



Charter Schools Institute
The State University of New York

MEMORANDUM

To: All SUNY Authorized Charter Schools and Board Chairs

From: Ralph A. Rossi II, General Counsel

Date: March 10, 2006

Re: Changes to New York's Freedom of Information Law (FOIL) (REVISED)

On May 3, 2005, changes to New York State's Freedom of Information Law (FOIL) went into effect as Chapter 22, Section 1 of the 2005 Laws of New York. The revised FOIL statute is now available in book form and on-line including on the website of the New York State Department of State's Committee on Open Government at <http://www.dos.state.ny.us/coog/foil2.htm>. Regulations of the Committee on Open Government that incorporate the changes to FOIL were effective on September 28, 2005 and are available at <http://www.dos.state.ny.us/coog/regscog.htm>. The purpose of this memorandum is to introduce the changes to FOIL (Article 6 of the New York Public Officers Law (POL)) to charter schools so that each school may modify its FOIL policies and procedures accordingly, and comply with FOIL. We also include some general information about FOIL and responding to FOIL requests. As you are already aware both the Charter Schools Act (Education Law subdivision 2854(1)(e)) and your charter make your school subject to FOIL and the New York Open Meetings Law (Article 7 of the Public Officers Law available at <http://www.dos.state.ny.us/coog/openmeetlaw.htm>).

New Reasonableness Standard for Responses to FOIL Requests

As was the case before, all written FOIL requests that reasonably describe documents must be acknowledged by the school within 5 business days. If the school cannot within five business days provide the records or deny the request (e.g., when the school has no responsive records), it *must* within five business days write to the FOIL requester and provide an *approximate* date by which either the some or all of records will be available or the request will be denied. One change to the law is that the approximate date given must now be "*reasonable under the circumstances of the request.*" POL § 89(3). For example, if a FOIL request sought a copy of a charter school's latest outside audit, the school should be able to comply within the five days or within a few days thereafter. If on the other hand a FOIL request sought all of the school's audits for the last six years as well as any board minutes referencing any of those audits, the school would justifiably take a greater period of time to comply, which would likely be tied to its methods for storing, retrieving and reviewing records.

20 Day Limit

Another change to the law is that if a school determines that it is going to provide some or all of the records sought by a FOIL request, *and* circumstances prevent the school from providing those records to the FOIL requestor *within 20 days of the date of the school's acknowledgement of the request* (not the date of the request), *the school must state in writing both* 1) the reason the school is not able to provide the record within the 20 days, *and* 2) a date certain (*not* an approximate date) by which the school will provide some or all of the records requested, *which must be "reasonable under the circumstances."* POL § 89(3).

FOIL Appeals

If a school does not follow the above provisions of FOIL (contained in POL subdivision 89(3)), it will now be considered a denial of the FOIL request for purposes of a FOIL appeal. Within 30 days of a denial, a FOIL requestor may appeal the decision of the school's Records Access Officer to the school's Records Appeals Officer, who must respond to the appeal within 10 days and copy the Committee on Open Government on both the appeal and the determination "immediately" after receipt or determination, respectively. POL § 89(4). If the decision of the appeal is to still deny the request, the FOIL requestor may sue the school through an Article 78 proceeding in state court within 4 months of the appeal denial, (Civil Practice Law and Rules (CPLR) 217.) Under another new provision of the law, if a school does not follow the FOIL appeal procedures set forth in POL subdivision 89(4)(a), it will now constitute a denial of the FOIL appeal for purposes of allowing the FOIL requestor to bring an Article 78 proceeding. A negative determination in an Article 78 proceeding could result in attorneys' fees and litigation costs being assessed against the school.

All schools should incorporate the above changes to FOIL into their FOIL policies and procedures. Any questions may be directed to Ralph Rossi, the Institute's General Counsel, who works in the Institute's Albany Office.

FOIL Reminders

- Charter schools do not have to create any documents in response to a FOIL request – only existing documents need be produced.
- Charter schools may charge up to \$0.25 per one sided, 9"x14" page for copies of documents, but cannot charge FOIL requestors for document review or copying time.
- Charter schools must maintain a public list containing the name of each officer and employee, his or her public office address (school address), title and salary.
- Charter schools must also keep a record of the final vote of each trustee in each instance when school trustees vote (which should already be the minutes of board meetings being kept pursuant to the Open Meetings Law and charter monitoring plan).
- Charter schools must also keep a *reasonably detailed current list* by subject matter of all records held by the school whether or not such records are available under FOIL. POL § 87(3)(c). The list must be updated at least annually, and "shall be sufficiently detailed to permit identification of the record sought," (21 N.Y.C.R.R. § 1401.6). One way to compile

such a list is to chart the various areas of school operations and then list what documents each area creates or receives. The list may contain for example some or all of the following:

- Student Health Records*
- Student Immunization Records*
- Student Medical Records*
- Student Accident Reports*
- Safety Records
 - School SAVE Plan
 - Reports of Fire Department Inspections
- School Contracts
 - Management Contract Records
 - Outside Contract Records
 - SPED Contractor Records*
- Personnel Files*
 - Generally*
 - Fingerprint Clearance Records*
 - Certification Records*

* All categories marked with an asterisk may contain personal and confidential or other information that should not be released pursuant to FOIL, the Family Educational Rights and Privacy Act or the Individuals with Disabilities Education Act (which are exceptions to FOIL). For more information, regarding information exempt from FOIL consult POL subdivisions 87(2) and 89(2), and the Personal Privacy Protection Act, POL § 91 and the sections that follow. For more information on FERPA and the IDEA, please review the information posted on the Institute's website at <http://www.newyorkcharters.org/documents/7confidentialityStudentRecords.pdf>.

- Each charter school, whether as part of its FOIL policy or otherwise, must have written rules and regulations regarding how the public may obtain records (POL § 87(1)(b)). A model set of regulations is available from the Committee on Open Government at <http://www.dos.state.ny.us/coog/pdfs/modelregulations.pdf>.
- Pursuant to regulations of the Committee on Open Government, (21 N.Y.C.R.R. § 1401.9), every charter school must post a FOIL notice in a public place in the school. The notice must contain the names of the Records Access Officer and the Records Appeals Officer (who should be different people) as well as locations where records will be made available for inspection and copying.

References

The Committee on Open Government has further information about FOIL and the Open Meetings Law available on its website, <http://www.dos.state.ny.us/coog/coogwww.html>. It also has staff that can answer questions about those laws available at 518-474-2518.