

AMENDMENT TO NEW YORK'S FREEDOM OF INFORMATION LAW

Government entities beware! An amendment to New York's Freedom of Information Law ("FOIL"), which took effect on August 16, 2006, makes it easier for the public to recover attorneys' fees and costs incurred when they are forced to seek judicial review of a government agency's denial of access to requested records. As we all know, FOIL gives the public the right to access government records with the goal of promoting greater understanding and participation of the public in government.

However, the law also allows government agencies to limit or deny access to requested records in certain situations. In these cases, the public has the right to appeal the denial. The public first appeals the decision to the agency which issued the denial. Should the agency uphold the denial, the public can then seek a judicial review of the decision. If the court determines that the public substantially prevailed in the action, then the court can also make the government agency pay the public's attorneys' fees and costs incurred during the judicial proceeding.

The August 16th amendment affects Public Officer's Law Sec. 89(4)(c) and makes it easier for the public to recover fees and costs. Under the old law, even if the public substantially prevailed in the action, before recovering fees and costs the public was required to show that "the record involved was, in fact, of clearly significant interest to the general public" and that "the agency lacked a reasonable basis in law for withholding the record."

With the August 16th amendment, the threshold used to determine the payment of attorneys' fees and costs is much lower. The public has to show only **either** that the agency had no reasonable basis for denying access **or** that the agency failed to respond to the request or appeal in a timely manner. The requirement that records requested are "of clearly significant interest to the general public" no longer applies. Failure by the agency to respond in a timely manner does not, however, automatically mean the public is entitled to fees and costs. If the agency is able to justify the delay, then the agency may avoid the award of attorneys' fees and costs.

A governmental agency should never be in the position of having attorneys' fees and costs assessed against it for failure to respond in a timely manner. Subject to resource constraints, an agency is totally in control of its response.

Every agency should have a procedure in place that ensures timely response to "FOIL" requests and appeals. Procedures for "FOIL" denials should also be in place, and it is recommended that agencies seek counsel in the event that access to requested information is to be denied. With proper safeguards in place, and the advice of counsel, attorney fee awards should be a rare occurrence, even under the amended statute.

If you have any questions or would like more information regarding the amendment to New York State's Freedom of Information Law described in this Alert, please contact one of the attorneys below, who are all admitted to practice in the State of New York.



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This Jaeckle Alert, prepared by the attorneys at Jaeckle Fleischmann & Mugel, LLP, is intended for general information purposes only and should not be considered legal advice or an opinion on specific facts. For more information on these issues, contact one of the attorneys listed above or your existing Firm contact. The invitation to contact is not a solicitation for legal work in any jurisdiction in which the contacted attorney is not admitted to practice. Any attorney/client relationship must be confirmed in writing.

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