

Releases, Subpoenas and FOILs, Oh My!

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Responding to FOIL requests

What is FOIL?

New York Public
Officers Law,
Article 6

Mechanics of the FOIL process
NY Public Officers Law §67(1)(b).

The requirement for the agency to have
a procedure to make a FOIL request;

The requirement for the agency to have
a person to direct the FOIL requests to;
and

The authority to charge for the copying
or reproduction of the information that
is being released.

New York State
Committee on Open Government
advisory opinions

What social services records are subject to a FOIL request?

Advisory opinion boilerplate language: "...first, as a general matter, the Freedom of Information Law is based upon a presumption of access. Stated differently, all records of an agency are available, except to the extent that records or portions thereof fall within one or more grounds for denial appearing in §87(2)(a) through (j) of the Law."

What parts of Public Officers Law §87(2) contain the most pertinent grounds for denial, for our purposes?

Records that:
(a) are specifically exempted from disclosure by state or federal statute;

Records that:

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

Records that:

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

Records that:

(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;

Records that:

(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.

Matter of Madeiros v New York State Educ. Dept., 30 NY3d 67 (2017).

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

Records that:

(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;

Records that:

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

What exceptions to FOIL protect certain social services client records from disclosure?

Public Officers Law §67(2)(a) permits the local district to deny access to records that "...are specifically exempted from disclosure by state or federal statute."

Can DSS client records be obtained by a FOIL request in certain situations, or is the law and/or regulation that pertain the client record confidentiality the only method for disclosure?

Advisory opinion
FOIL- AO- 19205

Paine v Chick,
50 AD2d 686 (3rd Dept., 1975)

Rabinowitz v. Hammons,
228 AD2d 369 (1st Dept., 1996)

New York News, Inc. v Grinker,
142 Misc. 2d 325 (Supreme Court, New York
County, 1989)

Advisory opinion
FOIL-AO-16155 (2006)

*Newsday v. Empire State Development
Corporation,*
98 NY2d 359 (2002)

Castillo v Bailey,
2010 N.Y. Misc. LEXIS 5152 *;
2010 NY Slip Op 32972(U)
(Supreme Court, New York County, 2010)

Wise v Battistoni,
208 AD2d 755 (2nd Dept., 1994)

What is the FOIL request response
process?

The following are some of the possible
ways in which a FOIL request might
play out:

1. Provide the requested records in full.

2. Provide partial records,
and deny the remainder
of the request.

3. Deny the request in its entirety.

4. If there is a denial, the requestor can make an appeal to the County Records Officer to reconsider their denial.

5. If there is a denial, the requestor can make an appeal to the County Records Officer to reconsider their denial.

Can a local district, in denying a FOIL request, chose to refuse to confirm whether or not the requested records exist?

Matter of Abdur-Rashid v. New York City Police Department, 2018 N.Y. LEXIS 723 *;
2018 NY Slip Op 02206.

Obtaining records via releases and subpoenas

Although we are primarily talking about obtaining records for trial, a few words about production of records to various parts of the local social services district:

Records for CPS:

- Social Services Law
§415
- Social Services Law
§416

Records for Child Support Enforcement:

- Social Services Law §111-p
- Social Services Law §111-r
- Social Services Law § 111-s
- Social Services Law §144

Outside of the CSEU subpoena, does an LDSS or its attorney have a general “agency” subpoena authority?

Legislative initiatives?

Other agencies that do have agency subpoena authority?

- As mentioned, a CSEU under Social Services Law §111-p.
- A district attorney under the authority of Criminal Procedure Law §610.20(2)
- NYS Department of Human Rights, under Executive Law §295(7), 9 NYCRR 465.14

Obtaining Records for Trial or Hearing:

Release vs. Subpoena: what is the practice?

Records for hearing/trial: what is required?

Records in custody of court?

- CPLR §2306(b)
- When a subpoena is judicially issued for records for trial, the subpoena usually requires that the records be delivered to the court.

Certification to enter in to evidence?

- CPLR §4518- business records, requirement of certification for admissibility.
- CPLR §2307- a subpoena for government records may be satisfied by a certified copy of the records.

Requirements for obtaining particular types of
records for hearing/trial

Medical records

Statutes/regulations

CPLR 2306

CPLR 2302(b)

Public Health Law §18

HIPAA- 45 CFR 164.512-

HIPAA Sidebar: what is a “covered
entity?”

45 CFR 160.103

45 CFR 164.105- “hybrid entity,”

HIPAA disclosure exceptions that permit a covered entity to comply with Social Services Law §415 and Social Services Law §416:

45 CFR 164.512-

HIPAA disclosure exceptions that permit a covered entity to comply with a subpoena:

45 CFR 164.512

HIPAA Sidebar: State law preemption

45 CFR 160.202

Will a release work?

Substance abuse treatment records

Statutes/regulations:

NY Mental Hygiene Law §22.05(b)

NY Public Health Law §18

42 USC 290dd-2

42 CFR 2.64

42 CFR 2.63

42 CFR 2.61

Preemption

42 CFR 2.20

Will a release work?

Mental health records

Statutes/regulations:

New York Mental Hygiene Law §33.13
HIPAA

Will a release work?

Sample Papers

Law enforcement records

Statutes/regulations:

For the purposes of the production of State/local police or county sheriff records at trial or hearing, you might need to utilize CPLR 2307

Questions/Final Comments