

MUNICIPALITIES HIT WITH DELUGE OF FOIL REQUESTS AFTER REPEAL OF SECTION 50-A OF THE CIVIL RIGHTS LAW

Hodgson Russ Municipal Alert
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In a sweeping change to a decades-old law, the governor of New York signed into law the repeal of Civil Rights Law Section 50-a, which chiefly prohibited the disclosure of personnel and disciplinary records of police officers, corrections officers, firefighters, and paramedics. The repeal was effective June 12, 2020.[1] Under the prior law, a government agency could release personnel and disciplinary records only by court order or written consent of the individual whom the records concerned. The repeal of Section 50-a now makes those records subject to the Freedom of Information Law (“FOIL”), which was also amended as of June 12, 2020.[2] Many municipalities have already begun receiving such requests.

FOIL Amendments Related to Law Enforcement Agency Records

The amendments to FOIL are found in Public Officers Law (“POL”) Sections 84-90. Records of a “law enforcement agency” are now available by FOIL. The law broadly defines “law enforcement agency” as:

a police agency or department of the state or any political subdivision thereof, including authorities or agencies maintaining police forces of individuals defined as police officers in section 1.20 of the criminal procedure law, a sheriff’s department, the department of corrections and community supervision, a local department of correction, a local probation department, a fire department, or force of individuals employed as firefighters or firefighter/paramedics.[3]

While personnel and disciplinary records are now subject to FOIL, the FOIL amendments require the redaction of certain information in “law enforcement disciplinary records” before public disclosure, including things like the medical history, home address, Social Security Number, and contact information of the officer. [4] As defined, “law enforcement disciplinary records” are any record created in the furtherance of a law enforcement disciplinary proceeding, including:

- (a) the complaints, allegations and charges against an employee;
- (b) the name of the employee complained of or charged;
- (c) the transcript of any disciplinary trial or hearing, including any exhibits;

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- (d) the disposition of any disciplinary proceeding; and
- (e) the final written opinion or memorandum supporting the disposition and discipline imposed, including the factual findings, analysis of conduct and appropriate discipline.[5]

Redactions for “technical infractions” are permitted, but not required.[6] A “technical infraction” is “a minor rule violation . . . solely related to the enforcement of administrative departmental rules that (a) do[es] not involve interactions with members of the public, (b) [is] not of public concern, and (c) [is] not otherwise connected to such person’s investigative, enforcement, training, supervision, or reporting responsibilities.”[7]

Retroactivity

Many municipalities are wondering whether the repeal of Section 50-a and the enactment of the amendments to FOIL will open the flood gates to FOIL requests for law enforcement agency personnel and disciplinary records from any timeframe. The courts have not yet decided this issue. A party challenging the denial of a FOIL request on this basis is likely to argue that the intent of the Legislation was to allow the inspection of any covered records regardless of when they were created.

FOIL Exemptions

The Legislature’s repeal of Section 50-a and amendments to FOIL did not remove all bases to withhold certain law enforcement disciplinary records. Other existing FOIL exemptions under POL Section 87(2) may also be relevant and applicable to requests for law enforcement agency records. Such examples include information that:

- if disclosed, would constitute an unwarranted invasion of personal privacy, as defined by POL Section 89(2)(b);[8]
- is compiled for law enforcement purposes, which, if disclosed, would interfere with law enforcement investigations or judicial proceedings; deprive a person of a right to a fair trial or impartial adjudication; identify a confidential source or disclose confidential information relating to a criminal investigation; or reveal criminal investigative techniques or procedures, except routine techniques and procedures;[9]
- if disclosed, could endanger the life or safety of any person;[10] and
- are inter-agency or intra-agency materials which are not: statistical or factual tabulations or data; instructions to staff that affect the public; final agency policy or determinations; external audits, including but not limited to audits performed by the comptroller and the federal government.[11]

Record Retention

According to the Records Retention and Disposition Schedule MU-1, personnel records of local government employees are to be retained for six years after termination of employment.^[12] Records related to disciplinary proceedings are to be retained for three years after a final decision is rendered.^[13] The only permanent retention requirement imposed by Schedule MU-1 is a summary of the personnel file, inclusive of the employee’s age, dates of employment, job titles, and civil service status.^[14] It is therefore possible that, consistent with Schedule MU-1 or a municipality’s own record retention policy, the records requested may no longer be in existence.

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Risks with FOIL Requests for Law Enforcement Agency Records

Responding to FOIL requests of this nature has risks. Obtaining records from years past, assuming they still exist, may be a complicated process. Thoroughly reviewing records to determine whether they should be redacted is imperative.

In the event a FOIL request (and subsequent appeal) is denied, the requester may sue and seek an award of attorneys' fees. FOIL also has a mandatory award of attorneys' fees and costs provision where the requester "substantially prevails" and the agency had no reasonable basis for denying access.[15] Police officers who believe that privileged records or information was incorrectly released may also sue. Therefore, responding to FOIL requests seeking law enforcement agency records requires municipalities be cautious to not only provide themselves a sufficient amount of time to review the records sought and redact as appropriate, but also conduct a final review to ensure that nothing protected will be disclosed.

Timing to Respond

FOIL requires an acknowledgment of the request within five days, and if additional time is needed to process the request, a statement of the approximate date, which must be reasonable, is to be conveyed.[16]

Should there be an administrative appeal, which must be filed within thirty (30) days of any denial, a determination of the appeal is required within ten (10) business days of receipt of the appeal.[17] The appeal determination must also be forward to the Committee on Open Government.[18]

Permissible Costs

Since responding to FOIL requests of broad nature require effort, municipalities should be permitted to charge reasonable fees for such effort. FOIL authorizes an agency to charge a fee of 25¢ per copy for copies of records up 9" x 14", or the actual cost of reproducing a record.[19] In determining the actual cost of producing a record, an agency may include only:

- an amount equal to the hourly salary attributed to the lowest agency paid employee who has the necessary skill required to prepare the requested record(s), if at least two hours of agency employee time is needed to prepare a copy of the record (s) requested;
- the actual cost of the storage devices or media provided to the person making the request in complying with such request; and
- the actual cost to the agency of engaging an outside professional service to prepare a copy of a record, but only when an agency's information technology equipment is inadequate to prepare a copy, if such service is used to prepare the copy.[20]

Takeaway

Depending on the size, scope, and nature of a FOIL request, municipalities may need to consider taking additional precautions as part of their FOIL review and response, particularly with respect to law enforcement agency records. A municipality should also realistically consider its ability to respond to extensive requests, at least at the present time, as their employees may still be working remotely or be otherwise limited due to the COVID-19 pandemic. FOIL responses should provide sufficient time to account for those limitations.

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If you have any questions about the repeal of Civil Rights Law § 50-a and the related amendments to FOIL, or FOIL issues generally, please contact Jeff Swiatek (716.848.1449), Chuck Malcomb (716.848.1261), or an attorney in our Municipal Practice.

If you received this alert from a third party or from visiting our website, and would like to be added to our Municipal alert mailing list or any other of our mailing lists, please visit us **HERE**.

[1] 2020 Session Law, c. 96, § 1.

[2] 2020 Session Law, c. 96, §§ 2-5.

[3] Public Officers Law ("POL") § 86(8).

[4] POL § 4-a.

[5] POL § 86(6)(a)-(e).

[6] POL § 4-b.

[7] POL § 86(9) (ellipsis and brackets added).

[8] POL § 87(2)(b).

[9] POL § 87(2)(e)(i)-(iv).

[10] POL § 87(2)(f).

[11] POL § 87(2)(g)(i)-(iv).

[12] Records Retention and Disposition Schedule MU-1, 8 NYCRR 185.11, Appendix H, *obtained from <http://www.archives.nysed.gov/common/archives/files/MU-1.pdf>*, p. 91.

[13] *Id.*

[14] *Id.*

[15] *Compare* POL § 89(4)(c)(i) (discretionary award of attorney's fees) with POL § 89(4)(c)(ii) (mandatory award of attorney's fees).

[16] POL § 89(3)(a).

[17] POL § 89(4)(a).

[18] *Id.*

[19] POL § 87(1)(b)(iii).

[20] POL § 87(1)(c)(i)-(iv).