

NYS SUNSHINE LAWS

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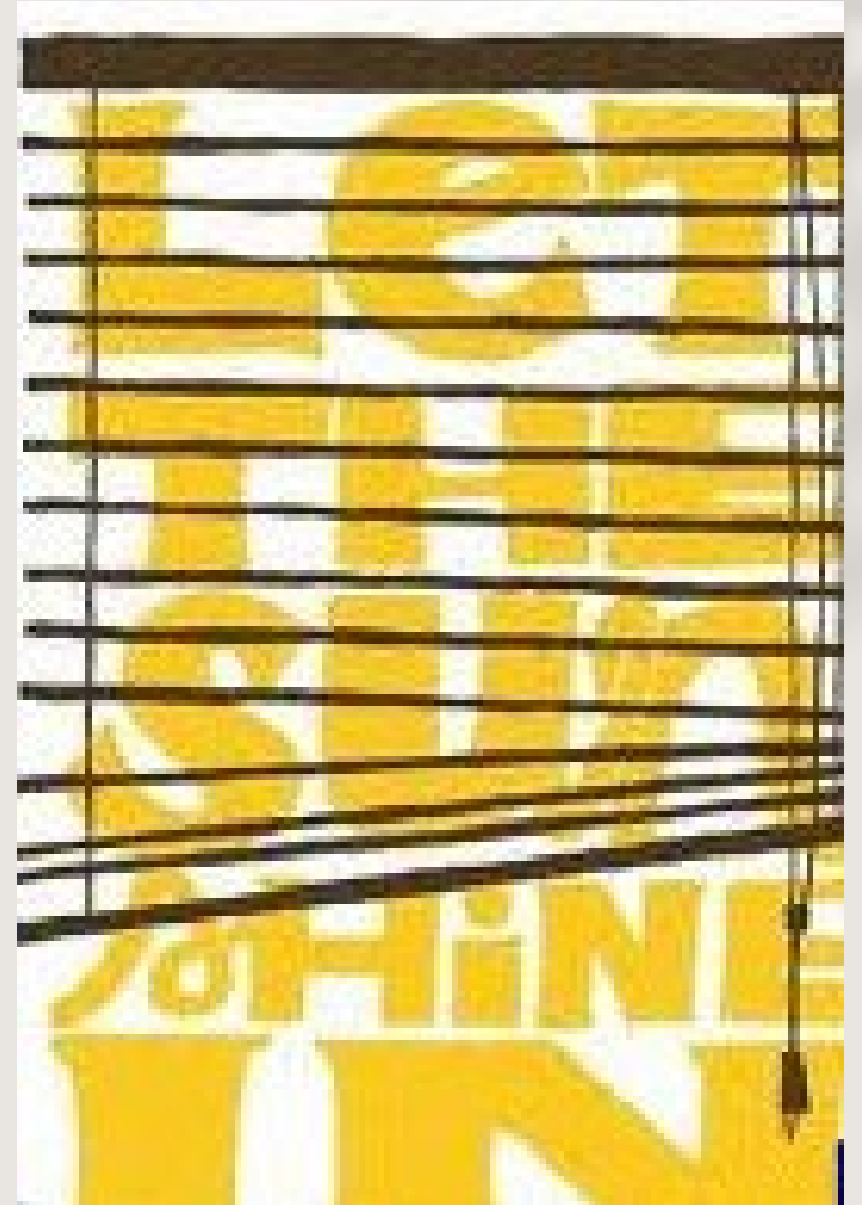
NYS Sunshine Laws

Freedom of Information Law

Requires government agencies to provide access to agency records

Open Meetings Law

Protects the right to attend meetings of public bodies, listen to debates and watch the decision-making process in action.



FOIL

- Who is required to provide records to the public?
- What type of things can be accessed?
- How do you make a request?
- When does the agency have to respond to your request?
- What can you do if you don't receive the requested records?

Who is required to provide records to the public?

FOIL governs access to agency records.

- Agency: “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.”
- Records Access Officer: agencies must designate one or more persons by name or specific job title.

Pop Quiz

Which of the following is not an agency?

1. Dobbs Ferry Union Free School District
2. Fashion Institute of Technology
3. Westchester County Board of Legislators
4. New York University
5. NYS College of Veterinary Medicine at Cornell University
6. Brighter Choice Charter School

How do you make a request?

If agency is able, it must accept requests by email.

Agency cannot require use of a form but can require that requests be made in writing.

Unless there are personal privacy concerns, a requestor should be permitted to remain anonymous.



What type of things can be accessed?

Agency records

- Record means any information kept, held, filed, produced, or reproduced by, with or for an agency ... in any physical form whatsoever including, but not limited to, reports, statements, examinations, memoranda, opinions, folders, files, books, manuals, pamphlets, forms, papers, designs, drawings,

No requirement to create records

3 exceptions:

1. Record of vote
2. List: name, public office address, title, salary
3. Subject matter list

Must make copies or convert to a preferred format, if possible.

Reasonably Describe Records Sought

- Agency must be able to locate or retrieve the requested record with reasonable effort
- Will likely differ based on whether the record is hard paper copy or electronic record

What types of records can be withheld?

An agency may deny access to records that:

- A. are specifically exempted from disclosure by state or federal statute;
- B. if disclosed would constitute an unwarranted invasion of personal privacy under the provisions of subdivision two of section eighty-nine of this article;
- C. if disclosed would 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 only to the extent that disclosure would:
 - i. interfere with law enforcement investigations or judicial proceedings, provided however, that any agency, which is not conducting the investigation that the requested records relate to, that is considering denying access pursuant to this subparagraph shall receive confirmation from the law enforcement or investigating agency conducting the investigation that disclosure of such records will interfere with an ongoing investigation;
 - 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;

What types of records can be withheld? (cont'd)

An agency **may** deny access to records that:

- F. if disclosed could endanger the life or safety of any person;
- 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; or
- H. are examination questions or answers which are requested prior to the final administration of such questions.
- 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;

Remainder relate to records maintained pursuant to vehicle and traffic law.

Exempt by Statute

1. Attorney-client communications (CPLR)
2. Student records (FERPA)
3. Mental health records (Mental Hygiene Law)
4. Social Security Numbers (Public Officers Law 96-a)

Unwarranted Invasion of Personal Privacy

Examples:

- Employment application of person not hired
- Unsubstantiated allegations of misconduct
- Personal phone numbers (home and cell)
- Medical information
- Public employee home addresses
- Lists of names and addresses of persons if used for solicitation or fund-raising purposes
- Mugshots

Law Enforcement

Records must be:

1. Compiled for law enforcement purposes, AND
2. Disclosure would cause one of the harms envisioned by the statute
 - i. interfere with law enforcement investigations or judicial proceedings, provided however, that any agency, which is not conducting the investigation that the requested records relate to, that is considering denying access pursuant to this subparagraph shall receive confirmation from the law enforcement or investigating agency conducting the investigation that disclosure of such records will interfere with an ongoing investigation;
 - 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;

Intra-Agency and Inter-Agency Material

1. Intended to protect the deliberative process
2. Required to disclose
 - i. Statistical or factual information
 - ii. Instructions to staff that affect the public
 - iii. Final agency policy or determinations
 - iv. External audits

What can you do if you don't receive the requested records?

When denied access to a record or any portion thereof, applicant has 30 calendar days to submit and administrative appeal;

Two types of denials:

1. Express denial of access – a record possessed by an agency is withheld in whole or in part
2. Constructive denial of access – agency fails to respond to request within time limits set forth in statute

More about the right to appeal

- Must be submitted in writing to the person designated by the agency to determine appeals or the chief executive or governing body of the agency.
- FOIL Appeals Officer cannot be the same as the Records Access Officer;
- Within 10 business days, FOIL Appeals Officer must either provide records sought or “fully explain” reasons for further denial (or a combination of both);

TIMELINE

- 5 business days-initial response
- 20 business days-if more time needed
- Date certain – Reasonable under the circumstances
- No repeated extensions
- 30 calendar days to appeal denial
- 10 business days for agency to respond to appeal



What can you do if the appeal is denied?

- A person denied access to a record in an appeal may bring a court proceeding to review such denial.
- 4 months after denial (may require Notice of Claim)
- The agency bears the burden of proving that such record falls within one of the exemptions.

Fees

Two Fee Structures (not combinable)

1. \$.25 per photocopy for copies up to 9 x 14 inches
2. Actual cost of reproduction for all other records
 - 2-hour rule
 - Cost of electronic storage device (e.g., thumb drive)
 - Cost of having copy made by third party vendor
 - May not charge for search or review time

Hypothetical:

The school district that you work for recently hired a new building principal (Don Draper) who has been causing significant difficulties for your members. According to the notice announcing Don's appointment, he was previously employed by a District far upstate.

When you reach out to the local president of that District, you're surprised to hear that they've never heard of Don Draper. So you submit a FOIL request asking for Don's job application. The District denies your request claiming that such disclosure would constitute an unwarranted invasion of privacy.

What position would you take regarding their denial?

Open Meetings Law

- Who is covered by the law?
- What constitutes a meeting?
- What are the quorum requirements?
- What are the notice requirements?
- When can a meeting be closed to the public?
- When is the public allowed to participate?
- How can you challenge non-compliance?

Who is covered by the OML?

- The OML governs the conduct of meetings of public bodies.
- Public bodies: “any entity, for which a quorum is required in order to conduct public business and which consists of two or more members, performing a governmental function for the state or for an agency or department thereof, or for a public corporation ... or committee or subcommittee or other similar body consisting of members of such public body or an entity created or appointed to perform a necessary function in the decision-making process for which a quorum is required in order to conduct public business and which consists of two or more members...”

What constitutes a meeting?

“Meeting” is defined as “the official convening of a public body for the purpose of conducting public business.”

Any time a quorum of a public body gathers for the purpose of discussing public business, the meeting must be open to the public, regardless of whether there is intent to act, and regardless of the way the gathering is or may be characterized.

The definition also authorizes members of public bodies to conduct meetings by videoconference provided that certain requirements are adhered to. A meeting cannot validly be held by telephone or by email.

Video Conferencing

Standard videoconferencing

A public body may, under all circumstances, allow its members to attend from any physical location that is open to in-person public attendance. The locations from which all members will be attending, which must be open to the public, must also be included in the meeting notice.

Video Conferencing

Extraordinary Circumstances videoconferencing

- Absent a declared statewide or applicable local disaster, a public body may act to allow members to attend a meeting by videoconference without opening the location to in-person public attendance under “extraordinary circumstances” only.
- Each public body that wishes to allow for remote attendance by its members at locations that do not allow for in-person physical attendance by the public is required to, after a public hearing, adopt a local law or resolution (depending on the type of public body) authorizing remote attendance, and establishing written procedures that set forth what they determine to be “extraordinary circumstances.”

A note about quorums...

- Means a majority of the total membership of a public body, notwithstanding absences or vacancies.
- Members who are participating from a physical location that has been properly noticed and is open to in-person public attendance do count toward a quorum and may fully participate and vote.
- Members who are videoconferencing from a remote location that is not open to in-person public attendance do not count toward a quorum unless they have a disability that renders them unable to participate in-person. Remote participants may, fully participate and vote if a quorum has otherwise been met.

What are the notice requirements?

The law requires advanced notice of the time and place of all meetings.

1. 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.
2. If 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.

In both cases, notice must be posted in designated public locations and, when possible, online.

A note about records to be discussed...

If the agency maintains a regularly updated website and uses a high-speed internet connection, it is required to post records [i.e., docs subject to FOIL), proposed resolutions, laws, rules, regulations, policies, or an amendment thereto, that are scheduled to be discussed during an open meeting at least 24 hours prior to the meeting to the extent practicable.

Public Officers Law § 103(e)

When can a meeting be closed to the public?

- a. matters which will imperil the public safety if disclosed;
- b. any matter which may disclose the identity of a law enforcement agent 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 fourteen of the civil service 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.

When is the public allowed to participate?

- The OML does not create a right to public participation
 - Public bodies can create reasonable rules



Hypothetical

In the last round of bargaining, the District tried to negotiate a drug-testing policy. Ultimately, it was withdrawn near the end after recreational marijuana use was legalized because the parties reached an agreement on all other items, and it was too complicated to parse out how legalization could be addressed.

The school board's agenda for tomorrow's meeting indicates that it will be voting on a proposed drug-testing policy.

The proposed policy is not attached to the meeting notice, and it is not available on the district's website even though other records are available.

What can you do?

How can you challenge non-compliance?

FOIL

- CPLR Article 78 proceeding
- Attorney's fees and other reasonable litigation costs can be awarded

OML

- CPLR Article 78 proceeding
- Attorney's fees and other reasonable litigation costs can be awarded
- Invalidate action
- Require training

Resource:

Committee on Open Government website:

<https://opengovernment.ny.gov/>