



# NUTS & BOLTS



Training for newly elected and newly appointed city and village officials is an important benefit of your membership in NYCOM. If you have never attended one of these sessions, you are missing a great deal. The sessions focus on basic “nuts and bolts” topics to help the new official become familiar with and comfortable in their new position.

## The Freedom of Information Law (FOIL)\*

The Freedom of Information Law is contained in Article 6 of the NYS Public Officers Law and sets forth the guidelines for public access to records of a municipality. FOIL requires that all records be made available for public inspection or reproduction unless a record falls under a specifically designated exception.

**Agencies** – An agency is any state or municipality, and all of their departments, boards, bureaus, divisions, committees or any governmental entity performing a governmental or proprietary function for the state or a municipality. This includes villages, towns, counties, cities, school districts and special districts. In villages and cities, this would include all separately created boards such as the zoning board of appeals, the planning board and all other entities performing a function for the municipality.

**Records** – A record is any information available in physical form. This includes photographs, designs, maps, microfilms, and records maintained in a computer. It includes all records pertaining to village or city business regardless of where the record is kept. Tape recordings are available under the Freedom of Information law. Therefore, if the clerk or an elected official tape records meetings, the tape recording would be available under FOIL. Municipal officials cannot prevent disclosure of a record by defining a record as “confidential” or promising another that the record will remain confidential. The record would still be

available unless it falls within one of the statutory exceptions. A village or city is never required to create a record. FOIL only applies to existing records and a municipality is not required to create a record or prepare answers to questions in response to a request.

**Purpose of request** – Anyone can request records under FOIL. The records access officer cannot ask a requester why he or she wants records or the intended use of the record. The only instance in which an agency can ask why a person wants a record is when the request is for a list of names and home addresses. The agency is authorized to seek an assurance that the list will not be used for commercial or fund raising purposes. If it is determined that a list will be used for these purposes, an agency can deny access under the ground that the release would result in an unwarranted invasion into personal privacy.

### Municipal responsibilities

- Furnish written rules providing the time and place that records are available. Rules should not unreasonably limit the times for access but allow for access during the times that village or city hall is open for business;
- Furnish written rules designating the person from whom records can be obtained (the records access officer). This person is usually, but does not have to be, the municipal clerk.
- Furnish written rules providing the fee for copies, which may not exceed 25 cents per copy. Fees can be established up to 25 cents per copy. For documents larger than 9" X 14" or for reproducing photographs, maps, etc., the actual

cost of reproduction may be charged. A fee cannot be charged for time spent in retrieving records or for the cost of the employee's time in fulfilling the FOIL request. Any person has the right to inspect accessible records at no charge.

- Designate an appeals officer. Absent a designation, the appeal may be submitted to the mayor or the board.
- Provide public notice of the availability of its records. The village or city must provide for the conspicuous posting and/or publishing in a local newspaper the place where local government records may be accessed; the name, title, business address, and telephone number of the municipality; the name of the records access officer; and the right to an appeal if access to records is denied, as well as the name and business address of the person designated by the municipality to hear such appeals.

#### **Records that must be created:**

- a record of the final votes of each member of the governing body; name, public office address, title and salary of every officer and employee. The home address of an officer or employee does not have to be revealed; a reasonably detailed current list, by subject matter, of all records in the possession of the municipality, whether or not the records are available under FOIL.

**Exempt records** – A municipality may deny access to a record or any portion of a record that:

- is exempt from disclosure by some other state or federal law;
- if disclosed would constitute an unwarranted invasion of personal privacy;
- if disclosed would impair present or imminent contract awards or collective bargaining negotiations;
- 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 business injury to the competitive position of the subject enterprise;

- are compiled for law enforcement purposes and which, if disclosed, would interfere with law enforcement investigations or judicial proceedings, deprive a person of the right to a fair trial, identify a confidential source or disclose confidential information relating to a criminal investigation, or reveal non-routine criminal investigative techniques;
- if disclosed would endanger the life or safety of any person;
- are an inter-agency or intra-agency communication. Disclosure must be made of any portion of such inter- or intra-agency communication that consists of: statistical or factual tabulations or data, instructions to staff that affect the public, external audits, or final agency policy or determinations;
- is an examination question or answer which is requested prior to the final administration of such examination; contains a computer access code.

**Submission of FOIL requests** – Municipalities may request that a FOIL inquiry be in writing. The request should reasonably describe the records sought, and provide sufficient details to enable the records access officer to locate the records. Municipalities can not mandate that a prescribed form be used for all requests, but should accept any request for a record which is in writing. Although a municipality may require that the request be made in writing, it may accept oral requests. Municipalities should be consistent in the treatment of requests.

**Making records available** – FOIL does not require that the records access officer immediately provide access to a request for records. It does not require that all records be made available within five days. It only requires that the records access officer respond in writing with one of the following four responses. After receipt of a request for a record reasonably described, the records access

officer has five business days to: make the record available; deny the request in writing and inform the party of the right to appeal; furnish a written acknowledgment of the receipt of the request and a statement of the approximate date when the record will be made available or the request denied; or certify in writing that the municipality does not have possession of the record or that the record cannot be found after a diligent search. The village cannot charge a fee for the certification and the law does not provide any particular form for this certification.

While a municipality must grant access to records, deny access, or acknowledge the receipt of a request within five business days, there is no precise time period within which a grant or denial of access must occur. However, the municipality should not delay disclosure. If a record is clearly public and can be found easily, there is no rational basis for delaying disclosure beyond the five days. When a FOIL request does not receive a response within five days, the request is considered denied and the individual can appeal the denial of the record.

**Large requests** – Municipalities can establish a reasonable schedule when records will be available. Additionally, if a voluminous request is made, the village or city can require payment in advance to avoid unnecessary copying costs.

**Appeals** – An appeal of the records access officer's decision may be taken within 30 days of the denial to the chief executive officer, governing body, or person designated to handle appeals. Within 10 business days of the appeal, a written response must be made to the applicant which either grants the request or fully explains the denial. The municipality must notify the Commission on Open Government of all appeals and appeal decisions. When a municipality denies access to records the denial must advise the person denied his or her right of appeal to the person or body established to hear appeals in the municipality. The failure to inform a person denied access to records of the right of appeal enables that person to seek judicial review of the denial. If the records are denied on appeal, the applicant may bring an Article 78 proceeding to review the decision of the appeals officer. If access to the records is allowed by a court and the court finds that the records were unrea-

sonably withheld, the applicant may be awarded attorney's fees.

*\*The Committee on Open Government has been established within the New York State Department of State as mandated by FOIL. The Committee, through its Executive Director, Robert Freeman, will provide individuals with advice in response to telephone inquiries. It will provide a written advisory opinion to those who so request in writing. The Committee can be contacted at: Committee on Open Government, Robert Freeman, Executive Director, 41 State Street, Albany, NY 12231, (518) 474-2518. Information is also available on the Committee's web site at: [www.dos.state.ny.us/coog/coogwww.html](http://www.dos.state.ny.us/coog/coogwww.html).*