

# FOILed Again!

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## Panning for Gold: Finding Relevant Fair Hearing Decisions

### Introduction

New York's Freedom of Information Law, known as FOIL,<sup>1</sup> was enacted in the post-Watergate era, to ensure "that the public, individually and collectively and represented by a free press, should have access to the records of government."<sup>2</sup>

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.<sup>3</sup>

FOIL is an invaluable tool in representing New Yorkers in both administrative and judicial proceedings involving a local or state agency.<sup>4</sup> For advocates of the poor, FOIL provides a means of discovery beyond the avenues of disclosure normally associated with preparation for the administrative appeal process known as a Fair Hearing.<sup>5</sup>

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\* For those of you who have seen the cartoon show, "Rocky and His Friends" (later known as "The Bullwinkle Show"), you'll remember that famous catch phrase, "Curses, foiled again!" uttered by Snidely Whiplash whenever Dudley Do-Right defeated his nefarious plots.

\*\* I am a licensed master social worker, not an attorney. The information contained in this article is not intended as legal advice. It is simply a lay advocate's description of some of the techniques that have improved my ability to assist low-income New Yorkers during my 36 years as a social worker.

<sup>1</sup> FOIL is found in Article 6 of New York's Public Officers Law and encompasses §§ 84 through 90 [available at: <http://www.dos.state.ny.us/coog/foil2.htm>].

<sup>2</sup> Public Officers Law § 84.

<sup>3</sup> Id.

<sup>4</sup> Public Officers Law § 86[3] defines an "Agency" as "any state or municipal department, board, bureau, division, commission, committee, public authority, public corporation, council, office or other governmental entity performing a governmental or proprietary function for the state or any one or more municipalities thereof, except the judiciary or the state legislature."

<sup>5</sup> State social services regulations provide several means of accessing records independent of FOIL. These regulations are found in Title 18 of the New York Codes, Rules and Regulations (18 NYCRR), which can be accessed on the Internet at: <http://www.dos.state.ny.us/info/nycrr.htm>.

This article is the first of what is hoped will be an occasional series, which explores how FOIL, and its companion, New York's Personal Privacy Protection Law (PPPL),<sup>6</sup> can be employed to obtain useful information from the state and local agencies that administer the various public benefit programs authorized by New York's Social Services Law.

Each article will focus on a specific pool of records.<sup>7</sup> For more information on the breadth and depth of FOIL and PPPL, use the links found at:

- <http://onlineresources.wnyc.net/FairHearingResources/showfaq.asp?fldAuto=16> [for FOIL], and
- <http://onlineresources.wnyc.net/FairHearingResources/showfaq.asp?fldAuto=17> [for PPPL].

## **Fair Hearing Decisions Must Be Made Publicly Accessible**

Federal regulations<sup>8</sup> and state law<sup>9</sup> require that all Fair Hearing Decisions must be made accessible to the public, provided that confidential information is safeguarded. To protect against the unwarranted invasion of personal privacy, certain identifying information is redacted from the publicly accessible version of Fair Hearing Decisions.

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The customary means for obtaining information under social services regulations are:

- Applicants and recipients (“clients”) and their authorized representatives have the right to review their case records upon request at any time. See 18 NYCRR § 357.3(c).
- Clients who have requested Fair Hearings (“appellants”) and their representatives have the additional right to request that free copies of specified case record documents be mailed to them to prepare for their Fair Hearings. See 18 NYCRR §§ 358-3.7(b)(1) and (2), and 358-4.2(c) and (d).
- There is also the less well known right to obtain free copies of specific policy materials needed to prepare for a Fair Hearing, or to determine whether to request a Fair Hearing. See 18 NYCRR § 300.5(b) and (c).

<sup>6</sup> PPPL is found in Article 6-A of New York's Public Officers Law and encompasses §§ 91 through 99 [available at: <http://www.dos.state.ny.us/coog/actualpppl.htm>].

<sup>7</sup> Public Officers Law § 86[4] defines a “Record” to encompass “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.”

<sup>8</sup> See 45 CFR § 205.10(a)(19); 42 CFR § 431.244(g); 7 CFR § 273.15(q)(5). All 50 Titles of the Code of Federal Regulations (CFR) are available at: <http://www.access.gpo.gov/nara/cfr/cfr-table-search.html>.

<sup>9</sup> See State Administrative Procedure Act (SAPA) § 307[3]. All New York State statutes are available at: <http://public.leginfo.state.ny.us/menugtf.cgi?COMMONQUERY=LAWS>.

## **Where to Find Fair Hearing Decisions?**

The New York State Office of Temporary and Disability Assistance (OTDA) is responsible for issuing and maintaining the collection of Fair Hearing Decisions not only for its own commissioner but also for the Commissioner of the New York State Department of Health (DOH) with respect to Fair Hearings involving Medical Assistance (Medicaid) and for the Commissioner of the Office of Children and Family Services (OCFS) with respect to Fair Hearings involving various Social Services.

OTDA is planning to make redacted versions of Fair Hearing Decisions available on the Internet.<sup>10</sup> Until then, it is necessary to make a FOIL request to OTDA's Public Information Office<sup>11</sup> for redacted copies of specific Fair Hearing Decisions.

The Online Resource Center (ORC) [<http://onlineresources.wnyc.net/>], a joint project of the Western New York Law Center and Empire Justice Center, provides an alternative source for selected Fair Hearing Decisions assembled by advocates. ORC's Fair Hearing Bank provides a text-searchable summary of each of the more than 2,000 decisions available at this site. In order to access ORC's Fair Hearing Bank, it is necessary to register at: <http://onlineresources.wnyc.net/register.asp?index=Register>.

## **How to Find Specific Fair Hearing Decisions?**

OTDA does not currently have any means of searching the text of Fair Hearing Decisions. Instead OTDA relies on its database, called the Fair Hearing Information System (FHIS), which contains various codes to identify such elements as the type of determination being appealed (issue, action and category of assistance codes), the local agency that made the determination (agency code), the outcome of the appeal (outcome code) and reason for the decision (outcome reason code).<sup>12</sup>

Through the use of these FHIS codes, it is possible to identify a group of Fair Hearing Decisions that pertain to:

- a specific local social services district, a specific center in New York City or another entity, such as a state agency or a Medicaid managed care agency,<sup>13</sup> and/or
- a specific issue,<sup>14</sup>

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<sup>10</sup> See April 10, 2009 letter from OTDA General Counsel John P. Bailly, Jr. [available at: [http://onlineresources.wnyc.net/FairHearingResources/docs/foil\\_appeal\\_\\_09-16.pdf](http://onlineresources.wnyc.net/FairHearingResources/docs/foil_appeal__09-16.pdf)].

<sup>11</sup> See <http://www.otda.state.ny.us/main/foil.asp>.

<sup>12</sup> A listing of all FHIS codes (as of June 26, 2008) is available at: [http://onlineresources.wnyc.net/FairHearingResources/docs/fhis\\_codes\\_\\_06-26-08\\_.pdf](http://onlineresources.wnyc.net/FairHearingResources/docs/fhis_codes__06-26-08_.pdf).

<sup>13</sup> For a list of Agency Codes, see: <http://onlineresources.wnyc.net/FairHearingResources/showquestion.asp?faq=7&fldAuto=54>.

<sup>14</sup> For a list of Issue Codes, see: <http://onlineresources.wnyc.net/FairHearingResources/showquestion.asp?faq=7&fldAuto=57>.

- a specific hearing officer, also known as an Administrative Law Judge (ALJ),<sup>15</sup> and/or
- a specific outcome reason.<sup>16</sup>

For example, through recent FOIL requests,<sup>17</sup> OTDA has provided FHIS listings of all available Fair Hearing Decisions,<sup>18</sup> which reversed or remanded<sup>19</sup> contested determinations because:

- the agency's notices were defective,<sup>20</sup>
- the agency failed to provide requested documents in advance of the hearing,<sup>21</sup> or
- the agency failed to produce the appellant's case record at the hearing.<sup>22</sup>

With such FHIS lists, follow-up FOIL requests can be made for specific Fair Hearing Decisions.<sup>23</sup> It is also possible to skip the initial step of requesting an FHIS listing of Fair Hearing Decisions before requesting redacted copies of the decisions themselves. But this “sight unseen” approach could result in a request for hundreds or even thousands of Fair Hearing Decisions.<sup>24</sup>

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<sup>15</sup> For a list of ALJ Codes, see: <http://onlineresources.wnyc.net/FairHearingResources/showquestion.asp?faq=7&fldAuto=313>.

<sup>16</sup> For a list of Outcome Reason Codes, see: <http://onlineresources.wnyc.net/FairHearingResources/showquestion.asp?faq=7&fldAuto=61>.

<sup>17</sup> One of these FOIL requests (#09-024) is available at: [http://onlineresources.wnyc.net/FairHearingResources/docs/foil\\_request\\_09-024.pdf](http://onlineresources.wnyc.net/FairHearingResources/docs/foil_request_09-024.pdf).

<sup>18</sup> OTDA generally keeps Fair Hearing Decisions for three years after the date of issuance.

<sup>19</sup> A reversal typically annuls an agency determination to discontinue, reduce or restrict benefits. A remand annuls an agency determination but also instructs the agency to make a new determination after further review. Remands typically involve challenges to the denial or adequacy of benefits.

<sup>20</sup> This listing is available at: [http://onlineresources.wnyc.net/FairHearingResources/docs/foil\\_09-021.pdf](http://onlineresources.wnyc.net/FairHearingResources/docs/foil_09-021.pdf).

<sup>21</sup> This listing is available at: [http://onlineresources.wnyc.net/FairHearingResources/docs/foil\\_09-020.pdf](http://onlineresources.wnyc.net/FairHearingResources/docs/foil_09-020.pdf).

<sup>22</sup> This listing is available at: [http://onlineresources.wnyc.net/FairHearingResources/docs/foil\\_09-024.pdf](http://onlineresources.wnyc.net/FairHearingResources/docs/foil_09-024.pdf).

<sup>23</sup> See, for example, an April 18, 2009 FOIL request for redacted copies of Fair Hearing Decisions that reversed Public Assistance (PA) recoupment determinations due to defective notices, and for redacted copies of the defective notices themselves [available at: [http://onlineresources.wnyc.net/FairHearingResources/docs/foil\\_request\\_04-18-09\\_.pdf](http://onlineresources.wnyc.net/FairHearingResources/docs/foil_request_04-18-09_.pdf)].

<sup>24</sup> For example, a FOIL request for all Fair Hearing Decisions, which reversed or remanded determinations because of defective notices would yield more than 1,500 records. See [http://onlineresources.wnyc.net/FairHearingResources/docs/foil\\_09-021.pdf](http://onlineresources.wnyc.net/FairHearingResources/docs/foil_09-021.pdf).

It is therefore recommended that an initial FOIL request be made for an FHIS listing of Fair Hearing Decisions that cover a particular set of Issue Codes, Agency Codes, ALJ Codes, Outcome Reason Codes, *etc.* and that a subsequent FOIL request be made for specific Fair Hearing Decisions that have been identified on the FHIS listing.

### **How Much Will Copies of Fair Hearing Decisions Cost?**

FOIL authorizes agencies to charge up to 25¢ for each photocopied page of records.<sup>25</sup> Fortunately, OTDA retains all Fair Hearing Decisions in electronic format. Consequently, if you make a FOIL request by e-mail and ask that copies of specific Fair Hearing Decisions be sent to you by e-mail as electronic files,<sup>26</sup> there is usually no charge for these records.<sup>27</sup>

But be aware that if you request voluminous records, you may be charged “an amount equal to the hourly salary attributed to the lowest paid agency employee who has the necessary skill required to prepare a copy of the requested record” if “at least two hours of agency employee time is needed to prepare a copy of the record requested.”<sup>28</sup>

Therefore, it is better to make several successive FOIL requests, each for a manageable number of records, than to make one big FOIL request for voluminous records. Requests for large numbers of records will likely be delayed and may result in the imposition of a fee if more than two hours of time is needed to prepare the requested records.

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<sup>25</sup> See Public Officers Law § 87[1](b)(iii).

<sup>26</sup> These files are typically distributed in portable document format (pdf), which can be viewed and printed with Adobe Acrobat<sup>®</sup> or the freely distributed Adobe Reader.<sup>®</sup>

<sup>27</sup> The Committee on Open Government of the New York State Department of State has explained [<http://www.dos.state.ny.us/coog/highlights.htm>] that

It is our view that if an agency has the ability to scan records in order to transmit them via email and doing so will not involve any effort additional to an alternative method of responding, it is required to do so. 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. In that instance, transferring a paper record into electronic format would eliminate any need to collect and account for money owed or paid for preparing paper copies, as well as tasks that would otherwise be carried out. In addition, when a paper record is converted into a digital image, it remains available in electronic format for future use.

In sum, when an agency has the technology to scan a record without an effort additional to responding to a request in a different manner, and a request is made to supply the record via email, in our opinion, the agency must do so to comply with the Freedom of Information Law.

<sup>28</sup> Public Officers Law § 87[1](c)(i) and (iv).

## **What Is the Value of Prior Fair Hearing Decisions?**

The New York Court of Appeals has held that “in administrative, as in judicial, proceedings ‘justice demands that cases with like antecedents should breed like consequences’.”<sup>29</sup> When there is a change in state policy, as previously set forth in a Fair Hearing Decision, the reasons for such a departure from the past position must be clearly set forth in the decision. “Absent such an explanation, failure to conform to agency precedent will, therefore, require reversal on the law as arbitrary, even though there is in the record substantial evidence to support the determination made” (citations omitted.)<sup>30</sup>

These principles of administrative stare decisis are well settled<sup>31</sup> and have specifically been held to be binding on the OTDA Commissioner and his predecessors.<sup>32</sup>

ALJs often welcome the submission of prior Fair Hearing Decisions. Such decisions have two practical advantages: an ALJ knows that the prior decision has been approved by one of the “Commissioner’s Designees”<sup>33</sup> and the prior decision can be used as a template for deciding the current Fair Hearing if the factual and legal issues are similar.

Moreover, if a newly issued Fair Hearing Decision departs from prior decisions without explanation, it is subject to judicial reversal even if the decision is supported by substantial evidence.

Lastly, prior Fair Hearing Decisions can be excellent learning tools as a means of preparing for an upcoming hearing on the same issue. The decisions recite the “applicable law” as well as the “relevant facts.” Even if a previous decision was unfavorable, there are often lessons to be learned from a prior appellant’s mistakes.

Given the ease with which FOIL requests can be e-mailed, these prior Fair Hearing Decisions are a free and often indispensable resource that should not be overlooked.

*For more information, contact Gene Doyle, LMSW, People Organized for Our Rights, Inc. (P.O.O.R.) at: [POOR@nyc.rr.com](mailto:POOR@nyc.rr.com)*

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<sup>29</sup> Matter of Charles A. Field Delivery Service, Inc. [Roberts], 66 N.Y.2d 516, 519 (1985), quoting Davis, *Doctrine of Precedent as Applied to Administrative Decisions*, 59 W.Va.L.Rev. 111, 117.

<sup>30</sup> Field Delivery Service, Inc., 66 N.Y.2d at 520.

<sup>31</sup> Matter of Richardson v Commissioner of New York City Department of Social Services, 88 N.Y.2d 35, 39-40, (1996); Matter of Lafayette Storage & Moving Corp. [Troy Publ. Co.-Harnett], 77 N.Y.2d 823, 826 (1991); Matter of Martin [Roberts], 70 N.Y.2d 679, 681 (1987); Matter of Muhlstein v New York City Human Resources Administration, 55 A.D.3d 736, 737 (2d Dept. 2008); Matter of Long v Perales, 172 A.D.2d 667 (2d Dept. 1990).

<sup>32</sup> See Richardson, *supra*; Muhlstein, *supra*; Long, *supra*.

<sup>33</sup> Social Services Law § 22[2] authorizes the Commissioner to designate one or more members of his staff to decide administrative appeals. The Commissioner’s Designees, whose signatures appear at the conclusion of Fair Hearing Decisions, are typically Supervising Hearing Officers or their supervisors, known as Principle Hearing Officers.