

Wrapped in Foil!

Many, many years ago, I worked for an overly demanding boss. One day when New York City was being pummeled by record snows – one of those memorable blizzards where people were skiing down empty Manhattan avenues – my boss emerged from his office demanding that the mail be brought to him.

When the receptionist, one of the few people who actually made it into the office that day, told him that because of the blizzard, there would be no mail delivery that day, he barked in full voice so the whole world could hear: “They have to deliver the mail! IT’S THE LAW!!”

Ah, if life were only so simple. Take, for instance, the New York Freedom of

Information Law (FOIL). On its face FOIL is a wonderful tool. It allows anyone to obtain records or documents maintained by any State agency simply by requesting them. If a State agency prepares a document or record that you want, it is required to make it available to you.

The basic premise for the law, which exists in some form or another in all states plus in Federal law, is set forth in the legislative Declaration section of Article 6 of the New York Public Officers Law, which states in part:

“The people’s right to know the process of governmental decision-making and to review the documents and statistics leading to determinations is basic to our society. Access to such information should not be thwarted by shrouding it with the cloak of secrecy or confidentiality.”

The law also includes a number of exceptions, of course, mostly dealing with invasion of privacy (for others, not the agency), confidential information, trade secrets, interference with a pending proceeding, or anything that might endanger a person or persons if released. These exceptions are often used as excuses for delaying or denying legitimate requests. The courts, however, have been helpful in supporting the purpose of FOIL. For

instance, the courts have made it clear that the burden in denying access to any document or record is on the agency – not the requesting party -- and have also confirmed that FOIL does not require the party requesting the information to show any particular need or purpose for the request. One of the restrictions of the statute is that an agency does not have to create a new document to comply with a record request. However, a 2007 Court of Appeals decision (In the Matter of Data Tree, LLC v. Edward P. Romaine, & Co.) held that reformatting electronic data to meet a specific request is not necessarily the creation of a new record. The court stated “if the records are maintained electronically by an agency and are retrievable with reasonable effort, that agency is required to disclose the information.” The principle holdings of the case were included in a 2008 amendment to the law making it clear that the burden will be on the agency to justify a denial of access to government records, and that denial of access cannot be based on the form in which the records are maintained.

Each agency is required to establish its own procedures for handling FOIL requests, and if the agency has a website it is required to include this information on the website. The Insurance Department, has complied with this requirement for a number of years and now the DFS seems to be following suit. Requests can be made via mail, fax or electronically through the DFS website. The online form is easy to follow, although the process seems unduly cumbersome in one respect. When making a request using the online form you receive an acknowledgment with a confirmation number. However, in a few days you receive a second e-mail with a new tracking number that is different from the original confirmation number. This second notice advises which bureau will be responding to the request, and that you should be receiving their response within 20 business days (that’s four full work weeks!). The response will either be that the requested records will be provided and the cost, if any, of providing the records, or that the records are not available or are subject to an exemption from disclosure. If you disagree with a determination denying the records, there is an administrative appeal process and ultimately recourse to the courts.

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My record with FOIL requests to the Insurance Department over the years was generally good. It helps a lot if you are precise in describing the requested records, and if you know where in the Department the specific records are kept. The Department is a big operation with many units, and it is not always obvious where certain records are maintained.

Patience is very important! I cannot recall how many times I was told such and such records did not exist until I was able to suggest where they might look, or to refer to the specific statutory requirement for maintaining the requested records. I have also had some frustrating experiences where records have been denied or redacted to such extent as to render them useless on some basis that I considered to be outside the spirit of the law.

Why the lesson on FOIL now? With the merger of banking and insurance (banking has its own FOIL process) finding where records are maintained may even be more difficult, and early indications are not encouraging that the new DFS is anxious to share its records. In a column earlier this year I described how the annual report of the Superintendent was a mere shadow of its former self in providing information about the insurance business in the State (“DFS Report: Size and Content May Send a Message,” June 18, 2012). The signs seem to point to an administration that believes that less is more when it comes to sharing information with the industry and the consumer. FOIL can help counter this course through requests for records of the Department that, for whatever reason, it has elected not to share.

At the time I submitted this column, I had two open record requests seeking records that have routinely been a part of

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the Superintendent of Insurance's annual reports in the past but which the DFS has chosen not to share publicly. Among other things, the information I have requested includes details of the surplus lines business written in the state, details of free zone writings, and information about the staffing of the Department. These requests have been outstanding beyond the statutory requirement for response. In fairness, Superstorm Sandy intervened and as noted patience is important.

There are many other areas where details previously provided were not provided this year, or which many of you know are collected on a regular basis by the Department that are no longer made available. Do not forget about FOIL as a tool if that information is meaningful to your business or to your customers!

And be persistent. Remember, to paraphrase my former boss: "They have to give it to you. IT'S THE LAW!" [A]

[IN THE NEWS]

IICF Grant Distribution

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aster preparedness, and the environment across the New York/New Jersey/Connecticut tri-state area. The 16 grantees for 2012 is the highest number ever, surpassing the 2011 total of 15. Each of the grants is for \$50,000 or more and were received by these organizations:

Alzheimer's Drug Discovery Foundation is dedicated to rapidly accelerating drug research to get new therapies into the hands of patients and their families as quickly as possible. ADDF provides critical seed funding to scientists conducting innovative research, to date investing more than \$54 million to fund nearly 400 drug research programs at academic centers and biotechnology companies in 18 countries.

American Red Cross prevents and alleviates human suffering in the face of emergencies by mobilizing the power of volunteers and the generosity of donors. Through its network, the Red Cross provides trained individuals ready to use their skills to save lives.

buildOn has a goal to break the cycle of poverty, illiteracy and low expectations through service and education. It runs after-school service programs across the United States and builds schools in developing countries.

The Central Harlem Initiative for Learning and Development, Inc. (CHILD, Inc.) is a not-for-profit organization that supports St. Aloysius School, a two-campus school in Central Harlem dedicated to educating children who are at great risk of not meeting their potential.

CityKids Foundation offers an arts-based youth empowerment model to urban young people ages 13-19, through arts and educational programs to develop the knowledge, skills, and confidence to succeed in school, workplace and life.

Community Mainstreaming Associates provides homes and life-enhancing services for men and women with developmental disabilities. Its Sweet Comfort Bakery & Café provides its employees with a developmental disability with the individualized support needed to help learn the skills and concepts necessary for sustained, rewarding employment.

Covenant House New Jersey provides services to homeless young people to help themselves to become happy, healthy and independent young adults by providing food, shelter and immediate crisis care.

The Doe Fund answers the call for a proven and effective solution to homelessness and criminal recidivism. Through its innovative paid transitional work program "Ready, Willing & Able," the organization has empowered tens of thousands of individuals to lead productive lives.

Eden Autism Services is a primary resource for autism information, education, training and support services for individuals with autism, families, educators and healthcare professionals. Programs include early intervention, education, employment training and residential services.

Family Reach Foundation provides financial relief and heartfelt support to families fighting cancer. It strives to reduce the often-overwhelming financial and emotional burdens that families experience after a child or parent is diagnosed with cancer.

Friends of Karen, Inc. ensures that families of critically ill children don't have to face the illness alone. The organization

puts its experience to work to assure the emotional and financial well-being of every family member coping with a child's illness.

Harlem RBI serves more than 1,200 boys and girls, ages 5-22, with year-round academic, sports and enrichment programs. Harlem RBI's comprehensive approach to youth development replaces the barriers inner-city youth typically face with concrete opportunities to build the skills and confidence needed to graduate high school, matriculate to college and break the cycle of poverty. Harlem RBI operates DREAM Charter School in East Harlem.

Hudson River Sloop Clearwater provides innovative environmental programs, advocacy and celebrations in order to inspire and energize the next generation of environmental leaders.

The **Joe Torre Safe At Home Foundation** has worked for 10 years to end the cycle of domestic violence through counseling, education and support. Its school-based "Margaret's Place" program reaches 8,000 middle and high school students in New York City and Los Angeles.

Metropolitan Hospital Center (MHC) is a community hospital for residents of East Harlem, northern Manhattan and neighboring communities. Metropolitan provides culturally-sensitive care in a welcoming and hospitable setting, emphasizing primary care medicine and utilizing the latest advances in medical science.

Mount Kisco Child Care Center is a non-profit, non-sectarian childcare facility licensed by the New York State Office of Children and Family Services that is dedicated to providing high quality child care and early education, regardless of a family's ability to meet tuition.

For more information about the grantees, visit www.IICF.org/grants/north-east-division-grants.

At the event, IICF also made an appeal for additional Superstorm Sandy relief. Contributions can be made by clicking the "Donate" tab at www.IICF.org. [A]

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