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Committee on Open Government



New Provisions Modernize and Clarify FOIL

Legislation approved by Governor Paterson and effective August 7, 2008 (Chapter 223) modernizes the Freedom of Information Law (FOIL) and clarifies several of its provisions. The amendments reflect a recognition of advances in information technology, as well as judicial determinations and advisory opinions prepared by the Committee on Open Government. It also provides guidance to agencies and the public concerning the costs associated with providing access to information that is maintained electronically.

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Committee on Open Government. It also provides guidance to agencies and the public concerning the costs associated with providing access to information that is maintained electronically.

Fees for Electronic Information

A new section 87(1)(c) for the first time defines the basis for determining the actual cost of reproducing records maintained electronically. For many years, section 87(1)(b)(iii) of FOIL stated that unless a different fee is prescribed by statute, an agency could charge a maximum of twenty-five cents per photocopy when records are made available, or the actual cost of reproducing other records, i.e., those that are not or cannot be photocopied. The new provisions balance the public interest in gaining access to computerized records at low cost with the tasks carried out by agencies when making those records available.

In most instances, gaining access to those records can be realized without a financial hardship, for the actual cost relating to most requests involves only the cost of the storage medium in which the information is made available, i.e., a computer tape or disk. However, in those instances in which substantial time is needed to prepare a copy, at least two hours of an employee's time, the legislation permits an agency to now charge a fee based on the cost of the storage medium used, as well the hourly salary of the lowest paid employee who has the skill needed to do so. This change in FOIL for the first time authorizes agencies to determine and assess a fee to be charged on the basis of an employee's time.

In rare cases, those in which an agency's information technology equipment is incapable of preparing a copy, an agency can charge the actual cost of engaging a private professional service to do so. In analogous circumstances, it has been advised that a fee based on actual cost may include all expenditures incurred by an agency associated with preparing a copy, such as postage, transportation, and the like. Expenditures of that nature may, in our view, be included as part of the actual cost and the fee that an agency could charge. An applicant must be informed of the fee in advance if more than two hours of employee time or an outside professional service is needed to prepare a copy of a record. With advance knowledge of the amount of the fee that would be assessed, applicants in many situations may narrow the scope of their requests.

Large Requests

The initial clause of amendments to section 89(3)(a) of FOIL codifies and confirms the judicial finding that a denial of access to records due to a contention that an agency has a shortage of staff would, in the words of that decision, "thwart the very purpose of the Freedom of Information Law and make possible the circumvention of the public policy embodied in the Act" [United Federation of Teachers v. New York City Health and Hospitals Corporation, 428 NYS2d 823, 824 (1980)]. The ensuing clause states that an agency cannot deny a request due to insufficient staff or other basis if an outside service can be retained to accommodate the applicant, and if the applicant agrees to pay the actual cost of reproducing the records.

Recognizing the Benefits of Information Technology

A new section 87(5) requires an agency to "provide records on the medium requested...if the agency can reasonably make such copy." This requirement clarifies and confirms judicial decisions rendered over the course of years, those requiring that agencies make records available economically on computer tapes or disks, rather than photocopying [see Szikszay v. Buelow, 436 NYS2d 558 (1981)], or by transferring data onto computer tapes or disks, instead of printing out as much as a million pages on paper at a cost of thousands of dollars [see Brownstone Publishers, Inc. v. New York

City Department of Buildings, 560 NYS2d 642 (1990)]. It also specifies that records provided in a computer format shall not be encrypted.

Creating, Extracting and Generating Records

Section 89(3) of FOIL has long essentially provided that FOIL pertains to existing records and does not require that an agency create a record in response to a request. However, with advances in information technology, courts have held that when portions of records, i.e., databases, can be extracted or generated from existing records with reasonable effort, an agency is required to do so. Amendments to that provision now include that requirement in the law itself. The new provision also states that "Any programming necessary to retrieve a record maintained in a computer storage system and to transfer that record to the medium requested...or to allow the transferred record to be read or printed shall not be deemed to be the preparation or creation of a new record." Therefore, if a request reasonably describes records or data maintained electronically, and when extracting the data with new programming is more efficient than engaging in manual retrieval or redactions from non-electronic records, the agency is required to do so.

New Provisions Concerning Privacy

Section 89(2)(b) includes examples of instances in which records or portions of records may be withheld on the ground that disclosure would constitute "an unwarranted invasion of personal privacy." Subparagraph (iii) of that provision stated since 1978 that an unwarranted invasion of personal privacy included "sale or release of lists of names and addresses if such lists would be used for commercial or fund-raising purposes." The amendment provides that such lists may be withheld when used for "solicitation" or fund-raising purposes. The substitution of "solicitation" for "commercial" clarifies the intent of the provision since its enactment, to give state and local government agencies the authority to preclude the use of a list of persons' names and residence addresses when the list would be used to contact citizens directly in their homes in an effort to solicit their business. In addition, when a list of names and addresses is sought, an agency may require the applicant for such a list to "provide a written certification" that the list will not be used or made available to any other person for the purpose of engaging in solicitation or fund-raising.

Maximizing Access to Records

Amendments to sections 87 and 89 require an agency to consider public access when contracting with outside vendors and when designing electronic information systems.

The amendment to section 87 prohibits an agency from entering into or renewing a contract for the creation or maintenance of records if a contract would impair public inspection or copying.

The amendment to section 89 requires, "whenever practicable and reasonable" that an agency design its information systems in a manner that permits segregation and retrieval of publicly available data "in order to provide maximum public access." This amendment does not require an agency to expend public moneys to alter current practices or procedures. Rather, when agencies determine to change or purchase new electronic information systems, they are required to consider access to information within the systems and the protection of privacy, to ensure easy access to portions of records that are available to the public while guaranteeing the security of other portions that may properly be withheld. This provision is effective immediately (Chapter 351).

Real Property Records

A new subparagraph (iv) added to section 89(2)(c) specifies that disclosure of records

involving real property, such as assessment records critical to enable individuals to ascertain the fairness of their real property tax assessment, would not constitute an unwarranted invasion of personal privacy if disclosed. Those records have historically been accessible to the public pursuant to the Real Property Tax Law, as well as FOIL. A recent judicial decision appeared to limit disclosure and created confusion and difficulties in gaining access [COMPS, Inc. v. Town of Islip, 822 NYS2d 768 (2006)]. The amendment ends the confusion and guarantees public rights of access.

County Clerks' Fees

Various provisions in the Civil Practice Law and Rules (CPLR) deal with the fees that county clerks may charge for services that they provide. Section 8019 deals with the preparation of copies, but referred only to copies made on paper. A new paragraph (5) added to section 8019(f) states that the provisions in FOIL dealing with the actual cost of reproducing records "in a medium other than paper" serve as the standard under which county clerks may assess fees for preparing copies of records.