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“The Impact of Technology on the Freedom of Information Law, a/k/a the ‘FOIL’ ” (a summary)

Government, Law and Policy Journal. Albany: NYSBA, Spring 2000, Vol. 2, No. 1, pp. 24-29.

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(Permission to produce this summary was given by Mr. Freeman, June 2000.)

Introduction

When the NYS Freedom of Information Law (FOIL) was enacted in 1974, government like the rest of society was tied to the typewriter and photocopy machine. Most record searches consisted reviewing documents in filing cabinets to determine the extent to which they must be disclosed.

Technology is changing the relationship between government and its public. At the heart of the relationship are the expectations of citizens regarding the information they can acquire, as well as the means and speed of this acquisition.

What is a “Record”?

By 1978 the original version of the FOIL was repealed and replaced with a statute that broadened the term “record” to include other than paper documents. Since then FOIL has been based on a presumption of access. All records of an agency are available, except to the extent that records or portions of them fall within one or more grounds for denial. Most grounds of denial involve the ability of a government agency to withhold records if disclosure would result in harm—

- to a person based on invasion of personal privacy,
- to a commercial entity based on its competitive position, or
- to the government in terms of its capacity to discharge its duties effectively on behalf of taxpayers.

FOIL § 86(4) defines a record as:

any information kept, held, filed, produced, reproduced by, with or for an agency or the state legislature, in any physical form whatsoever including, but not limited to, reports, statements, examinations, memoranda, opinions, folders, files, books, manuals, pamphlets, forms, papers, designs, drawings, maps, photos, letters, microfilms, computer tapes or discs, rules, regulations or codes.

If information is maintained by or for an agency in any physical form, it constitutes a record subject to rights of access. The FOIL definition includes reference to computer tapes and discs, and it was held soon after this statement was enacted that information being stored in computers should not be restricted merely because it is not in *printed* form.

Freeman, p.2.

Creating Records

FOIL pertains to existing records. It specifies that an agency is not required to create a record in response to a request. However, when information is maintained electronically, if the information sought is retrievable by means of existing computer programs, an agency is required to disclose the information. The agency is retrieving data that it has the capacity to retrieve. Disclosure is accomplished by printing the data or by copying it to another storage mechanism such as a tape or disk. If, however, the data sought can be retrieved only by means of new programming or alteration of existing programs, the agency is not required to reprogram or develop new programs for data retrieval.

Notwithstanding an agency's inability to retrieve information sought unless it modifies its programs or reprograms, it may often be relatively simple to alter a program to retrieve the information sought. And it may be more cost efficient to reprogram than to delete portions of a printout by hand, for example, or to engage in a physical search of paper records.

Format: Paper, Disk or Tape?

Agencies are required to make records available wherever and whenever feasible. The NYS Supreme Court ruled in 1992 (*Samuel vs. Mace*) that these records must be provided in an electronic format, if requested, if they exist or can be easily reproduced in that format. Under these conditions, production of the record would not involve creation of a new record or reprogramming.

Fees

Only an act of the NYS Legislature would permit the assessment of a fee higher than \$.25 per photocopy (not in excess of 9" x 14"), or a fee that exceeds the actual cost of reproducing records that cannot be photocopied, or any other fee, such as a fee for a search. Fees can be charged only for the reproduction of records. Unless otherwise determined by statute, there can be not fee charged for inspection of records or records search. Therefore, a fee for reproducing electronic information would most often involve the cost of computer time, plus the cost of an information storage medium (i.e.: disk, tape).

Although compliance with FOIL involves use of employee time and perhaps other costs, the Court of Appeals has found that the law's intent is to meet the public's legitimate right of access to information, and that providing this information is part of government's obligation to its citizens and therefore not a gift of, or waste of, public funds.

E-mail Under FOIL

E-mail is an equivalent, actually and legally, to paper correspondence. Therefore, e-mail should be treated in most respects just like paper in terms of public rights of access, retention and disposal.

An agency may withhold any inter-agency or intra-agency materials (including e-mail) which are not:

- Statistical or factual tabulations or data (or statements of agency "fact");
- Instructions to staff that affect the public;
- Final agency policy or determinations; or
- External audits, including but not limited to audits performed by the comptroller and the federal government.

Those portions of documents that contain information in this list ARE open to public access while other portions of documents need not be shared.

Retention and Disposal

Article 57-A, Local Government Records Law, deals with the management, custody, retention and disposal of records by state agencies and local governments. State and local governments are precluded from destroying or disposing of records without following applicable procedures and until a minimum period of retention has been reached. Provisions relating to retention and disposal of records are carried out by the SED's State Archives and Records Administration (SARA). SARA has published *Managing Records in E-mail Systems*, with guidelines for developing policies and procedures for management of records created and captured in e-mail systems.

Frequently, e-mail messages are treated like phone calls and deleted once they are read. However, some e-mail may be considered a record for FOIL purposes and may need to be preserved under a SARA retention schedule. The delete key does not mean that a record has been destroyed. It could be found in the "trash" folder and therefore subject to FOIL, subpoena or discovery in a lawsuit.

E-mail and the Open Meetings Law

Nothing in the Open Meetings Law (OML) precludes members of a public body from conferring individually by e-mail or phone. However, a series of such communications that results in a collective decision, a telephone conference call, or a vote taken by e-mail would be inconsistent with law. Voting and action by a public body may only occur at a meeting during which a quorum has physically convened. The OML provides the public the right to observe public officials in their deliberations. This right disappears if members conduct public business by phone or e-mail, so such action is prohibited. If a majority of the members of any public body engage in instant e-mail or chat room conversation, a court could determine that the results of that activity were illegal.

Information Security

Technology now allows large amounts of information to be stored electronically and be made available quickly, efficiently and economically. Web sites increasingly make information available to anyone, anywhere at virtually no cost and without the need for formal FOIL paperwork. This same technology raises new challenges regarding rights to privacy. In 1984 FOIL was amended to enable agencies to withhold "computer access codes." To ensure that FOIL cannot facilitate the unauthorized access to information stored electronically, or require disclosure of security procedures, the Committee on Open Government is urging that the existing exception regarding computer access codes be replaced with a new provision permitting agencies to withhold records or portions thereof that would facilitate unauthorized access to their electronic information systems.

It is becoming increasingly critical to consider the design of information systems used by government to provide maximum access to records while concurrently protecting against disclosure of deniable information, especially when disclosure would constitute an unwarranted invasion of personal privacy. Through design of information systems that provide appropriate public access coupled with privacy protection, an agency can delete certain fields from a database it makes public.