FOIL'D AGAIN: HANDLING FREEDOM OF INFORMATION REQUESTS INVOLVING SOCIAL SERVICES RECORDS
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FOIL’d Again: Handling Freedom of Information requests involving Social Services Records

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This material is designed to supplement the excellent treatise on the “Confidentiality of Social Services Records” written by Mark E. Maves, Esq., Senior Deputy County Attorney with the Monroe County Department of Law. It can be used as a practice tool for advising the LDSS on specific freedom of information requests and how to process them. As Mark noted, “practically every DSS record has its own disclosure statute.” Handling FOIL requests appropriately requires a careful balance between the public’s right of access, confidentiality statutes, and narrowly construing the exemptions the LDSS counsel believes applies to a given request. The goal is to provide timely the broadest amount of requested material without violating any confidentiality or privilege, and without invading someone else’s privacy, or jeopardizing a law enforcement process. The final requirement is to be specific and detailed about the bases for any full or partial denial that allows for a full review, if necessary, by the judiciary.

I. The Intent of the Freedom of Information Law

A. FOIL in New York State: NY Public Officers Law Article 6

In 1977, the New York State Legislature restructured the existing public records access law in Article 6 of the Public Officers Law, imposing a broad standard of open disclosure to ensure the public has maximum access to government documents (L. 1977, Ch. 933). The purpose of the Freedom of Information Law in New York (commonly referred to as “FOIL”) “is to shed light on government decision making, which in turn both permits the electorate to make informed choices regarding governmental activities and facilitates exposure of waste, negligence and abuse.” As the Court of Appeals stated a few years after the amendments were passed, “the public is vested with an inherent right to know and [...] official secrecy is anathematic to our form of government.”

1 Mark’s material will be referred to here as the “Confidentiality Handbook”. Mark Maves granted this author permission to reprint excerpts from the Confidentiality Handbook, in the manner chosen herein.


B. Government Records are Presumed to be Accessible to the Public

The mandate of New York’s Freedom of Information Law is clearly stated: “Each agency shall, in accordance with its published rules, make available for public inspection and copying all records”\(^4\), subject to certain exceptions which are to be narrowly construed (see below). The definitions of “agency” and “records” contained in Public Officers Law § 86 make applicable the FOIL mandate to the LDSS and all of its records and data.\(^5\)

“No 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.\(^6\)

“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.\(^7\) As the Court of Appeals noted in 1984, this broad definition of what is a public record was meant to indicate that the “vast majority of requested documents [would be] presumptively discoverable as ‘records’” under the Freedom of Information Law.\(^8\)

C. Exemptions to the Right of Access under FOIL

Overview

Exemptions, while regularly invoked by public agencies in denying FOIL requests, are not the Berlin Wall to accessibility. Where denials have been reviewed by courts, there is an inevitable recitation of the premise that “[e]xemptions are to be narrowly construed to provide maximum access.”\(^9\) The exemptions which will most likely be invoked in the context of reviewing a FOIL request for social services records include the following:

1. Records otherwise prohibited from disclosure (POL § 87(2)[a]);
2. Privileged Communications;
3. Intra-Agency Communications (POL § 87(2)[g]);

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\(^7\) N.Y. Pub. Off. Law § 86(4).
\(^9\) *Friedman v. Rice*, 20 N.Y.S.3d 600 (2d Dep’t 2015).
4. Records which, if disclosed, would be an unwarranted invasion of another person’s privacy;
5. Records which, if disclosed, would jeopardize Law Enforcement efforts.

1. Records otherwise prohibited from disclosure

The very first, listed exemption in New York’s Freedom of Information Law is the one that allows the LDSS to deny a FOIL request for “records or portions thereof that [...] are specifically exempted from disclosure by state or federal statute.”10 Below is a brief summary of the SSL Confidentiality Handbook’s coverage of the confidentiality provisions of social services law.11

a) Social Services Records, Generally – SSL § 136

Social Services Law §136 contains the general provisions related to the confidentiality of public welfare records.

SSL §136(5) obliges a social services official to disclose the current address of a recipient to a federal, state or local law enforcement official provided that the official indicates that it is his duty to apprehend the recipient and that the recipient is fleeing to avoid prosecution, custody, or confinement after conviction, for a felony (or high misdemeanor in New Jersey), or is violating a condition of parole or probation or has information necessary for the official to conduct his duties.

Regulations pertaining to the confidentiality of public assistance records are found in 18 NYCRR 357. While that regulation applies to all DSS records generally, it is specifically applied to public assistance records. 18 NYCRR 357.1(a) indicates that the information that is to be kept confidential is all information secured by the agency whether or not it is contained in the written record.

18 NYCRR 357.3 gives the bases upon which confidential information may be disclosed.

b) Medicaid Records – SSL § 369(3) and HIPAA

The Medicaid program is deemed to be a “Health Plan” pursuant to 45 CFR 160.103, and thus subject to the confidentiality requirements of HIPAA.

Current New York State law (Social Services Law [SSL] §§367-b and 369) makes Medicaid information confidential. SSL §367-b directs you to the general Social Services confidentiality statute found at SSL §136. Under present New York law, Medicaid information may only be released where the disclosure is necessary for four activities:

1. establishing eligibility;

11 Please note that where there are verbatim excerpts from the Confidentiality Handbook, the type is indented and a different typeface is used, in order to avoid having to extensively footnote and quote Mark’s comprehensive paper.
2. determining the amount of medical assistance;
3. providing services for recipients;
4. fraud and abuse activities.

HIV information may only be released pursuant to PHL 2782.

The case record is available to the Applicant/Recipient or his representative to review and copy at the agency - [release to designated parties of Medicaid records appears to be acceptable] under HIPAA.

[The LDSS may] release [a Medicaid record] to another person, public official or agency when it may be properly assumed that the client has requested that the inquirer act on his behalf- [this would] seem to require an authorization under HIPAA.

Judicially issued subpoena – [Court-ordered release to designated parties of Medicaid records appears to be acceptable] under HIPAA.

[Request from] any properly constituted authority with regard to investigation or appraising the operation of public welfare - [release to designated parties of Medicaid records appears to be acceptable] under HIPAA.

[An LDSS may] report to appropriate agency or official known or suspected instances of physical or mental injury, sexual abuse or exploitation or child maltreatment - [release to designated parties of Medicaid records appears to be acceptable] under HIPAA.

c) Child Welfare Records, Generally – SSL § 372; FAR Cases – SSL § 427-a

New York’s Social Services Law § 372 relates to records in the LDSS which are held or created to perform “duties in relation to abandoned, delinquent, destitute, neglected or dependent children.”12 Social Services Law §§ 372(3) and (4) provide that foster care records are confidential.

Those districts which have adopted Family Assessment Response tracks (“FAR” cases) should note that, in addition to being covered by SSL § 372’s confidentiality provisions, the FAR statute provides that “[a]ll reports assigned to, and records created under, the family assessment and services track, including but not limited to reports made or written as well as any other information obtained or photographs taken concerning such reports or records shall be confidential.”13 There are seven parties or entities that are listed in the statute that may be entitled to some of the FAR records14, none of which include a party requesting information under FOIL.

d) Reports of Abuse or Neglect – SSL § 422

The specific confidentiality statute for Child Protective records is found in SSL §422. This statute sets out the law related to the statewide central register of child abuse and maltreatment. SSL §422(4)(A) states that not only are the state central register

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reports confidential, but so is any other information, reports written, or photographs taken regarding such reports that are in the possession of State DSS (now OCFS), the local department, or the commission on quality of care for the mentally disabled. This would include the local district CPS file. Pursuant to SSL §422(12), it is a class A misdemeanor for a person to willfully permit or encourage the release of any information from the local or statewide register to persons or agencies not permitted to receive the information by title 6 of article 6 of the Social services law.

SSL §422(4)(A) goes on to list 25 exceptions to the confidentiality statute. These exceptions cover both different individuals and/or agencies which may be entitled to the information, as well as different circumstances under which the records may be reviewed. None of the exceptions include a FOIL request.

One example of this is found in *Matter of Gannett Co., Inc., v. County of Ontario*, 173 Misc.2d 304, 661 NYS2d 920 (Sup. Ct., Ontario Co., 1997). In that case, the Court ruled in an Article 78 proceeding brought by a newspaper seeking information from Ontario County DSS that FOIL did not apply, since SSL 422-a specifically addresses the request. However, the Court did rule that Ontario County DSS was required to produce the CPS records pursuant to SSL §422-a(2)(g), a result that was disagreed with and commented upon in a subsequent case. In *Matter of the Application of Children’s Rights v. New York State Office of Children & Family Services*, 6 Misc.3d 1026 (Sup. Ct., Rensselaer County, 2005), the Court held that the fact that child protective records are confidential pursuant to the Social Services makes them exempt from FOIL, and that the only way that CPS records can be made available is pursuant to SSL §§422 and 422-a.

e) Adoption Records – DRL §114; PHL §4138(c)

In addition to the broad blanket of confidentiality provided to adoption records under SSL § 372, New York’s Domestic Relations Law § 114 provides that the records of the adoption court are to be sealed after an order of adoption is made. These records may only be disclosed by order of the adoption court or supreme court for good cause shown after notice is given to the adoptive parents and to other additional persons as the court may direct. However, the statute makes no reference to agency records, whether related to the adoption or prior foster. It is the position of OCFS that DRL §114 is controlling, but there is no definitive statute or case law on this point.

In addition, Public Health Law §4138(c) provides that adoption “records and information shall be kept strictly confidential except as specifically authorized by law.”
f) Preventive Services Records – SSL §§ 409, 409-a

Preventive services records are discussed in SSL §§409 and 409-a. SSL §409 defines “preventive services,” and SSL §409-a discusses confidentiality of preventive services record in the context of their release to the comptroller’s office of the State or of the City of New York, or of the county officer designated to perform that county’s auditing function.

18 NYCRR 423.7(b) states that preventive services records are confidential, and further states that these records may only be open to the inspection of: (1) New York State DSS (OCFS); (2) the social services district; (3) a preventive service or authorized agency providing service to the child or the family; (4) any person or entity upon an order of a court of competent jurisdiction; or (5) any other person or entity providing or agreeing to provide services to the child or the child’s family upon the written consent of the child or the child’s parent executed in accordance with 18 NYCRR 423.7(e). 18 NYCRR 423.7(e) contains the specific requirements of the consent.

Like for other DSS records, a subpoena or other type of order for preventive services records must be obtained on notice to DSS, and must be issued by a judge.

g) Child Support Enforcement Records – SSL § 111-v; 42 USCA 654(26)

As a general rule, child support enforcement records are confidential pursuant to SSL §111-v and 42 USCA 654(26). However, there are also specific limitations attached to different sources of information (i.e., federal tax return information, FIDM information). Information obtained by the child support worker or program is to be maintained in a confidential manner and shall not be disclosed except for the purpose of, and to the extent necessary to, establish paternity, or establish, modify or enforce an order of support, for administration of the child support program, or as specifically authorized by other laws. SSL §111-v(5) states that the safeguards established in the section apply to local social services districts and contractors as well as to the State agency. Unauthorized disclosure of information can result in employee disciplinary proceedings, civil liability, and prosecution as a class A misdemeanor. SSL §111-v(2)(d), (3), (4).

The federal government adopted new regulation effective in 2010. 45 CFR 303. 21 and 307.13. These regulations attempted to pull all of the rules for different sources of information into one place. Conforming amendments to the New York regulations are pending. The current New York regulation related to the confidentiality of child support records is found in 18 NYCRR 347.19. This regulation states that all information obtained by the agency is confidential, whether or not it is contained in the written record or the CSMS/ASSETS record.
h) Adult Protective Services Records – SSL § 473-e

Adult Protective records are covered in Social Services Law (SSL) §473-e. Records include referrals as well as any other information obtained, including written reports, names of sources and photographs. SSL §473-e(2). 18 NYCRR 457.16(g) further defines “record” as any information in the possession of the DSS regarding the subject of a report. All of this information is confidential and, unless released with the written permission of the subject of the report or their authorized representative, may only be released to certain enumerated persons or entities, none of which include a requesting party under FOIL.

SSL §473-e(4) states that before the records are released, DSS must be satisfied that the confidential character of the records will be maintained and that they will only be used for the purposes for which they were made available.

SSL §473-e(3) authorizes DSS to withhold information in the record that it believes would identify a person who made a referral or who cooperated in an investigation of a referral if DSS finds that the release would be detrimental to the safety of interest of such person.

2. Privileged Communications

Some district records are exempt because they are covered by a specific privilege – most often in our roles, attorney work product and material prepared in anticipation of litigation,15 or attorney-client communication.16

Attorney Work Product/Litigation Preparation: This material may include “interviews, statements, memoranda, correspondence, briefs, mental impressions, [and] personal beliefs’ conduct, prepared, or held by the attorney”.17 Arguably, it could also include documents prepared by the fraud investigative staff if the documents are leading to a referral for criminal prosecution or an administrative disqualification hearing. It may also protect the agency’s work in preparing for, and commenting on the proceedings of, a fair hearing (but, of course, not the actual case records).18

Attorney-Client Communication: “To qualify for the privilege such communications must have been made for the purpose of obtaining or facilitating the rendition of legal advice or services.”19 DSS counsel should ensure that appropriate reference to this privilege is included in all materials to which you and your client want the privilege to attach. Given that our roles often involve business and programmatic decisions that are not necessarily for the purpose of responding to a request for legal advice, it is recommended that you do not make this a part of your “auto-signature”, but take the action to label privileged communications, and do not label

15 CPLR § 3101(c).
16 CPLR § 4503(a)(1).
18 CPLR 3101(d)(2).
non-privileged communications. The process of “active labelling” will provide better support to your claim that the material is exempt from disclosure under FOIL.

3. Intra-Agency Communications

New York’s Public Officers Law provides an exemption to FOIL for records which “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.”

In analyzing whether a record fits this exemption, the agency must evaluate whether the record constitutes an opinion or recommendation prepared by agency personnel in a “pre-decision” phase of the deliberative process, which would be “material, prepared to assist an agency decision maker * * * in arriving at his decision [citations and quotations omitted]. Such material is exempt to protect the deliberative process of the government by ensuring that persons in an advisory role would be able to express their opinions freely to agency decision makers.”

4. Records where the release would invade another’s privacy

Recalling that SSL § 136 throws a protective cloak over all social services records, the primary intent appears to safeguard the identity of individuals receiving public assistance and care. Accordingly, any release of lists of data or recipients would automatically invoke the confidentiality exemption under POL § 87(2)(a), but also would implicate the exemption regarding invasion of privacy. The Confidentiality Handbook discusses the application of these kinds of data requests and how to resolve the privacy issue:

A major portion of this statute (SSL §136(1)) is devoted to the examination of records of disbursements made by DSS for public assistance and care by a “bona fide news disseminating firm.” All kidding aside, this probably does include your local newspaper and television stations. There must be a written request from the firm and it must be granted within five (5) days, provided that the firm provides written assurance before seeing the records that it will not publicly disclose or acquiesce in the public disclosure of the names and addresses of the applicant/recipient (A/R). See also 18 NYCRR 357.3(g). The only exception to the disclosure of names if found in SSL §136(4) which allows disclosure of the identities of people charged with crimes related to their application or receipt of public assistance. My reading of SSL §136 is that disclosure of public assistance records to a news firm is limited to disbursements only. In 1998, A Supreme Court Justice interpreted SSL §136(1) to entitle a newspaper to examine records for the names and addresses of public assistance recipients, provided that the newspaper does not publicly disclose the information. The newspaper

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However, this exemption to FOIL is considered a sort of equitable “catch all” to protect the privacy of individuals interacting with government entities where no particular other exemption applies. “Pursuant to Public Officers Law § 87(2)(b), an agency may deny access to records where disclosure would constitute an unwarranted invasion of personal privacy under the provisions of [Public Officers Law § 89(2)(b)]. Where none of the [exemptions under Public Officers Law § 89(2)(b) are] applicable, a court ‘must decide whether any invasion of privacy ... is unwarranted by balancing the privacy interests at stake against the public interest in disclosure of the information.’”

Here are some other examples of records which were and some which were not, held to be records that would pose an unwarranted invasion of a person’s privacy, if disclosed:

**Would Be an Invasion**

- identifying characteristics of witnesses in a requester’s criminal prosecution
- criminal records relating to a criminal prosecution that would tend to identify the victims, regardless of whether redaction might remove details that would tend to identify the victims
- the home addresses of the principal or officers of a corporate licensee
- unproven or unaccepted charges or complaints made by an employee’s superiors until a final determination is made

**Would NOT Be an Invasion**

- records pertaining to public employees that are relevant to the performance of their duties
- the substance of a written complaint
- burial permits

### 5. Law Enforcement Records

While the LDSS is not an agency charged with “law enforcement” responsibilities in the generally understood concept of the term, the fraud investigative work of the LDSS often does intersect with criminal investigations. Therefore, it may be appropriate to invoke this exemption when that role intersects with the development of a welfare fraud investigation and a referral to the District Attorney’s office as envisioned by Social Services Law. The law provides an exemption for the release of LDSS records under FOIL if they “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.”

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22 Prall v. New York City Dep’t of Corr., 129 A.D.3d 734, 736 (2nd Dep’t 2015) (citations omitted).
23 Taken from 92 N.Y. Jur. 2d Records and Recording § 49 (citations omitted).
The LDSS is under a statutory mandate (SSL § 145[1]) to develop the record and report to the appropriate prosecutor whenever “a social services official has reason to believe that any person has violated any provision of this section, [whereupon] the appropriate district attorney or other prosecuting official [...] shall immediately evaluate the facts and evidence and take appropriate action.” Accordingly, it might be a reasonable interpretation, particularly where confidential witnesses provided information that developed the findings of the fraud investigative staff, that disclosure of those records might “identify a confidential source”, and therefore be exempted from disclosure under POL § 87(2)(e)(iii). See, also, 18 NYCRR 357.3(c)(1)(ii).

A denial based on this exemption, even where the agency was not a traditional prosecution or police-type agency, was found appropriate in a Third Department case involving audit records of the NY State Education Department, which audits had led to criminal convictions. The appellate court acknowledged that the requested records “did not arise from a specific law enforcement investigation, [but] they were nevertheless compiled with law enforcement purposes in mind, and are exempt from disclosure if their release would enable individuals to ‘frustrate pending or prospective investigations or to use that information to impede a prosecution.”

There is an interesting provision in the Federal FOIA statutory scheme that does not explicitly exist in NY’s FOIL framework, which is called a “Glomar Response”. The agency who invokes the Glomar doctrine under federal law is permitted to refuse to confirm or deny the existence of a requested document, because even verifying that a document may or may not exist could jeopardize law enforcement efforts or put a person at physical risk. There is one New York County Supreme Court decision which stated that the NYPD could use a Glomar Response, because the agency had sufficiently detailed its supporting affidavit confirmation or denial of investigation records related to surveillance of petitioner and of the Mosque of Islamic Brotherhood might be covered under the existing FOIL exemptions, in that release might “interfere with law enforcement investigations; [or the request documents are] records compiled for law enforcement purposes, which if disclosed, would reveal criminal investigative techniques or procedures; and [...], which if disclosed, could endanger the life or safety of a person.”

The LDSS conceivably may have a reason, in some fraud investigations, to consider invoking this kind of response.

D. Converting a Deniable FOIL Request to a Client’s Request for Records

Some Requestors ARE entitled to confidential records, just not under FOIL. A particular FOIL request may be subject to denial because of a confidentiality statute which protects them from disclosure under FOIL, but the requesting party might have been entitled to them if she had asked for access based on other provisions of Social Services Law. Although a record may be exempt from disclosure under FOIL an agency may, nevertheless, disclose that record, in whole or in part, as a matter of discretion. You might wish to review

with your client whether to adopt a policy that calls for converting an inappropriate FOIL to a potentially legitimate request by a person who could otherwise have access to the records. If the agency chooses to convert the request into a client request, the FOIL request must still be denied with specificity and a detailed explanation, based on the confidentiality exemption under POL § 87, but direct the individual to reach out to the appropriate records custodian for the particular program.

**Non-Services Cases:** For case records in the benefits programs (e.g., SNAP, HEAP, Temporary Assistance or Medicaid), 18 NYCRR 357.3 provides "(c) Disclosure to applicant, recipient, or persons acting in his behalf. (1) The case record **shall be made 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.

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.

**Services Cases:** A two-prong analysis must be performed to determine whether the purported FOIL request is really a request from a person entitled to the records in a services case. The first part of the analysis requires a determination of what role the requesting party played in the case: is he or she the subject or a person named in the report, or a person representing that individual? The second step requires evaluation as to whether the applicable confidentiality statute provides for release of some or all of the case records to the identified individual, based on his or her role.

For child welfare records, SSL § 422(4)(A)(d) provides that the case record of an indicated report may be made available to “any person who is the subject of the report or other persons named in the report or their representatives, including their attorneys. The relevant excerpt from the SSL Confidentiality Handbook explains:

SSL §422(4)(A)(d) says that “any person who is the subject of the report or other persons named in the report” may have the record made available to them. Notice that it does not say their representative or their lawyer may have access to the record under this exception. Ridiculous as this may seem at times, representatives should not be given access to CPS records under this exception, even if they have a release. Nor should access or information be given in response to an attorney-issued subpoena. MCDSS has a policy for dealing with requests by individuals to review and copy their own records. In the absence of any statutory, regulatory or case law to the contrary, you should only allow individuals to see their records. OCFS takes a more expansive view and does allow attorneys to have access to their client’s records provided that they have a valid authorization from their client.

“Subject of the report” is defined in SSL §412(4) as the person who has been reported to the central register as the person responsible for inflicting the injury, abuse or maltreatment on the
child, or allows such injury to be inflicted. There can be more than one “subject of the report.”
“(O)ther persons named in the report” is defined in SSL §412(5) as the child who has been
reported to the central registry, and the child’s parent, guardian, custodian, or other person legally
responsible for the child who is not named as the subject of the report.”

For FAR case records, the subject of the report is also entitled to access.30

For adult protective services records, SSL § 473-e provides that the records,

with the written permission of the subject of the report or their authorized representative, may only
be released to […] any person who is the subject of the report or such person’s authorized
representative. “Subject of the report” is the subject of the referral or applications for APS
services or is receiving or has received APS services. “Representative” is defined in 18 NYCRR
457.16(a)(2) as a person named in writing by the subject to be the subject’s representative, a
person appointed by the court to act in the interests of the subject, or the subject’s legal counsel.

E. How to Process a FOIL Request

The general outline of the mandatory process under FOIL is found in Public Officers Law § 89.

“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 acknowledgement
of the receipt of such request and a statement of the approximate date, which shall be
reasonable under the circumstances of the request, when such request will be granted or
denied, including, where appropriate, a statement that access to the record will be determined
in accordance with subdivision five of this section. An agency shall not deny a request on the
basis that the request is voluminous or that locating or reviewing the requested records or
providing the requested copies is burdensome because the agency lacks sufficient staffing or on
any other basis if the agency may engage an outside professional service to provide copying,
programming or other services required to provide the copy, the costs of which the agency may
recover pursuant to paragraph (c) of subdivision one of section eighty-seven of this article.”31

These directions and limitations are “directory rather than mandatory.”32 In other words, the agency
does not “forfeit” the right to withhold the documents based on a valid exemption simply by failing to
sufficiently explain the reason for the denial, or missing a deadline, prior to being hit with an Article 78 petition.

32 Floyd v. McGuire, 87 A.D.2d 388, 390 (1st Dep’t 1982).
1. General Time Frames

a. Initial Response – the Acknowledgement, Denial in whole or in part, or the Request for more Information:

Acknowledgment of Receipt: FOIL directs that, within five (5) business days of receiving a written request for a record reasonably described, an agency subject to FOIL’s provisions shall either: 1) make such record available to the requestor; 2) deny the request, in writing; or 3) furnish a written acknowledgment of the receipt of the request, inclusive of a statement of the approximate date upon which the request will be granted or denied. Failure of the agency to timely respond to an initial FOIL request, as set forth above, may be deemed a constructive denial, thus triggering the requestor's right to file an administrative appeal.33

Denial, in whole or in part: See below in this section, D. Denials.

Request for More Information: The agency may need more information to correctly identify the types of information that the requesting party is seeking. Under POL § 89(3)(a), the requested documents must be “reasonably described” so that an agency can locate and identify the records in question.34 If the required five-day letter is sent which requires further information, and the requesting party does not respond, an agency may treat that failure as abandonment of the FOIL request.35

Production: Production of the responsive documents or data should occur within twenty (20) business days from the date of the acknowledgement. “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.”36

Articulate a Justification: If production is conditioned upon prepayment of an identified fee,37 the agency bears the burden to articulate a justification for the imposition of those fees.38

Process to Appeal Must be Clearly Stated: In letters that contain a denial, condition for performance or fee, the process and right to appeal should be clearly explained.39 An agency’s failure to notify the petitioner that an appeal is available, or a failure to provide the mechanism for an appeal, will foreclose the defense of failure to exhaust remedies.40

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35 See, e.g., Timmons v. Records Access Officer, 271 A.D.2d 320, 320 (1st Dep’t 2000).
37 “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.” Id.
39 “District Attorney failed to advise petitioner of the availability of an administrative appeal in the office [see, 21 NYCRR 1401.7(b) ] and failed to demonstrate in this proceeding that procedures for such an appeal had, in fact, even been established.” Barrett v. Morganthau, 74 N.Y.2d 907, 909 (1989).
b. Administrative Appeal:

Public Officers Law § 89(4)(a) provides that 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.” [Emphasis supplied.]

The decision of the Appeals Officer is the responsive document that most clearly requires a full explanation of the basis for denial. Finally, the Appeals Officer must forward to the Committee on Open Government copies of both the appeal and the determination thereon.

LDSS counsel should note that an unreasonable, unjustified, failure or inordinate delay in responding to a FOIL request may prompt a court to grant attorneys’ fees and costs to the prevailing party. In a case involving the span of more than twelve months between the original FOIL request and the agency’s failure to respond to a second administrative appeal (the first appeal was apparently “lost”), the Third Department awarded counsel fees and other litigation costs to the Legal Aid Society, deeming the failure to respond within the statutory timeframes a “constructive denial.”

2. Fee Schedule

The LDSS may charge a fee for certain costs incurred in responding to a valid FOIL request. Public Officers Law §§ 87(1)(b)-(c) set forth the parameters:

First, “preparing a copy shall not include search time or administrative costs, and no fee shall be charged unless at least two hours of agency employee time is needed to prepare a copy of the record requested. A person requesting a record shall be informed of the estimated cost of preparing a copy of the record if more than two hours of an agency employee's time is needed, or if an outside professional service would be retained to prepare a copy of the record.” POL § 87(1)(c)(4).

If the party requests paper copies, an agency may charge up to twenty-five cents per photocopy up to 9”x14”. If the paper copies requested are larger than 9’x14’, the agency can charge the actual cost of making the copies. See POL § 87(1)(b)(iii).

If the records are digital, and you can deliver the response electronically, there may be no basis for charging a fee. See POL §§ 87(1)(b) and (c).

If the party is requesting a large volume of electronic records, the LDSS may recover the actual cost of reproducing the records. When it takes an agency more than 2 hours to prepare, extract or generate electronic

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42 Id.
data, the agency could charge for the employee’s time – but that rate must be based on the salary or hourly wage of the employee with the lowest position who is capable of identifying and producing the documents. See POL §§ 87(1)(b) and (c). 44

If the party requests that paper records be scanned and forwarded to him electronically, please review the following advisory opinions of the New York State Committee on Open Government: 18568, 18620. 45 [A note on the Advisory Opinions: courts will consider these letter opinions as guidance, but are not bound by the findings of the Committee on Open Government. 46]

The LDSS may waive a fee in stated circumstances. For example, the State has chosen to “waive the collection of such a fee on any request for [OTDA, OCFS] copies of 10 or less pages.” 47

F. Denials

The Agency bears the burden of establishing that there is a specific exemption in the law to deny the request. 48 The agency’s letter denying the request based on an enumerated exemption should be clear and specific as to the nature of the records which, while held and located, will not be released and on what basis.

1. Bases

a. Based on Exemption

Given that any DSS record that identifies the subject of a report or parties receiving services or benefits will be covered by some level of statutory protection from disclosure, it will often be the case that counsel will have to advise the LDSS to deny the request. However, a flat denial based on a labeled exemption will not meet the requirements of FOIL. As the New York Court of Appeals stated in 1996, the only way the public may have maximum access to government records was to make sure that the “exemptions are to be narrowly construed, with the burden resting on the agency to demonstrate that the requested material indeed qualifies for exemption.” 49

“In the FOIL context, the agency must provide specific and particularized justification for not disclosing the material and provide evidentiary support for its position [...]. As such, under FOIL, an agency cannot simply quote the language of an exception without enumerating or describing the documents.” 50

As an example, a denial of a request for records pertaining to the records appeal officer handling of a FOIL request as exempted as records covered by “privilege” was found insufficient. 51

44 Advisory Opinion 18620 of the New York State Committee on Open Government (July 18, 2011).
45 Advisory Opinion 18568 of the New York State Committee on Open Government (July 6, 2011). Advisory Opinion 18620 of the New York State Committee on Open Government (July 18, 2011).
46 See, e.g., Prall v. New York City Dep’t of Corr., 40 Misc. 3d 940, 946 (Queens Sup. Ct. 2013), aff’d, 129 A.D.3d 734 (2nd Dep’t 2015).
47 N.Y. Comp. Codes R. & Regs. tit. 18, § 340.7
50 Weisshaus v. Port Authority of New York and New Jersey, N.Y.Sup. | July 01, 2015 | --- N.Y.S.3d ----
51 “Merely attaching privilege log to agency’s records appeal officer’s affidavit, without any corresponding reference to the cited exemptions or any explanation as to the manner in which such exemptions applied to the documents...”
The agency may have multiple bases for denying the release based on the statutory exemptions. For example, the New York State Committee on Open Government, which provides advisory opinions to individuals seeking or responding to FOIL requests reviewed a case in which the person sought records relating to allegations of abuse or maltreatment at [a homeless shelter], and specifically wanted “all personal identifying items including names and ID #s be excluded from the requested documents.” The Opinion said that the New York City Department of Homeless Services must “disclose them, except to the extent that disclosure would constitute an unwarranted invasion of personal privacy, could endanger life or safety, or permit the identification of an applicant for or recipient of public assistance.”

b. Inability to Locate Records

With all denials, the agency must be very specific about the basis for not producing the responsive documents. That includes a denial based on an inability to locate the requested records. Where applicable, the agency must certify that it does not possess the requested record, or after a diligent search that the record cannot be located. A district can satisfy the certification requirement by “averring that all responsive documents had been disclosed and that it had conducted a diligent search for the documents it could not locate.”

2. Partial Denial

Certain provisions of the confidentiality statutes discussed herein and in the Confidentiality Handbook may provide a basis for denying access to some, but not all, of the requested records. For example, a FOIL request may be received asking for a list of property owners who received Temporary Assistance shelter grant vouchers on behalf of TA recipients. This request might be partially denied on the following basis: properties that were owner-occupied and single family dwellings would essentially identify the Temporary Assistance recipient, which would violate SSL § 136. Accordingly, DSS would be able to provide the commercial real estate owners’ names, the number of units where the rent was vouchedered, and provided the number of “landlords” whose names DSS could not release based on the likelihood that more detailed information would disclose the identity of the recipients, which is prohibited under SSL § 136.

3. What is NOT a Basis to Deny a FOIL Request

a. Improper or No Stated Purpose of the Request

It is long-standing tenet of New York’s Freedom of Information Law that “all records of governmental agencies are presumptively available for public inspection and copying, without regard

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52 New York State Committee on Open Government, FOIL Advisory Opinion 19205 (November 20, 2014).
53 State agency’s response to prison inmate’s request, under Freedom of Information Law (FOIL), for documents relating to his criminal trial and conviction failed to satisfy FOIL’s certification requirement that agency did not have possession of the records, or that the records could not be found, where agency indicated only that there was “nothing in the case file” that met requester’s description of the items. New York Public Officers Law § 89(3). Baez v. Brown, 124 A.D.3d 881, 2015 WL 360956 (2d Dep’t 2015).
54 N.Y. Pub. Off. Law § 89(3).
to status, need, good faith or purpose of the applicant requesting access.” 56 There is no provision in the law that requires the requesting party to state a particular reason in order to justify access. For example, the party requesting access under FOIL might be looking to support his or her case against the very agency that holds the records. Access to records of a government agency under the Freedom of Information Law (FOIL) is not affected by the fact that there is pending or potential litigation between the person making the request and the agency. 57 A company seeking to “data mine” the government records for its commercial advantage was equally eligible to obtain appropriate records. In this case, the Court of Appeals reiterated that “FOIL does not require the party requesting the information to show any particular need or purpose.” 58

b. Originator of the Record was not the LDSS

If the record is in the files of the agency, it is presumptively discoverable via FOIL, absent an exemption. FOIL provides for a “very broad definition” 59 of records, including papers or documents that are received from outside the agency “any information kept, held, filed, produced or reproduced by, with or for any 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, photo, letters, microfilms, computer tapes or discs, rules, regulations or codes.” POL § 86(4).

c. Producing responsive documents will take too much time or money

New York’s FOIL explicitly provides that a district “shall not deny a request on the basis that the request is voluminous or that locating or reviewing the requested records or providing the requested copies is burdensome because the agency lacks sufficient staffing or on any other basis if the agency may engage an outside professional service to provide copying, programming or other services required to provide the copy, the costs of which the agency may recover” (see, section on Fees, below). 60

d. The Agency will have to create a report (the “create a record” denial)

While it is true that, in responding to a FOIL request, the LDSS does not have to create a record it does not have 61, a computer query is required when that effort may produce a response that meets the requestor’s needs. In other words, if the requested data exists in in the district’s accessible databases, and all that is required is a “simple manipulation of the computer” to create the response, this will not “be treated as creation of a new document”, 62 and the district must run the report.

G. Selected Cases:

Foster Care Records; Converting a FOIL Request to a Client Request: Article 78 proceeding was brought to review a determination of the commissioner of a county department of social services which denied the petitioner's request for access to records in its possession pertaining to himself and his natural mother. The Supreme Court, Nassau County, Winick, J., dismissed the proceeding, and the petitioner appealed. The Supreme

61 “Nothing in this article shall be construed to require any entity to prepare any record not possessed or maintained by such entity”. N.Y. Pub. Off. Law § 89(3)(a).
Court, Appellate Division, held that: (1) section of Social Services Law providing that medical histories of a child in foster care and of his or her natural parents shall be provided by authorized agency to such child when discharged to his or her own care was applicable to petitioner, notwithstanding fact that statute did not become effective until several years after petitioner was discharged into his own care, and (2) records in possession of county department of social services pertaining to petitioner and his natural mother were not exempt from disclosure under Freedom of Information Law. Malowsky v. D’Elia, 160 A.D.2d 798, 553 N.Y.S.2d 836 (1990)

Child Protective Records; Elisa’s Law; Converting a FOIL Request to a Client Request: Petitioners sought access to county department of social services records relating to family after father was convicted of murder based on fire that killed his children. After access to most information was denied, petitioners brought article 78 proceeding pursuant to Freedom of Information Law (FOIL). The Supreme Court, Ontario County, Ark, J., held that records would be made available unless department requested in camera inspection. Gannett Co. v. Cty. of Ontario, 173 Misc. 2d 304 (Sup. Ct. 1997)

Mental Health Records covered by Social Services Law § 136: Academic researcher brought Article 78 petition seeking disclosure of records (in redacted form, of approximately 1900 intake referral forms maintained by the Visiting Psychiatric Service) 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. Rabinowitz v. Hammons, 228 A.D.2d 369 (1st Dep’t 1996)

Partial Denial appropriate based on Unwarranted Privacy Invasion Exemption; Purpose of Request not a Basis for Denial: Newspapers brought Article 78 proceeding to review determination denying Freedom of Information Law (FOIL) requests for data in statewide centralized health care system. The date review board was alleged to evaluate the purpose of the request before granting access, a factor that petitioners alleged was contrary to the goal of FOIL. The Supreme Court, Albany County, Ceresia, J., held that: (1) newspapers were entitled to disclosure of physician identifier information, and (2) regulations relating to statewide centralized health care system were unenforceable to extent they purported to create personal privacy exemption which did not exist under public officers law. New York Times Co. v. New York State Dep’t of Health, 173 Misc. 2d 310 (Sup. Ct. 1997) aff’d, 243 A.D.2d 157 (3rd Dep’t 1998)

Child Abuse Reports Exempted: Court rejected 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. 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. Children’s Rights v. New York State Office of Children, Family Servs., 6 Misc. 3d 1026(A) (Rensselaer Sup. Ct. 2005)

Intra-Agency and Attorney-Client Privilege Exemptions; Partial Denial; Destruction of Privilege: Requestor filed Article 78 proceeding seeking judicial review of agency’s partial denial of his Freedom of Information Law (FOIL) request. The Supreme Court, Albany County, Lamont, J., dismissed requestor's application, and he appealed. Holdings: The Supreme Court, Appellate Division, Kane, J., held that: (1) appraisal report prepared by
agency and review of that report were intra-agency materials exempt from disclosure; (2) documents prepared by Attorney General's office in connection with agency's project were exempt from disclosure; and (3) letter prepared by Attorney General's office for agency and memorandum prepared in response to letter from third party were not exempt from disclosure. A document prepared in response to letter from third party was not exempt, when privilege was destroyed when the documents was copied to third party. Morgan v. New York State Dep't of Envtl. Conservation, 9 A.D.3d 586 (3rd Dep’t 2004)

Other case of note: Trade Secrets in Proposal Submitted to OTDA RFP: 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. Note that the Court relied on OTDA's explicit provision in RFP: “All of the proposals upon submission will become the property of the Department. The Department will have the right to disclose all or any part of a proposal to public inspection based on its determination of what disclosure will serve the public interest. Prospective offerors are further advised that, except for trade secrets and certain personnel information (both of which the Department has reserved the right to disclose), all parts of proposals must be disclosed to those members of the general public making inquiry under the New York State Freedom of Information Law (N.Y.S. Public Officers Law, Article 6).” Lockheed Martin IMS Corp. v. State Dep't of Family Assistance, 256 A.D.2d 847, 849 (3rd Dep’t 1998)