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Committee on Open Government

Welcome to the Committee on Open Government

Your right to know

New York State's Open Government Laws

Committee on Open Government

- **Freedom of Information Law**
- **Open Meetings Law**
- **Personal Privacy Protection Law**

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The Committee

The Committee on Open Government is responsible for overseeing the implementation of the Freedom of Information Law (Public Officers Law, sections 84-90) and the Open Meetings Law (Public Officers Law, sections 100-111). The Freedom of Information Law governs rights of access to government records, while the Open Meetings Law concerns the conduct of meetings of public bodies and the right to attend those meetings.

The committee also administers the Personal Privacy Protection Law.

The committee is composed of 11 members, 5 from government and 6 from the public. The five government members are the Lieutenant Governor, the Secretary of State, whose office acts as secretariat for the committee, the Commissioner of General Services, the Director of the Budget, and one elected local government official appointed by the Governor. Of the six public members, at least two must be or have been representatives of the news media.

The Freedom of Information Law directs the committee to furnish advice to agencies, the public and the news media, issue regulations and report its observations and recommendations to the Governor and the Legislature annually. Similarly, under the Open Meetings Law, the committee issues advisory opinions, reviews the operation of the law and reports its findings and recommendations annually to the Legislature.

When questions arise under either the Freedom of Information Law or the Open Meetings Law, the committee can provide written or oral advice and attempt to resolve controversies in which rights may be unclear. Since its creation in 1974, nearly 20,000 written advisory opinions have been prepared by the committee at the request of government, the public and the news media. In addition, several thousand oral opinions have been provided by telephone.

If you need advice regarding either the Freedom of Information Law or the Open Meetings Law, feel free to write to: Committee on Open Government, NYS Department of State, 41 State Street, Albany, NY 12231, or call (518) 474-2518, Fax (518) 474-1927

In addition, the opinions prepared since early 1993 that have educational or precedential value are identified by means of a series of key phrases in separate indices created in relation to the Freedom of Information Law and the Open Meetings Law. The full text of those opinions is now available through the Department of State's website. To gain direct access to the text of the opinions and open government statutes, you can search by entering "Committee on Open Government: or by using the following Internet address: <http://www.dos.state.ny.us/coog/coogwww.html>

Each index to advisory opinions will be updated periodically to ensure that interested persons and government agencies will have the ability to obtain opinions recently rendered.

In addition to advisory opinions and the indices to opinions, the website also includes

- The text of the Freedom of Information, Open Meetings and Personal Privacy Protection laws;
- the rules and regulations promulgated by the committee (21 NYCRR Part 1401);
- *Your right to know*, this guide to the Freedom of Information and Open Meetings Laws;
- *You should know*, which describes the Personal Privacy Protection Law;
- sample requests for records made via email
- responses to "FAQs" (frequently asked questions); and
- *Food for Thought*, issues relating to e-mail
- Annual Report to the Governor and the State Legislature

Freedom of Information

The Freedom of Information Law, effective January 1, 1978, reaffirms your right to know how your government operates. It provides rights of access to records reflective of governmental decisions and policies that affect the lives of every New Yorker. The law preserves the Committee on Open Government, which was created by enactment of the original Freedom of Information Law in 1974.

Scope of the law

The law defines "agency" to include all units of state and local government in New York State, including state agencies, public corporations and authorities, as well as any other governmental entities performing a governmental function for the state or for one or more units of local government in the state (section 86(3)). The term "agency" does not include the State Legislature or the courts. As such, for purposes of clarity, "agency" will be used hereinafter to include all entities of government in New York, except the State Legislature and the courts, both of which will be discussed later.

What is a record?

The law defines "record" as "any information kept, held, filed, produced or reproduced by, with or for an agency or the State Legislature, in any physical form whatsoever. . ." (section 86(4)). Thus it is clear that items such as tape recordings, microfilm and computer discs fall within the definition of "record." An agency is not required to create a new record or provide information in response to questions to comply with the law. However, the courts have held that an agency must provide records in the form requested if it has the ability to do so. For instance, if records are accessible on paper on a computer tape or disk, the public may choose to obtain them either way.

Accessible records

The original statute granted rights of access to nine specified categories of records to the exclusion of all others. Therefore, unless a record conformed to one of the categories of accessible records, it was presumed deniable.

The current law, reversing that presumption, states that all records are accessible, except records or portions of records that fall within one of nine categories of deniable records (section 87(2)).

Deniable records include records or portions thereof that:

- a. are specifically exempted from disclosure by state or federal statute;
- b. would if disclosed result in an unwarranted invasion of personal privacy;
- c. would if disclosed 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 relative to a criminal investigation; or
- iv. reveal criminal investigative techniques or procedures, except routine techniques and procedures;
- f. could if disclosed endanger the life or safety of any person;
- g. are inter-agency or intra-agency communications, except to the extent that such materials consist of:
 - 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;
- h. are examination questions or answers that are requested prior to the final administration of such questions; or
- 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.

The categories of deniable records are generally directed to the effects of disclosure. They are based in great measure upon the notion that disclosure would in some instances "impair," "cause substantial injury," "interfere," "deprive," "endanger," etc. This represents a significant change from the thrust of the original enactment.

One category of deniable records that does not deal directly with the effects of disclosure is exception (g), which deals with inter-agency and intra-agency materials. The intent of the exception is twofold. Memoranda or letters transmitted from an official of one agency to an official of another or between officials within an agency may be denied, so long as the communications (or portions thereof) are advisory in nature, such as advice, opinions or recommendations. For example, an opinion prepared by staff which may be rejected or accepted by the head of an agency need not be made available. However, the statistical or factual information, as well as the policies and determinations upon which an agency relies in carrying out its duties, should be made available.

There are also special provisions in the law regarding the protection of trade secrets and critical infrastructure information. Those provisions pertain only to state agencies and enable a person submitting records to state agencies to request that records be kept separate and apart from all other agency records on the ground that they constitute trade secrets. In addition, when a request is made for records falling within these special provisions, the submitter of such records is given notice and an opportunity to justify a claim that the records would if disclosed result in substantial injury to his or her competitive position or other harm. A member of the public requesting records may challenge such a claim that records constitute trade secrets.

Generally, the law provides access to existing records. Therefore, an agency need not create a record in response to a request. Nevertheless, each agency must maintain the following records (section 87(3)):

- 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. reasonably detailed current list by subject matter of all records in possession of an agency, whether or not the records are accessible.

Protection of privacy

One of the exceptions to rights of access, referred to earlier, states that records may be withheld when disclosure would result in "an unwarranted invasion of personal privacy" (section 87(2)(b)).

Unless otherwise deniable, disclosure shall not be construed to constitute an unwarranted invasion of personal privacy when identifying details are deleted, when the person to whom a record pertains consents in writing to disclosure, or when upon presenting reasonable proof of identity, a person seeks access to records pertaining to him or her.

How to Obtain Records

Subject matter list

As noted earlier, each agency must maintain a "subject matter list." The list is not a compilation of every record an agency has in its possession, but rather is a list of the subjects or file categories under which records are kept. It must make reference to all records in possession of an agency, whether or not the records are available. You have a right to know the kinds of records agencies maintain.

The subject matter list must be compiled in sufficient detail to permit you to identify the file category of the records sought.

Regulations

Each agency must adopt standards based upon general regulations issued by the committee. These procedures describe how you can inspect and copy records. The committee's regulations and a model designed to enable agencies to easily comply are available on request and on the committee's website.

Designation of records access officer

Under the regulations, each agency must appoint one or more persons as records access officer. The records access officer has the duty of coordinating an agency's response to public requests for records.

The records access officer is responsible for responding to requests directly or ensuring that agency personnel keep the subject matter list up to date, assist you in identifying records sought, make the records promptly available or deny access, in writing, provide copies of records or permit you to make copies, certifying that a copy is a true copy and, if the records cannot be found, certify either that the agency does not have possession of the requested records or that the agency does have the records, but they cannot be found after diligent search.

The regulations also state that the public shall continue to have access to records through officials who have been authorized previously to make information available.

Requests for records

An agency may ask you to make your request in writing. The law merely requires you to "reasonably describe" the record in which you are interested (section 89(3)). Whether a request reasonably describes records often relates to the nature of an agency's filing or recordkeeping system. If records are kept alphabetically, a request for records involving an event occurring on a certain date might not reasonably describe the records. Locating the records in that situation might involve a search for the needle in the haystack, and an agency is not required to engage in that degree of effort. The responsibility of identifying and locating records sought rests to an extent upon the agency. If possible, you should supply dates, titles, file designations, or any other information that will help agency staff to locate requested records, and it may be worthwhile to find out how an agency keeps the records of your interest (i.e., alphabetically, chronologically or by location) so that a proper request can be made.

The law also provides that agencies must accept requests and transmit records requested via email when they have the ability to do so. For additional guidance concerning email requests, see the website.

Within five business days of the receipt of a written request for a record reasonably described, the agency must make the record available, deny access in writing giving the reasons for denial, or furnish a written acknowledgment of receipt of the request and a statement of the approximate date when the request will be granted or denied, which must be reasonable in consideration of attendant circumstances, such as the volume or complexity of the request. The approximate date ordinarily cannot exceed twenty business days from the date of the acknowledgment of the receipt of a request. If it is known within five business days of receipt of the request that more than twenty business days will be needed to grant a request in whole or in part, the agency's acknowledgment must explain the reason and provide a specific date within which it will grant access. Similarly, if the agency acknowledges the receipt of a request and provides an approximate date within twenty business days that cannot be met, it is required to inform the person requesting the record, indicating the reason for the delay, and provide a specific date when it will grant access. When a specific date beyond twenty business days is given, it must be reasonable in relation to the circumstances of the request.

If the agency fails to abide by any of the requirements concerning the time within which it must respond to a request, the request is deemed denied, and the person seeking the records may appeal the denial.

Fees

Copies of records must be made available on request. Except when a different fee is prescribed by statute, an agency may not charge for inspection, certification or search for records, or charge in excess of 25 cents per photocopy up to 9 by 14 inches (section 87(1)(b)(iii)). Fees for copies of other records may be charged based upon the actual cost of reproduction.

Denial of access and appeal

Unless a denial of a request occurs due to a failure to respond in a timely manner, a denial of access must be in writing, stating the reason for the denial and advising you of

your right to appeal to the head or governing body of the agency or the person designated to determine appeals by the head or governing body of the agency. You may appeal within thirty days of a denial.

Upon receipt of the appeal, the agency head, governing body or appeals officer has ten business days to fully explain in writing the reasons for further denial of access or to provide access to the records. Copies of all appeals and the determinations thereon must be sent by the agency to the Committee on Open Government (section 89(4)(a)). This requirement will enable the committee to monitor compliance with law and intercede when a denial of access may be improper. A failure to determine an appeal within ten business days of its receipt is considered a denial of the appeal.

You may seek judicial review of a final agency denial by means of a proceeding initiated under Article 78 of the Civil Practice Law and Rules. When a denial is based upon one of the exceptions to rights of access that were discussed earlier, the agency has the burden of proving that the record sought falls within one or more of the exceptions (section 89(4)(b)).

The Freedom of Information Law permits a court, in its discretion, to award reasonable attorney's fees when a person challenging a denial of access to records in court substantially prevails. To award attorney's fees, a court must find that the record was of "clearly significant interest to the general public" and that the agency "lacked a reasonable basis at law for withholding the record." While a court may award attorney's fees, such an award is not mandatory.

Access to Legislative Records

Section 88 of the Freedom of Information Law applies only to the State Legislature and provides access to the following records in its possession:

- a. bills, fiscal notes, introducers' bill memoranda, resolutions and index records;
- b. messages received from the Governor or the other house of the Legislature, as well as home rule messages;
- c. legislative notification of the proposed adoption of rules by an agency;
- d. transcripts, minutes, journal records of public sessions, including meetings of committees, subcommittees and public hearings, as well as the records of attendance and 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 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; and
- i. any other records made available by any other provision of law.

In addition, each house of the Legislature must maintain and make available:

- a. a record of votes of each member in each session, committee and subcommittee meeting in which the member votes;
- b. a payroll 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 record required to be made available by section 88.

Each house is required to issue regulations pertaining to the procedural aspects of the law. Requests should be directed to the public information officers of the respective houses.

Access to Court Records

Although the courts are not subject to the Freedom of Information Law, section 255 of the Judiciary Law has long required the clerk of a court to "diligently search the files, papers, records and dockets in his office" and upon payment of a fee make copies of such items.

Agencies charged with the responsibility of administering the judicial branch are not courts and therefore are treated as agencies subject to the Freedom of Information Law.

Sample Letters

Requesting Records

Records Access Officer

Name of Agency

Address of Agency

City, NY, ZIP code

Re: Freedom of Information

Law Request

Records Access Officer:

Under the provisions of the New York Freedom of Information Law, Article 6 of the Public Officers Law, I hereby request records or portions thereof pertaining to (or containing the following) _____ (attempt to identify the records in which you are interested as clearly as possible). If my request appears to be extensive or fails to reasonably describe the records, please contact me in writing or by phone at _____.

If there are any fees for copying the records requested, please inform me before filling the request (or: . . . please supply the records without informing me if the fees are not in excess of \$_____).

As you know, the Freedom of Information Law requires that an agency respond to a request within five business days of receipt of a request. Therefore, I would appreciate a response as soon as possible and look forward to hearing from you shortly.

If for any reason any portion of my request is denied, please inform me of the reasons for the denial in writing and provide the name and address of the person or body to whom an appeal should be directed.

Sincerely,

Signature

Name

Address

City, State, ZIP code

Appeal A Denial

Name of Agency Official

Appeals Officer

Name of Agency

Address of Agency

City, NY, ZIP code

Re: Freedom of Information

Law Appeal

Dear _____:

I hereby appeal the denial of access regarding my request, which was made on _____ (date) and sent to _____ (records access officer, name and address of agency).

The records that were denied include: _____ (describe the records that were denied to the extent possible).

As required by the Freedom of Information Law, the head or governing body of an agency, or whomever is designated to determine appeals, is required to respond within 10 business days of the receipt of an appeal. If the records are denied on appeal, please explain the reasons for the denial fully in writing as required by law.

In addition, please be advised that the Freedom of Information Law directs that all appeals and the determinations that follow be sent to the Committee on Open Government, Department of State, 41 State Street, Albany, New York 12231.

Sincerely,

Signature

Name

Address

City, State, ZIP code

Open Meetings

The Open Meetings or "Sunshine" Law went into effect in New York in 1977. Amendments that clarify and reaffirm your right to hear the deliberations of public bodies became effective on October 1, 1979.

In brief, the law gives the public the right to attend meetings of public bodies, listen to the debates and watch the decisionmaking process in action.

As stated in the legislative declaration in the Open Meetings Law (section 100): "It is essential to the maintenance of a democratic society that the public business be performed in an open and public manner and that the citizens of this state be fully aware of and able to observe the performance of public officials and attend and listen to the deliberations and decisions that go into the making of public policy."

What is a meeting?

Although the definition of "meeting" was vague as it appeared in the original law, the amendments to the law clarify the definition in conjunction with expansive interpretations of the law given by the courts. "Meeting" is defined to mean "the official convening of a public body for the purpose of conducting public business." As such, any time a quorum of a public body gathers for the purpose of discussing public business, the meeting must be convened open to the public, whether or not there is an intent to take action, and regardless of the manner in which the gathering may be characterized. The definition also authorizes members of public bodies to conduct meetings by videoconference.

Since the law applies to "official" meetings, chance meetings or social gatherings are not covered by the law.

Also, the law is silent with respect to public participation. Therefore, a public body may permit you to speak at open meetings, but is not required to do so.

What is covered by the law?

The law applies to all public bodies. "Public body" is defined to cover entities consisting of two or more people that conduct public business and perform a governmental function for the state, for an agency of the state, or for public corporations, including cities, counties, towns, villages and school districts, for example. In addition, committees and subcommittees consisting solely of members of a governing body are specifically included within the definition. Consequently, city councils, town boards, village boards of trustees, school boards, commissions, legislative bodies and sub/committees of those groups all fall within the framework of the law.

Notice of Meetings

The law requires that notice of the time and place of all meetings be given prior to every meeting.

If a meeting is scheduled at least a week in advance, notice must be given to the public and the news media not less than 72 hours prior to the meeting. Notice to the public must be accomplished by posting in one or more designated public locations.

When a meeting is scheduled less than a week in advance, notice must be given to the public and the news media "to the extent practicable" at a reasonable time prior to the meeting. Again, notice to the public must be given by means of posting.

If videoconferencing is used to conduct a meeting, the public notice for the meeting must inform the public that videoconferencing will be used, identify the locations for the meeting, and state that the public has the right to attend the meeting at any of the locations.

When can a meeting be closed?

The law provides for closed or "executive" sessions under circumstances prescribed in the law. It is important to emphasize that an executive session is not separate from an open meeting, but rather is defined as a portion of an open meeting during which the public may be excluded.

To close a meeting for executive session, the law requires that a public body take several procedural steps. First, a motion must be made during an open meeting to enter into executive session; second, the motion must identify "the general area or areas of the subject or subjects to be considered;" and third, the motion must be carried by a majority vote of the total membership of a public body.

Further, a public body cannot close its doors to the public to discuss the subject of its choice, for the law specifies and limits the subject matter that may appropriately be discussed in executive session. The eight subjects that may be discussed behind closed doors include:

- a. matters which will imperil the public safety if disclosed;
- b. any matter which may disclose the identity of a law enforcement agency or informer;
- c. information relating to current or future investigation or prosecution of a criminal offense which would imperil effective law enforcement if disclosed;
- d. discussions regarding proposed, pending or current litigation;
- e. collective negotiations pursuant to Article 14 of the Civil Service Law (the Taylor Law);
- f. the medical, financial, credit or employment history of a particular person or corporation, or matters leading to the appointment, employment, promotion, demotion, discipline, suspension, dismissal or removal of a particular person or corporation;
- g. the preparation, grading or administration of examinations; and
- h. the proposed acquisition, sale or lease of real property or the proposed acquisition of securities, or sale or exchange of securities held by such public body, but only when publicity would substantially affect the value thereof.

These are the only subjects that may be discussed behind closed doors; all other deliberations must be conducted during open meetings.

It is important to point out that a public body can never vote to appropriate public monies during a closed session. Therefore, although most public bodies may vote during a properly convened executive session, any vote to appropriate public monies must be taken in public.

The law also states that an executive session can be attended by members of the public body and any other persons authorized by the public body.

After the meeting — minutes

If you cannot attend a meeting, you can still find out what actions were taken, because the Open Meetings Law requires that minutes of both open meetings and executive sessions must be compiled and made available.

Minutes of an open meeting must consist of "a record or summary of all motions, proposals, resolutions and any matter formally voted upon and the vote

thereon." Minutes of executive sessions must consist of "a record or summary of the final determination" of action that was taken, "and the date and vote thereon." Therefore, if, for example, a public body merely discusses a matter during executive session, but takes no action, minutes of an executive session need not be compiled. However, if action is taken, minutes of the action taken must be compiled and made available.

It is also important to point out that the Freedom of Information Law requires that a voting record must be compiled that identifies how individual members voted in every instance in which a vote is taken. Consequently, minutes that refer to a four to three vote must also indicate who voted in favor, and who voted against.

Enforcement of the law

What can be done if a public body holds a secret meeting? What if a public body makes a decision during an executive session that should have been open?

Any "aggrieved" person can bring a lawsuit. Since the law says that meetings are open to the general public, you would be aggrieved if you feel that you have been improperly excluded from a meeting or if you believe that an executive session was held that should have been open.

Upon the judicial challenge, a court has the power to nullify action taken by a public body in violation of the law "upon good cause shown." In addition, a court also has the authority to award reasonable attorney fees to the successful party. This means that if you go to court and you win, a court may (but need not) reimburse you for your expenditure of legal fees.

It is noted that an unintentional failure to fully comply with the notice requirements "shall not alone be grounds for invalidating action taken at a meeting of a public body."

The site of meetings

As specified earlier, all meetings of a public body are open to the general public. Moreover, the law requires that public bodies make reasonable efforts to ensure that meetings are held in facilities that permit "barrier-free physical access" to physically handicapped persons.

Exemptions from the law

The Open Meetings Law does not apply to:

1. judicial or quasi-judicial proceedings, except proceedings of zoning boards of appeals;
2. deliberations of political committees, conferences and caucuses; or
3. matters made confidential by federal or state law.

Stated differently, the law does not apply to proceedings before a court or before a public body that acts in the capacity of a court, to political caucuses, or to discussions

concerning matters that might be made confidential under other provisions of law. For example, federal law requires that records identifying students be kept confidential. As such, a discussion of records by a school board regarding a particular student would constitute a matter made confidential by federal law that would be exempt from the Open Meetings Law.

Public Participation and recording meetings

The Open Meetings Law provides the public with the right to attend meetings of public bodies, but it is silent concerning the ability of members of the public to speak or otherwise participate. Although public bodies are not required to permit the public to speak at their meetings, many have chosen to do so. In those instances, it has been advised that a public body should do so by adopting reasonable rules that treat members of the public equally.

There is nothing in the Open Meetings Law dealing with the right of those in attendance to record meetings. However, judicial decisions indicate that any person present may record an open meeting (using either an audio or video recorder), so long as use of a recording device is not disruptive or obtrusive.

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