the general public are not entitled to the confidential records Children's Rights seeks and thus FOIL does not require their release.

There being no FOIL provision that carves out a special exception for requests filed by bona fide researchers or their attorneys, the Court rejects Children's Rights' FOIL claim to special treatment. The Court further finds that respondents have met their burden of specifically demonstrating that the material is exempt (Gould v New York City Police Department, 89 NY2d 267, 275; M. Farbman & Sons, Inc. v NYC Health & Hospitals Corp., 62 NY2d 75, 80) and that the SSL § 422 exemption applies to all the reports, allegations, records concerning investigations and prevention and mediation plans requested by Pitchal.

The Court is aware that Matter of Gannett Co., Inc. v County of Ontario, 173 Misc2d 304 arrived at a different result when it interpreted SSL § 422-a and FOIL . The Court finds that the Matter of Gannett Co., Inc. analysis is not persuasive. The court there began its analysis with the unexplained assumption that SSL § 422-a is an exception to FOIL's provisions for releasing documents. Social Services Law § 422-a actually appears to be an exception to statutes such as SSL § 422(4)(A) that make the records confidential and thereby limit their distribution. As an independent exception allowing release of material that SSL § 422(4)(A) makes confidential, SSL § 422-a is clearly not subject to FOIL's restrictions.

By mistakenly assuming that the legislature required that confidential information should be released to the public, Matter of Gannett Co., Inc. actually created the very problem that it urged the legislature to fix. Had that court properly interpreted the statutes, there would have been no problem to fix. In any event, the decision of a concurrent court is not binding on this Court (Siegel New York Practice 3rd Ed. § 449 p 724) and is rejected.

The Court also rejects Children's Rights' claims that FOIL creates a presumption in favor of releasing confidential information pursuant to SSL §§ 422(4)(A)(h) or 422-a or that those requesting information can force the commissioner to do a file by file search of all files by making nonspecific SSL § 422-a requests. When FOIL exempts material from disclosure it makes no provision for releasing any part of the exempt material. SSL § 422-a(1) makes no reference to requests for information, but instead merely permits agency commissioners to disclose otherwise confidential information if they make a series of determinations regarding the various statutory factors. Unlike FOIL, which favors releasing records and requires an explanation if agencies determine not to release documents, SSL § 422-a imposes no obligation to give any further explanation for refusing to release confidential material. The Court further finds no basis in the statute for imposing the obligation on commissioners to do a file by file analysis of every file if they receive a general request for information pursuant to SSL § 422-a.

Accordingly, the petition is dismissed with $100 costs and the relief requested therein is in all respects denied

This Memorandum constitutes the Decision and Order of the Court. All papers including this Decision and Order are returned to the Attorney General. The signing of this Decision and Order shall not constitute entry or filing under CPLR Rule 2220. Counsel is not relieved from the applicable provisions of that Rule respecting filing, entry and Notice of Entry.

SO ORDERED!
ENTER.

Dated: Troy, New York
February 22, 2005

JAMES B. CANFIELD
J.S.C.

Papers Considered:

(1) Notice of Motion dated October 14, 2004;
(2) Petition dated October 14, 2004, with exhibits annexed;
(3) Affidavit of Madelyn Freundlich dated October 12, 2004;
(4) Answer dated December 9, 2004;
(5) Affidavit of Susan Mitchell-Herzfeld dated December 9, 2004, with exhibits annexed.

STATE OF NEW YORK DEPARTMENT OF STATE COMMITTEE ON OPEN GOVERNMENT

41 State Street, Albany, New York 12231
(518)474-2518
Fax (518) 474-192 7
Website Address:http://www.dos.state.ny.us/coog/coogwww.html

January 6. 2003

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

Dear Mr. Jackson:

I have received your letters concerning your efforts in gaining access to records of the Office of Temporary and Disability Assistance ("the Office").

One relates to fees for copies of records sought under the Freedom of Information or Personal Privacy Protection Laws that may be assessed by the Office. Although you referred to "an alleged conversation between [me] and Russell Hanks, Deputy General Counsel" on the subject of fees, I had never spoken directly with Mr. Hanks prior to the receipt of your letter.

With respect to the substance of the matter, I note that neither of those statutes makes reference to fee waivers, and that it has been held that an agency may charge its established fee for copies even though the applicant for records is indigent [Whiteheadv. Morgenthau, 552 NYS2d 518 (1990)]. I recognize that the Office, by means of practice and through its regulations, has determined to waive copying fees when a request is made by person involved in ta hearing and the records are pertinent to the proceeding, or when a "data subject" seeking records pursuant to the Personal Privacy Protection Law "is a person applying for or receiving public assistance or care or food stamp assistance." However, I believe that the Office may charge fees in all other circumstances in which copies of records are requested. Moreover, it

has been held that an agency may require payment of fees in advance of its preparation of photocopies when a request is made under the Freedom of Information Law (Sambucci v. McGuire. Supreme Court, New York County, November 4,1982).

With regard to the other letter, you asked whether John Robitzek, Counsel to the Office, "can legally order others or instruct others to obstruct the physical delivery of a FOIL Request by [you] or others acting at your behest." While I am unaware of Mr. Robitzek's authority, it is my view that an agency has the inherent power to take action necessary to ensure the safety of its employees and to prevent disruption in the workplace. In addition, it is my understanding that your exclusion from the premises of the Office has not diminished your ability to request records. On the contrary, I was informed that an 800 telephone number may be used to request records under the Freedom of Information Law or in relation to a hearing, and that verbal requests in those instances are accepted.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: John Robitzek
Russell Hanks

November 9, 2004

This letter is in response to your appeal under the Freedom of Information Law (FOIL), referred to by FOIL Appeal Notice (016 #430) in your faxed correspondence of October 27, 2004. You requested numerous copies of documents and recordings that pertain to you and that are maintained by the Office of Administrative Hearings.

Your appeal is moot. By letter dated November 5, 2004, the Office of Administrative Hearings (OAH) informed you that you have been provided all of the material that you requested. If this is not the case, you may contact OAH and identify exactly what materials you need.

This decision constitutes the final action by this Office pursuant to §89.4(b) of the Public Officers Law with regard to your request for information under the FOIL. If you are dissatisfied with my decision, you may bring a proceeding for court review of this denial pursuant to Article 78 of the Civil Practice Law and Rules (CPLR). Pursuant to §217 of the CPLR, an Article 78 proceeding must be commenced within four months of the date of your receipt of this letter.

Yours truly,

John E. Robitzek
General Counsel

cc: Robert Freeman,
Committee on Open Government

LSH

MICHAEL G. BRESLIN
COUNTY EXECUTIVE

ALBERT F. DINGLEY
SENIOR ATTORNEY

COUNTY OF ALBANY
DEPARTMENT OF SOCIAL SERVICES
LEGAL DIVISION – 7TH FLOOR
162 WASHINGTON AVENUE
ALBANY, NEW YORK 12210-2304
(518) 447-7360 - FAX (518) 447-7722
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ROSS A. PRINZO, JR.
COMMISSIONER

ELIZABETH R.DOYLE
DEPUTYCOMMISSIONER

January 12, 2004

Re: Attorney Kelly O' Melia's letter of December 30, 2003 Foil Requests

Dear Mr. Jackson:

With regard to above captioned matter and your letter of January 5, 2004, please be advised that Kelly O'Melia letter concerns only a written FOIL request or Public Officers Law Article 6 request and therefore, the content of her letter is correct. A FOIL request is to be filed with the Albany County Clerk's Office as records access officer and not Albany County Department of Social Services at 162 Washington Avenue, Albany, New York 12210. As you should be aware from previous correspondence from this office over the years, correspondence from the Albany County Clerk and prior litigation , you should be complying with the Article 78 decision and order of Albany County Supreme Court Index # 1563-96 by the Hon. Thomas W. Keegan dated June 13, 1996 and follow Section 87(1) of the Public Officers Law and Albany County Resolution Nos. 58 adopted February 14, 1978 and 35 adopted January 1. 1993 and file a FOIL request with the Albany County Clerk as records access officer. A copy of the decision and order is enclosed.

There is a distinction between a FOIL request for documents and a request for documents for a fair hearing pursuant to Social Service Law Section 22. If you are requesting an inspection of records pursuant to Social Service Law Section 22 (Appeals and fair hearings; judicial review.) and regulation Title 18 NYCRR Section 358-3.7 (Examination of case record before the fair hearing.) for a fair hearing with this agency, then Albany County Department of Social Services allows you the right to review the documents which are the subject of the fair hearing at a reasonable time. The agency will also supply you with one copy of those documents **relating to and pertaining to the fair hearing**. If you request these documents for a fair hearing in a written request at 162

Washington Avenue, please do not refer to it as a FOIL or Public Officers Law Article 6 request since this will only confuse the matter and the agency staff and therefore, cause the request to be denied. A FOIL request goes to the Albany County Clerk. Please refer to any written request for documents for a pending fair hearing with Albany County Department of Social Services as simply a fair hearing request for documents or fair hearing request for documents pursuant to the Social Service Law 22 and the regulation above noted. If there is a document(s) you feel hasn't been provided by the agency to you pursuant to such a fair hearing request, you can address that with the hearing officer as outlined in the above-stated regulation. A copy of the regulation is enclosed.

Very truly yours,

Albert F. Dingley
Senior Attorney

Encs.

cc. Philip Nostramo
Thomas G. Clingan, County Clerk
Kevin McDermott
Kathy Tremont

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF ALBANY

In the Matter of the Application of
WAYNE JACKSON, c/o Capital City Rescue Mission
259 South Pearl Street
Albany, New York 12202

Petitioner,

against

Index No. 7528/04
AFFIDAVIT OF
MARK LACIVITA
ON BEHALF OF
STATE
RESPONDENT

ROBERT DOAR, Commissioner of NYSOTDA
JOHN ROBITZEK, Chief Counsel of NYSOTDA
40 North Pearl Street
Albany, New York 12243

Respondents.

STATE OF NEW YORK)
)ss.:
COUNTY OF ALBANY)

I, Mark Lacivita, being duly sworn deposes and says:

1. I am employed as the Director of Administration in the Office of Administrative Hearings (hereafter referred to as "OAH"), New York State Office of Temporary and Disability Assistance, located at 1 Commerce Plaza. I am responsible for all administrative functions that pertain to the hearings process, including handling requests for records under the Freedom of Information Law (hereafter referred to as "FOIL") and the Personal Privacy Protection Law.

2. Petitioner's FOIL request dated October 19, 2004, (Petitioner's Exhibit 1) requested all records from August 1, 2004 to October 19, 2004 held within the Office of Administrative Hearings related to Wayne Jackson including but not limited to all records for FH 4167737J. Fair hearing (FH 4167737J) was requested on August 5, 2004. That hearing resulted in a default on October 5, 2004, because the Petitioner refused to submit to Albany County Department of Social Services security procedures upon his return following a brief adjournment. The record

for this hearing consisted of documents that Petitioner had sent OAH: the fair hearing request print out, a recording of Petitioner's brief appearance at the hearing, documents submitted by the Albany County Department of Social Services and the Judge's checklist. (See Respondent's Exhibit 1, Record for FH 4167737J).

3. Prior to his FOIL request on October 19, 2004, Petitioner had made requests directly through OAH for records related to his fair hearing (FH 4167737J). (See Respondent's Exhibit 2, letters to OAH from Petitioner dated October 12 and 13, 2004, respectively.) On October 12, 2004, Mr. Allie Kamara, a member of OAH staff under my supervision, hand delivered the CD recording of the hearing (FH 4167737J) to Petitioner in the lobby of 1 Commerce Plaza, as is confirmed by Petitioner's letter dated October 13, 2004. (See Respondent's Exhibit 2, supra).

4. Following Petitioner's FOIL request dated October 19, 2004, the Petitioner notified OAH that he was having problems receiving his mail. The information was not provided within five days of the FOIL request because the Petitioner requested hand delivery of all of the records for FH 4167737J, and arranged to meet Mr. Kamara, in the lobby of 1 Commerce Plaza on October 26, 2004. Petitioner acknowledged receipt of the records for FH 4167737J. (See Respondent's Exhibit 3, Petitioner's letter to Deputy General Counsel, Russell Hanks, dated October 27, 2004.)

5. On October 13, 2004, Petitioner requested a second fair hearing (FH 4206927R), and this hearing was held on October 22, 2004. Except for a new fair hearing number and the fair hearing print out, there were no separate records at the commencement of this new fair hearing because the issues were simply a restatement of the issues for the defaulted FH 4167737J. On October 26, 2004, pursuant to my instructions, Mr. Kamara hand delivered to Petitioner a copy of transcripts for the second fair hearing (FH 4206927R), along with copies of all documents in

his file for the first fair hearing (FH 4167737J), as described in the prior paragraph. (See Respondent's Exhibit 4, notes in the comment section of the FHIS print out for FH 4206927R.)

6. The decision on this second hearing (FH 4206927R) was issued on November 3, 2004 and mailed to Petitioner at the address he provided in accordance with routine mailing procedures utilized by OAH. I was informed subsequently that this correspondence was returned to OAH as undeliverable.

7. By letter dated November 5, 2004, I informed the Petitioner that he had been provided all of the material that he had requested, since a copy of the decision and all evidentiary documents for this second hearing were enclosed with my letter. (See Respondent's Exhibit 5, Letter to Petitioner from Mark Lacivita dated November 5, 2004, with enclosure.) My November 5 letter further advised Petitioner that if it was not the case that he had been provided all of the documents that he had requested, he could contact OAH and identify exactly what additional materials he needs.

8. As Petitioner was previously advised, my November 5 letter reiterated that the reopen request for FH 4167737J has been denied. Lastly, I informed Petitioner that if he continues to fail to follow Albany County Department of Social Services security procedures, this office will be unable to treat these hearings in an expedited manner, and that there will be no change in the limitations that this office has placed on his access.

9. I was informed by staff from Counsel's Office that Mr. Jackson had submitted an appeal (FOIL Appeal Notice (016 #430) under the Freedom of Information Law following my November 5 letter. (See Respondent's Exhibit 6, FOIL Appeal Notice (016 #430). I provided a copy of my November 5 letter to Records Access Appeals Officer and General Counsel, John E. Robitzek. By letter dated November 9, 2004, Mr. Robitzek informed petitioner that his appeal

was moot because he had been provided all of the records in which he is identified as the subject, but that if this is not the case, he may contact the Office of Administrative Hearings and identify exactly what materials he needs. (See Respondent's Exhibit 7, Letter to Petitioner from Records Access Appeals Officer and General Counsel, John E. Robitzek, dated November 9, 2004.)

10. On December 14, 2004, Mr. Kamara again met with Petitioner in the lobby of 1 Commerce Plaza, pursuant to my instructions. On that date, Mr. Kamara accepted a new fair hearing request from Petitioner. Because of Petitioner's ongoing dissatisfaction and repeated insistence that the records provided by OAH since October 2004 were incomplete, I instructed Mr. Kamara to again provide copies of all records for Petitioner's two hearings, FH 4167737J and FH 4206927R. Pursuant to my instructions, Mr. Kamara hand delivered these records to Petitioner for at least the third time on December 14, 2004. (See Respondent's Exhibit 1 and 8, records for Petitioner's two hearings, FH 4167737J and FH 4206927R, respectively).

11. Upon information and belief, Petitioner has been provided all records in which he is identified as the data subject in the possession of the Office of Administrative Hearings.

_____

Mark Lacivita

Sworn before me this
_____day of December, 2004

_____

Notary Public
Of the State of New York

STATE OF NEW YORK
SUPREME COURT COUNTY OF ALBANY

In the Matter of the Application of

WAYNE JACKSON,

Petitioner,

-against-

Decision and Order
Index #1563-96
RJI #0196ST6530

BRIAN J. WING, Acting Commissioner of New York Dept. of Social Services, ROSS A. PRINZO, JR., Commissioner of Albany County Dept. of Social Services, MR. RAY TOBIN, MR. RICHARD RUDDOCK, both of Albany County Dept. of Social Services, DENNIS VACCO, Attorney General of New York State, MICHAEL G. ROSSETTI, of New York Dept. of Law, Albany, N.Y. and other to be named,

Respondents,

For a Judgment pursuant to Article 78 of the Civil Practice Law and Rules.

(Supreme Court, Albany County, Special Term of April 26, 1996)

(Justice Thomas W. Keegan, Presiding)

APPEARANCES:

WAYNE JACKSON
Petitioner Pro Se
421 Clinton Avenue
Albany, New York 12206

HON. DENNIS C. VACCO
Attorney General of the State of New York
(Keith H. Kammerer, of Counsel)
Attorney for Respondents Wing, Vacco and Rossetti
The Capitol
Albany, New York 12224

MICHAEL C. LYNCH, ESQ.
Albany County Attorney
(Craig R. Denning, of Counsel)
Attorney for Respondents
Prinzo, Tobin and Ruddock
112 State Street
Albany, New York 12207

KEEGAN, J.:

Petitioner commenced this CPLR article 78 proceeding to review determinations of the respondents in regard to petitioner's repeated Freedom of Information Law ("FOIL") requests for production of documents relating to his applications for public assistance.

Respondents move to dismiss and interject several objections in point of law. All of the objections raised by the respondents have merit, and most are dispositive of the instant proceeding; however, in the interest of judicial economy, the Court will only address only the following four.

First and foremost, petitioner has filed a Notice of Appeal of the Decision and Order of the Hon. George Ceresia dated February 26, 1996, which involved essentially the same litigants, and petitioner's FOIL requests for the same material. Thus, there is a prior proceeding pending, and "[u]nder CPLR 3211(a)(4), the court enjoys broad discretion to dismiss an action pending between the same parties, dealing with a like action in another forum." Matter of Janet L., 200 AD2d 801, 803, lv to appeal dismissed in part, denied in part 83 NY2d 941.

Second, it is obvious that in regard to his FOIL requests after the return date of his earlier article 78 proceeding on August 11, 1995, petitioner has failed to exhaust his administrative remedies by simultaneously serving on the State an appeal of a denial with the application for access without being notified that any portion of his request was being denied.

Watergate v. Buffalo Sewer, 46 NY2d 52, 57. Furthermore, petitioner has not shown that he followed established FOIL procedures, or pursued and obtained a final administrative determination from Albany County Department of Social Services.

Third, the petition fails to state a cause of action against the Albany County respondents as no facts are stated to support petitioner's claim that Albany County or any of its designated employees failed to follow § 87 of the Public Officers Law, or Resolutions Nos. 58 of 1978 and 35 of 1993.

Four, as evidenced by his signed receipt of February 22, 1996, petitioner has received 524 pages of the documents he seeks despite continually thwarting State respondents' attempts to comply with his requests, rendering his claims moot in regard to those documents.

Accordingly, respondents' motions are granted and the petition dated March 20, 1996 is dismissed.

Finally, a review of the papers before this Court indicates that the conduct of the petitioner throughout the earlier proceeding and since has been utterly vexatious, and at times, abusive. Although the Court hesitates to impose the financial sanctions sought by the respondents, it does not hesitate, given petitioner's course of conduct, to enjoin and restrain the petitioner from entering the non-public portions of the Attorney-General's and Department of Law premises. Furthermore, the Court will also hereby enjoin and restrain the petitioner from commencing any further actions, or proceedings in any form, with respect to

his FOIL requests, in any jurisdiction or in any forum, against the State and/or County respondents, and/or their respective agencies or employees, without the permission of this Court.

This memorandum shall constitute both the Decision and Order of this Court.

All papers, including this Decision and Order, are being returned to State respondents' attorneys. The signing of this Decision and Order shall not constitute entry or filing under CPLR 2220. Counsel are not relieved from the applicable provisions of that section respecting filing, entry and notice of entry.

SO ORDERED.

ENTER.

Dated: Albany, New York
June 13, 1996

Thomas W. Keegan, J.S.C.

PAPERS CONSIDERED:

(1) Notice of Petition sworn to March 20, 1996.
(2) Verified Petition, sworn to March 20, 1996, with attached exhibits.
(3) Notice of Motion to Dismiss, dated April 19, 1996.
(4) Affirmation of Keith E. Kammerer, Esq., dated April 19, 1996, with attached exhibits.
(5) Affidavit of David S. Kellogg, Esq., sworn to April 18, 1996.
(6) Notice of Objections and Motion to Dismiss, dated April 19, 1996.
(7) Affidavit of Craig A. Denning, Esq., sworn to April 19, 1996, with attached exhibits.
(8) Affidavit of Raymond J. Tobin, sworn to April 18, 1996.
(9) Affidavit of Richard J. Ruddock, sworn to April 18, 1996.
(10) Affidavit of Eric Misch, sworn to April 18, 1996.

COPY

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF MONROE : CIVIL TERM

STEVE ORR,

Index No. 2005/12791

Petitioner,

For a Judgment Pursuant to CPLR Article 78

- against -

NEW YORK STATE OFFICE OF CHILDREN AND FAMILY SERVICES, KATHLEEN R. DECATALDO, in her capacity as Records Access Appeals Officer, MONROE COUNTY, and RICHARD F. MACKEY, in his capacity as Records Appeal Officer,

Respondents.

APPEARANCES: Nixon, Peabody, LLP
P.O. Box 31051
Rochester, New York 14603
Appearing on behalf of the petitioner
By: Christopher D. Thomas, Esq., of Counsel

Eliot Spitzer, Attorney General
144 Exchange Blvd., Suite 200
Rochester, New York 14614
Appearing on behalf of the respondents New York State Office of Children and Family Services and Kathleen R. DeCataldo
By: Emil J. Bove, Jr., Esq., of Counsel

Daniel M. DeLaus, Jr., County Attorney
39 West Main Street, Room 307
Rochester, New York 14614
Appearing on behalf of the respondent Richard F. Mackey
By: Michael E. Davis, Esq., of Counsel

DECISION

FRAZEE, J.

This is a proceeding pursuant to Article 78 of the Civil Practice Law and Rules brought by petitioner Steve Orr[1] (Orr) for an order and judgment (1) vacating and annulling the July 18, 2005 determination by respondent New York State Office of Children and Family Services (OCFS) denying the request of the petitioner and the *Democrat and Chronicle* newspaper (D&C) for records relating to OCFS's inquiry into Monroe County Adult Protective Services (APS) in regard to a deceased client, Charles A. Lyon (Lyon) of Rochester, New York; (2) directing OCFS to supply the requested records; (3) vacating and annulling the determination on August 9, 2005, by respondent Monroe County (County) denying the request of the petitioner and the D&C for records relating to the County's inquiry into the death of Lyon; (4) directing Monroe County to supply the requested records; and (5) directing respondents to pay petitioners' legal fees, costs and disbursements, pursuant to statute.

Lyon was found dead on the floor in his home on February 2, 2005. He had been under the supervision of APS since about March, 2004. It is estimated that Lyon was dead for several months prior to February 2, 2005. Beginning on or about February 16, 2005, the D&C began to run articles regarding the death of Lyon.

On or about April 12, 2005, the petitioner requested, pursuant to the Freedom of Information Law (FOIL) (Public Officers Law §84, *et seq.*), documents prepared by the OCFS concerning Lyon's death. Orr requested "a copy of a report, any

---

[1]Steve Orr is a reporter for the *Democrat and Chronicle* newspaper.

appendices or attachments, any separate statements of deficiency and any related correspondence having to do with your office's inquiry into the performance of the Monroe County Adult Protective Services in regard to the case of a deceased client, Charles A. Lyon, of Rochester, New York."

On or about June 1, 2005, OCFS denied the request claiming the records fall into one or more of the following exceptions:

- They may be confidential under the State's Protective Services for Adults statute and thus unavailable pursuant to Section 87(2)(a) of the Public Officers Law.
- They may be attorney-client communications which are privileged under Section 4503 of the CPLR and thus are unavailable pursuant to Section 87(2)(a) of the Public Officers Law
- They may be intra-agency or inter-agency materials which are not final agency determinations and are thus unavailable pursuant to Section 87(2)(g)(iii) of the Public Officers Law.

An appeal to the records access appeals officer of OCFS was denied by letter dated July 18, 2005. The reasons for the denial were stated as follows:

> Section 87(2)(a) of the Public Officers Law provides that documents which are specifically exempted from disclosure by State or federal statute are also exempt from disclosure under FOIL. Pursuant to section 473-e of the Social Services Law, any protective services for adults' records requested by the D&C are confidential and may be released only in accordance with the provisions of that statute. Section 473-e of the Social Services [sic] does not provide for release of such information to a newspaper pursuant to a FOIL request. Some of the documents requested by the D&C also fall within section 87(2)(a) of the Public Officers Law because they are privileged as attorney-client communications pursuant to section 4503 of the Civil Practice Law and Rules. In addition, some of the documents requested by the D&C are exempt from

> disclosure under FOIL pursuant to section 87(2)(g)(iii) of Public Officers Law because they are intra-agency or inter-agency materials which are not at this time final agency determinations.

On or about May 27, 2005, petitioner requested documents prepared by the County concerning Lyon's death. He requested:

> . . . a copy of the report on the county's inquiry into the performance of the Monroe County adult protective services in regard to the case of its deceased client, Charles A. Lyon of Rochester. We are also requesting any and all appendices or attachments to this report.
>
> In addition, we are requesting a copy of the report prepared by the State Office of Children and Family Services on the adult protective unit's handling of Mr. Lyon's case, plus any attachments that accompanied that report. Also, we are requesting the entirety of the County's written response to OCFS and any related documents, including any subsequent written reply by OCFS to the county's response.

On June 27, 2005, the County denied the request stating:

> The records requested are specifically exempt from disclosure pursuant to Public Officers Law 87(2)(a). Adult protective file information is confidential pursuant to Social Services Law 473-e.

An appeal was denied by the County on August 9, 2005.

Petitioner asserts that the requested records are discoverable because (1) Lyon's death has obviated the need for privacy protection; (2) there is no attorney-client privilege applicable; and (3) no intra-agency or inter-agency exceptions apply to the requested documents, and even if they did, the factual portions of the materials should be disclosed. At oral argument, the Court requested that OCFS and the County submit the records requested by petitioner for

an *in camera* review. The Court has received these records and reviewed them.

Respondents also assert procedural defenses that the proceeding was not properly commenced since the petition was not filed with the Monroe County Clerk as required by CPLR §304 and that it is time-barred. Respondents subsequently withdrew these objections upon the filing of a new petition. Respondents maintain, however, that Steve Orr lacks standing and that, in any event, the documents sought are exempt from disclosure for the reasons stated in their respective letters of denial.

DISCUSSION

Initially, the Court finds no merit to respondents' assertion that petitioner lacks standing. Both the request to the OCFS and the County for the subject records were made by Orr. While Orr's letters indicate his affiliation with the D&C, that does not require a finding that the newspaper is the real party in interest. Public Officers Law §94 states ". . . that the public, individually and collectively and represented by a free press, should have access to the records of government . . ." Thus, Orr is deemed to have standing in his own right or as a reporter for the D&C. The merits of the matter will now be addressed.

It is well-established that FOIL is "to be liberally construed and its exemptions narrowly interpreted so that the public is granted maximum access to the records of government" (*Matter of Capital Newspapers v Whalen*, 69 NY2d 246, 252 [1987]; *Pennington v Clark*, 16 AD3d 1049, 1051 [4th Dept, 2005]). FOIL requires state and municipal agencies to make all records available for public inspection and copying

subject to certain enumerated exceptions set forth in Public Officers Law §87(2). In the instant proceeding, OCFS relies on two of these exceptions: the "state or federal statute" and the "inter-agency" exceptions. OCFS also relies upon attorney-client privilege. The County relies on the "state or federal statute" exemption.

Public Officers Law §87(2), in relevant part, sets forth the claimed exceptions, that is, that the agency may deny access to records that:

> (a) are specifically exempted from disclosure by state or federal statute; . . .
> (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;
> iv. external audits, including, but not limited to, audits performed by the comptroller and the federal government . . .

OCFS and the County, citing Public Officers Law §87(2)(a), contend that the records requested are specifically exempt from disclosure by state statute, to wit: Social Services Law §473-e. The burden of establishing that disputed material is exempt from disclosure is on the party opposing discovery, here OCFS and the County (*see*, *Kellner v General Motors Corporation*, 273 AD2d 444 [2nd Dept, 2000]; *Central Buffalo Project Corporation v Rainbow Salads, Inc.*, 140 AD2d 943 [4th Dept, 1988]).

Social Services Law §473-e provides, in relevant part, as follows:

> §473-e. Confidentiality of protective services for adult's records.

> . . . 2. Reports made pursuant to this article, as well as any other information obtained, including but not limited to, the names of referral sources, written reports or photographs taken concerning such reports in the possession of the department or a social services district, shall be confidential and, except to persons, officers and agencies enumerated in paragraphs (a) through (g) of this subdivision, shall only be released with the written permission of the person who is the subject of the report, or the subject's authorized representative, except to the extent that there is a basis for non-disclosure of such information pursuant to subdivision three of this section. Such reports and information may be made available to:
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> (a) any person who is the subject of the report or such person's authorized representative; . . . or
>
> (g) any person considered entitled to such record in accordance with applicable law.
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> 3. The commissioner or a social services official may withhold, in whole or in part, the release of any information in their possession which he or she is otherwise authorized to release pursuant to subdivision two of this section, if such official finds that release of such information would identify a person who made a referral or submitted an application on behalf of a person for protective services for adults, or who cooperated in a subsequent investigation and assessment conducted by a social services district to determine a person's need for such services and the official reasonably finds that the release of such information will be detrimental to the safety or interests of such person.
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> 4. Before releasing a record made pursuant to this article in the possession of the department or a social services district, the appropriate official must be satisfied that the confidential character of the information will be maintained in accordance with applicable law, and that the record will be used only for the purposes for which it was made available.

OCFS and the County assert that any document constituting part of Lyon's Adult Protective Services file or information obtained from such file are absolutely

statutorily exempted from disclosure by Public Officers Law §87(2)(a) and Social Services Law §473-e (*see*, *Children's Rights v New York State Office of Children & Family Services*, 6 Misc2d 1026[A] [Renssalaer County, 2005], "when FOIL exempts material from disclosure it makes no provision for releasing any part of the exempt material").

Petitioner acknowledges that there is a statutory exemption of confidentiality found in Social Services Law §473-e, but argues that such exemption ended upon the death of Lyon. In support of his argument, petitioner cites *Tri-State Publishing Company v City of Port Jervis*, 138 Misc2d 147 (1988). In that case, a newspaper commenced a CPLR Article 78 proceeding to review the denial of its request for the release of a death certificate of a decedent who was believed to have died of AIDS. The denial was based, in part, on the personal privacy exemption contained in FOIL, to wit: Public Officers Law §87(2)(b).[2] The Court in *Tri-State*, *supra* at 151, concluded "that disclosure of the death certificate in issue would not constitute an invasion of personal privacy as defined in the relevant statute and thus exempt from the mandates of disclosure under FOIL."[3]

Petitioner's reliance on *Tri-State* is misplaced for two reasons. First, *Tri-State* involved a determination based upon the personal privacy exception contained in Public Officers Law §87(2)(b) and not the statutory exemption found in Public

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[2]Public Officers Law §87(2)(b) provides that the agency may deny access to records that "if disclosed would constitute an unwarranted invasion of personal privacy under the provisions of subdivision two of section eighty-nine of this article."

[3]The Court also rejected the argument that Public Health Law §4174(1)(a) exempted the death certificate from disclosure.

Officers Law §87(2)(a). Respondents here rely upon the statutory exemption under Public Officers Law §87(2)(a) and do not assert a personal privacy exception under Public Officers Law §87(2)(b). Second, to the extent that petitioners cite *Tri-State* for the proposition that privacy rights terminate upon death, such argument was effectively rejected by the Court of Appeals in *Matter of New York Times Company v City of New York Fire Department*, 4 NY3d 477 (2005). In that case, the issue to be decided was whether the New York City Fire Department was required by FOIL to disclose tapes and transcripts of certain conversations that occurred on and shortly after September 11, 2001. Notably, the Court of Appeals stated:

> We first reject the argument, advanced by the parties seeking disclosure here, that no privacy interest exists in the feelings and experiences of people no longer living. The privacy exception, it is argued, does not protect the dead, and their survivors cannot claim 'privacy' for experiences and feelings that are not their own. We think this argument contradicts the common understanding of "privacy." *Matter of New York Times*, *supra* at 484.

The Court held that surviving relatives had a legally protected privacy interest. It was further found permissible to allow disclosure where the relatives wanted the words of their decedent disclosed. The Court of Appeals added that while there is a legitimate public interest in the disclosure of the 911 calls, the public interest is outweighed by the interest in privacy of those family members and callers who prefer that those words remain private.

In his responding papers, petitioner has submitted an affidavit from Lyon's brother asserting that he desires that the requested information be released. This affidavit, however, is not relevant to the pending application. The reason is that, as

previously stated, the cases of *Tri-State* and *New York Times* dealt with the privacy exception contained in Public Officers Law §87(2)(b). The matter before this Court involves the statutory exemption contained in Public Officers Law §87(2)(a) and Social Services Law §473-e.[4] Social Services Law §473-e permits disclosure to, *inter alia*, "any person who is the subject of the report or such person's authorized representative." By its express terms, the statute does not permit disclosure to any relative but rather to "such person's authorized representative." Here, the information is sought by Orr who is not a relative of Lyon. Whether a surviving relative who is the duly appointed estate representative of Lyon might be entitled to obtain a copy of the documents at issue is not presently before the Court and, therefore, will not be addressed.

The Court finds that OCFS and the County have sustained their burden of demonstrating that the records concerning Lyon's referral to and monitoring by APS are exempt from discovery pursuant to Public Officers Law §87(2)(a) and Social Services Law §473-e. Further, there is nothing in the language of those statutes to suggest that such exemption terminated upon the death of Lyon. Any change in this regard is a matter for the legislature and not the court.

Although petitioner has requested only the report prepared by OCFS and the County's response thereto, the status of the APS record for Lyon is relevant to an analysis of the discoverability of these reports. At issue is whether the report

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[4]Even in those circumstances where disclosure would not involve invasion of privacy, the agency may deny access based on the other categorial exceptions (*Short v Board of Managers of the Nassau County Medical Center*, 57 NY2d 399, 405 [1982]).

prepared by OCFS after its review of Lyon's APS record and the County's response to that report are documents also covered by the exemption. A careful reading of Social Services Law, Title 2, of which §473-e is a part, indicates that the provisions therein are concerned with protecting the confidentiality of the records concerning an individual who receives protective services for adults from a social services district as well as those involved in referral and investigation of the individual for these services. This is to be distinguished from a report by a reviewing agency that evaluates the performance of a social services district in providing protective services for adults. While the records of an individual maintained by the social services district are protected under the exemption provided by Social Services Law §473-e, an evaluation report, to the extent that it does not disclose information about the referral and investigation and the individual receiving services, is not covered by the exemption.

In certain circumstances, it may be possible to redact an evaluation report to remove material that is subject to the exemption from the report and, thus, enable disclosure of the report. Such is not the situation in this case. To redact the OCFS report and the County's response to remove references to items contained in the APS record would remove the context in which documents were prepared and render them subject to misinterpretation or virtually meaningless. The factual information contained in the confidential APS record is so integral a part of the OCFS report and the County's response that these documents, too, are covered by the exemption of Social Services Law §473-e. To find otherwise would open for disclosure through the vehicle of an evaluation report that which the legislature

sought to protect by providing in Social Services Law §473-e confidentiality protection for an individual receiving adult protective services.

The second statutory basis claimed by OCFS for exempting disclosure of certain documents is found in CPLR §4503 which defines the attorney-client privilege. It provides, in relevant part, as follows:

> §4503. Attorney.
> (a) 1. Confidential communication privileged. Unless the client waives the privilege, an attorney or his or her employee, or any person who obtains without the knowledge of the client evidence of a confidential communication made between the attorney or his or her employee and the client in the course of professional employment, shall not disclose, or be allowed to disclose such communication, nor shall the client be compelled to disclose such communication, in any action, disciplinary trial or hearing, or administrative action, proceeding or hearing conducted by or on behalf of any state, municipal or local governmental agency or by the legislature or any committee or body thereof. Evidence of any such communication obtained by any such person, and evidence resulting therefrom, shall not be disclosed by any state, municipal or local governmental agency or by the legislature or any committee or body thereof. The relationship of an attorney and client shall exist between a professional service corporation organized under article fifteen of the business corporation law to practice as an attorney and counselor-at-law and the clients to whom it renders legal services.

OCFS claims that there are three documents which are exempt from disclosure pursuant to the attorney-client privilege. These consist of two intra-agency e-mails and a memo.[5] The Court has reviewed these documents and finds that OCFS has demonstrated that an attorney-client relationship existed and that the

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[5]These are identified as pages 5 and 11 on OCFS Confidential Summary of Documents submitted to the Court *in camera*.

information sought to be withheld constituted protected attorney-client communications (*see*, *Lichtenberg v Zinn*, 243 AD2d 1045, 1048 [3d Dept, 1997]; *Mahoney v Staffa*, 184 AD2d 886, 887 [3rd Dept, 1992]).

OCFS also contends that the records are inter-agency materials which are not final agency determinations and are thus exempt pursuant to Public Officers Law §87(2)(g)(iii). Given the Court's determination that the records it has reviewed *in camera* are exempt from disclosure based on Public Officers Law §87(2)(a), Social Services Law §473-e, and CPLR §4503, it is not necessary to further consider whether some of the records are also exempt under Public Officers Law §87(2)(g)(iii).

Petitioner's request for attorney's fees, costs and disbursements is denied (*see*, *Matter of Beechwood*, 5 NY3d 435 [2005]).

Dated at Rochester, New York
this 7th day of July, 2006.

Honorable Evelyn Frazee
Justice Supreme Court