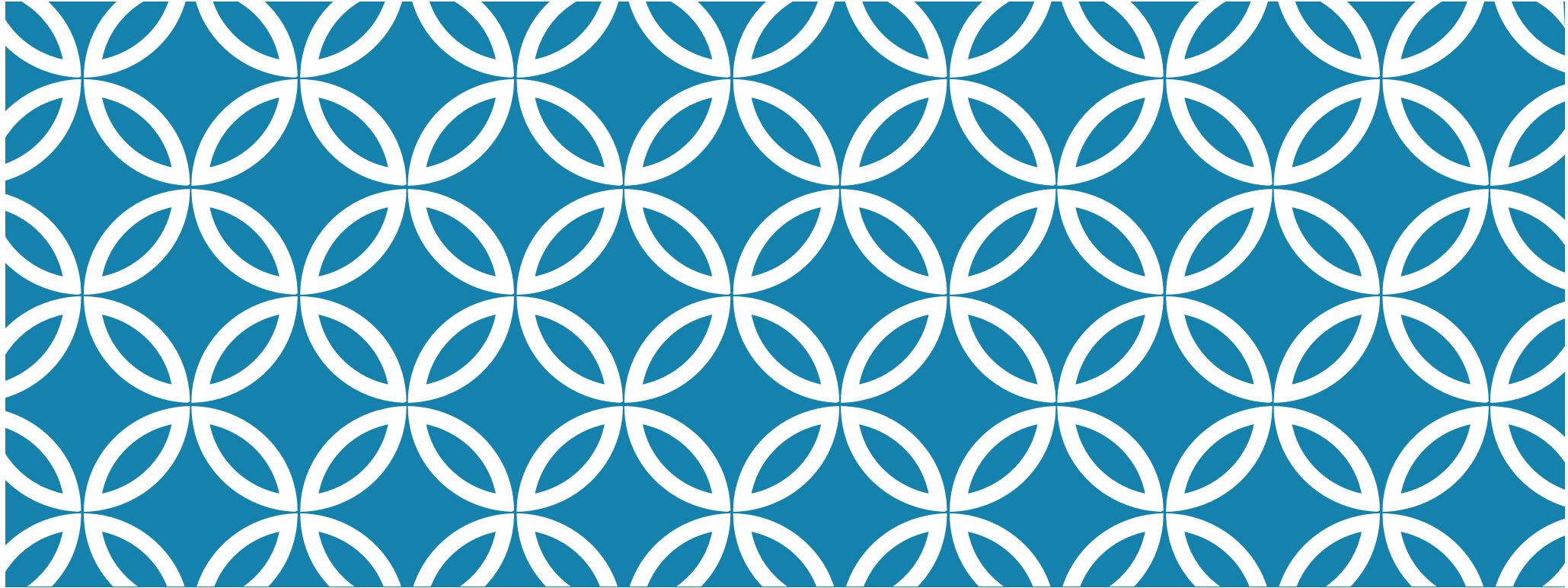


FOIL AT A GLANCE

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PROCESS |

FOIL ARRIVAL

Most FOIL requests come into the agency through the Assistant Records Access Officers, via the FOIL mailbox.

- Upon receipt, the Assistant RAOs will send the request to the **appropriate division** staff who coordinate a response.

On occasion, requests for specific records/ documents may be sent to Division staff in the course of their routine communications with members of the public.

- Staff should communicate to the informal FOIL requestor to submit their records request through the FOIL mailbox and avoid speaking further about the FOIL request or its progress to the requestor.

FOIL PROCESSING

Upon receipt by the Assistant RAOs, FOIL Counsel makes a determination as to sensitivity – Determinations as to whether a FOIL is sensitive is dependent on a number of factors which include:

- Is it from a media outlet?
- Is it related to something political?
- Is it connected to potential legal action against the Department?
- Is it non-routine information?

If a non-sensitive FOIL is received by Division staff, and program recognizes that this FOIL will deal with sensitive issues and will potentially require review of a large volume of documents, please notify the Assistant RAOs, CC'ing the FOIL attorney, to change the sensitive designation.

SENSITIVE FOILS

If a FOIL is deemed sensitive, the FOIL needs Chamber approval before any proposed response may be sent to the requestor. This FOIL will go to Division for processing and initial redactions, followed by review by the Division attorney before going to FOIL counsel and Chamber.

If it is a routine, non-sensitive FOIL, it get processed entirely by program, with guidance from program attorney as necessary. If Division staff has any specific questions regarding the non-sensitive FOIL, please contact the Division attorney, CC'ing FOIL counsel.

INITIAL PROCESSING

When Division staff receives a FOIL request, program staff should check within the first 5 days whether responsive documents exist. If there are no responsive documents, please inform the Assistant RAOs of this.

If potentially responsive documents are maintained at other locations, requests for their retrieval should be made at this point.

A 5-day letter gets sent out indicating that (1) the requested information will be provided 20 business days later, (2) the amount of time necessary for extension or (3) a denial decision will be issued.

FOIL DUTIES OF PROGRAM

When a FOIL request is routed to a division, division staff should make all reasonable efforts to determine if responsive records exist as soon as possible. Any questions as to what would be considered responsive should be directed to the division attorney and FOIL counsel.

- If the number of responsive records seems like it will be voluminous, please check with FOIL counsel or your program attorney to determine what is a feasible timeframe to complete the request or if the request needs to be clarified.
- At this time, program staff should ensure that these responsive documents are in **PDF format**.

Once responsive records are located, division staff should make necessary redactions. For non-sensitive FOILs, once redactions are made, the documents along with a cover letter can be sent to the requestor. Responses to sensitive FOILs should be sent to the division attorney and FOIL counsel for second level review.

PARAMETERS OF A FOIL RESPONSE

FOIL requests need only be responded to if it is reasonably described.

Time period – A time period must be specified to be reasonably described.

- Note: The Department does not have any obligation to provide documents that were created after the date that the FOIL request was submitted to the Department.

Specified records – A proper FOIL request should not require the Department to guess what records should be included in the response.

- How to tell if a request is specified? It is not specific if:
 - If the request asks a question rather than for a specific record.
 - If the request asks for records that “..might have gone into decision making for..”

WHEN TO CONTACT A FOIL REQUESTOR FOR CLARIFICATION

Requests of names and addresses require a signed certification that the requestor will not use such lists of names and addresses for solicitation or fund-raising purposes.

When the retrieval of the desired records will incur significant fees – This can either be through an official letter or a phone call to the requestor.

If the parameters of the FOIL request are unclear – Division staff should consult with the division attorney if the records requested are voluminous to the point of being burdensome. A call may be made to the requestor to narrow the range of requested documents.

FEES

The fees for copies of records which shall not exceed **twenty-five cents** per photocopy not in excess of nine inches by fourteen inches, or the actual cost of reproducing any other record. In determining the actual cost of reproducing a record, an agency may include only:

- an amount equal to the hourly salary attributed to the lowest paid agency employee who has the necessary skill required to prepare a copy of the requested record;
- the actual cost of the storage devices or media provided to the person making the request in complying with such request;
- the actual cost to the agency of engaging an outside professional service to prepare a copy of a record, but only when an agency's information technology equipment is inadequate to prepare a copy, if such service is used to prepare the copy; and
- preparing a copy shall not include search time or administrative costs, and no fee shall be charged unless at least two hours of agency employee time is needed to prepare a copy of the record requested. A person requesting a record shall be informed of the estimated cost of preparing a copy of the record if more than two hours of an agency employee's time is needed, or if an outside professional service would be retained to prepare a copy of the record.

Note: While FOIL requestors may be charged for the time needed to search for documents in an electronic database, the Department may not charge for time spent searching for paper records.

WHAT GOES IN A PRELIMINARY RESPONSE LETTER?

Discussion of fees

Request for clarification – overly broad request

- “needle in the haystack” – agencies are not required to engage in herculean or unreasonable efforts in locating records to accommodate a person seeking records (FOIL-AO-18949 (8/20/12))

Significant redactions

Further delays

RESPONDING TO A FOIL REQUEST

In addition to providing responsive documents (if available), the program attorney or a member of the division staff should prepare a FOIL response letter that should include the following information:

- Acknowledgment of the date and substance of the FOIL request
- Reasons for denial (if applicable)
- Reasons for withholding responsive documents
- Reasons for redacting information from responsive documents
- Notice that the requestor may appeal from a denial or a de facto denial of their FOIL request by sending written notice to Dan Shapiro

DENYING A FOIL REQUEST

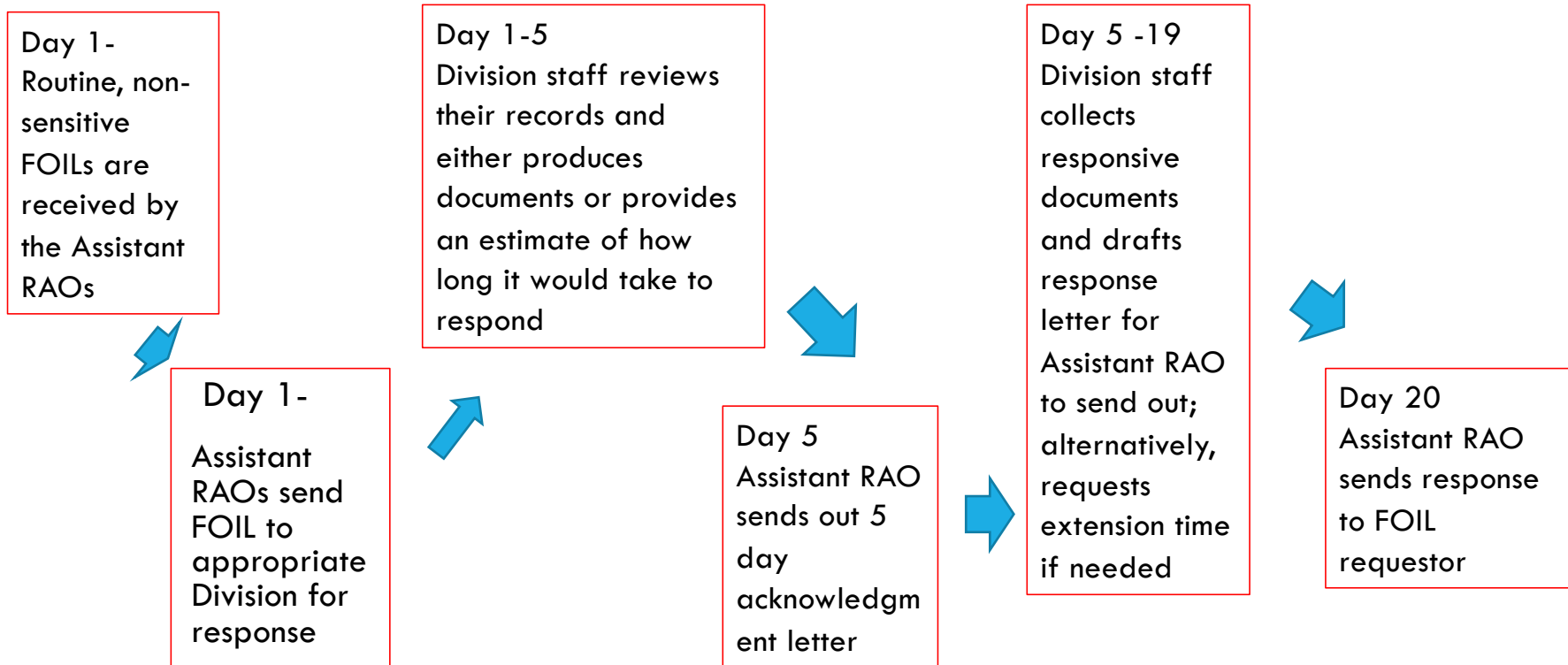
No responsive records

- Public Officers Law § 89 (3) provides that a government agency is not required to create or prepare a new record in response to a request for information (*Konigsberg v Coughlin*, 68 NY2d 245, 250 [1986]).
- No jurisdiction – The Department may not be the official record holder of the requested information.

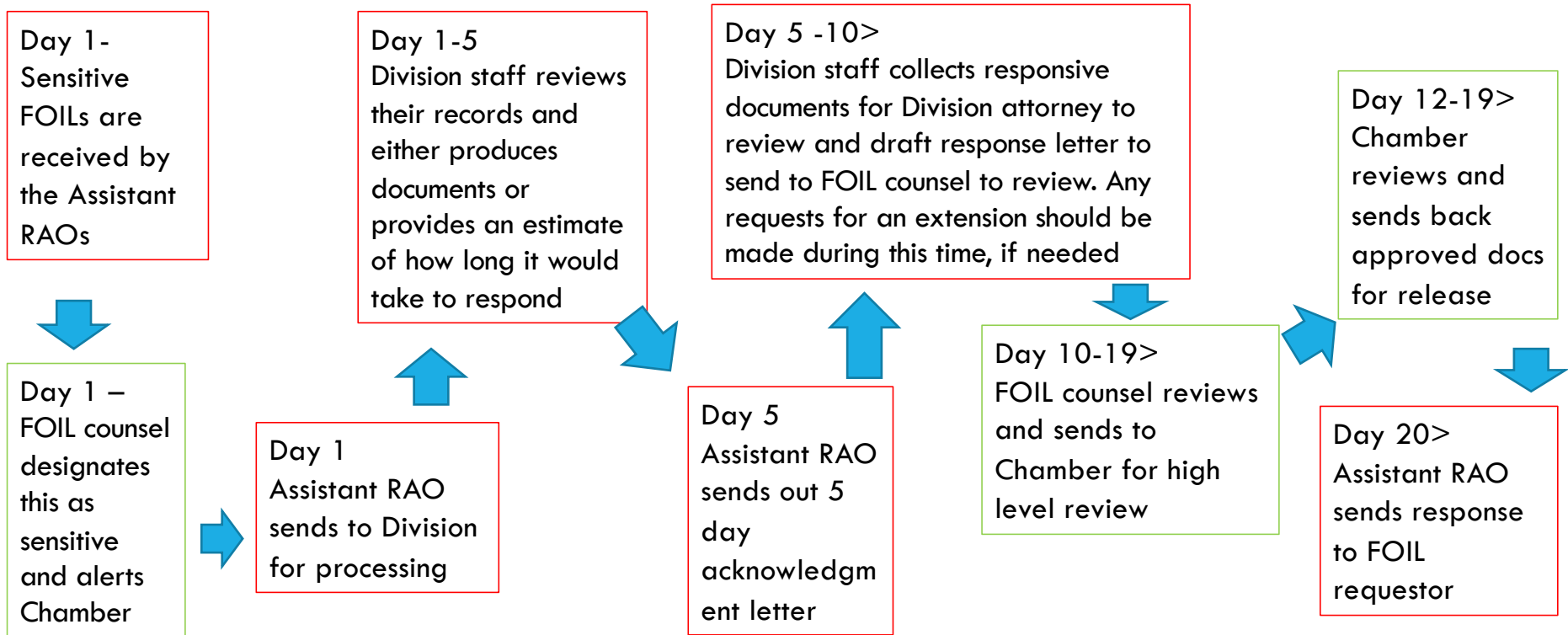
FOIL request is actually a request for information that is not available in any existing records

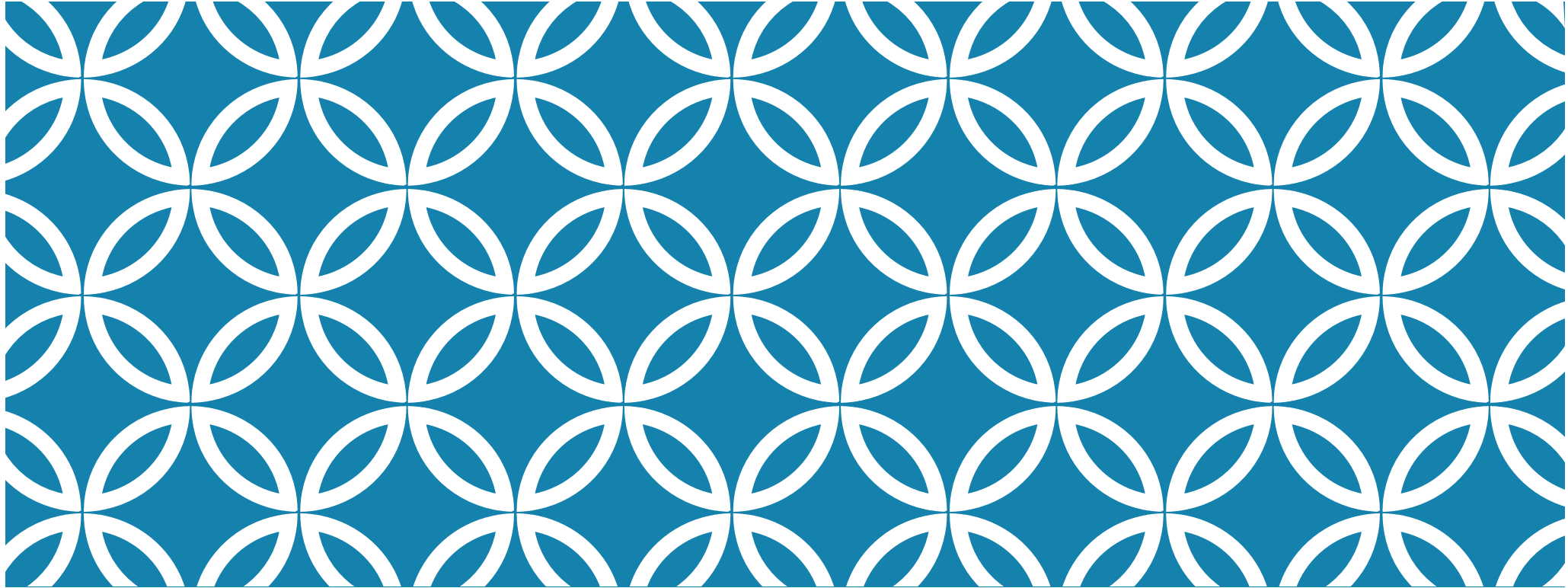
- Comm on Open Govt FOIL-AO-12002 [2000] provides that a FOIL request may be denied when the request consists entirely of a question that seeks information that is not contained in any existing record of the Department.
- FOIL does not entitle the public to obtain an interpretation of law that requires a judgment.

TIMELINE OF A ROUTINE FOIL REQUEST



TIMELINE OF A SENSITIVE FOIL





REDACTIONS |

EXEMPTIONS TO FOIL

State agencies may deny access to records or portions of records that

- Are exempted from disclosure by state or federal statute
- Would constitute an unwarranted invasion of personal privacy
- 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 such information and which, if disclosed, would cause substantial injury to the competitive position of the subject enterprise
- Are compiled for law enforcement purposes
- If disclosed, could endanger the life or safety of any person
- Are inter-agency or intra-agency materials
- Are examination questions or answers
- If disclosed, would jeopardize an agency's capacity to guarantee the security of its information technology assets.

STATE OR FEDERAL STATUTE: ATTORNEY-CLIENT WORK PRODUCT

Public Officers Law § 87[2][a], namely NY Civil Practice Law and Rules §§ 4503(a) and 3101(c), exempts from production, materials that constitute confidential communications made between an attorney and his or her client or attorney work product.

- Example:

- Requests for (and responses to) legal analysis; however, at the creation of this record, it should have been intended to be confidential.

UNWARRANTED INVASION OF PERSONAL PRIVACY

Disclosure of employment, medical or credit histories or personal references of applicants for employment;

Disclosure of items involving the medical or personal records of a client or patient in a mental facility;

Sale or release of lists of names and addresses if such lists would be used for solicitation or fund-raising purposes;

Disclosure of information of a personal nature when disclosure would result in economic or personal hardship to the subject party and such information is not relevant to the work of the agency requesting or maintaining it;

Disclosure of information of a personal nature reported in confidence to an agency and not relevant to the ordinary work of such agency;

Information of a personal nature contained in a workers' compensation record, except as provided by section one hundred ten-a of the workers' compensation law; or

Disclosure of electronic contact information, such as an e-mail address or a social network username, that has been collected from a taxpayer under section one hundred four of the real property tax law.

WHEN DISCLOSURE OF PERSONAL INFORMATION WILL NOT CONSTITUTE AN UNWARRANTED INVASION OF PERSONAL PRIVACY

When identifying details are deleted;

When the person to whom a record pertains consents in writing to disclosure;

When upon presenting reasonable proof of identity, a person seeks access to records pertaining to him or her; or

When a record or group of records relates to the right, title or interest in real property, or relates to the inventory, status or characteristics of real property, in which case disclosure and providing copies of such record or group of records shall not be deemed an unwarranted invasion of personal privacy, provided that nothing herein shall be construed to authorize the disclosure of electronic contact information, such as an e-mail address or a social network username, that has been collected from a taxpayer under section one hundred four of the real property tax law.

TRADE SECRETS

Most likely applicable to RFA's and RFP's.

This exception does not apply if these documents are publicly available.

- **“Substantial Injury to Competitive Position” Test-**
 1. Is FOIL the sole means by which competitors can obtain the requested information?
 - **YES-** the inquiry ends- *disclosure likely to cause competitive harm.*
 - **NO-** If information is available from other sources at little to no cost- *disclosure is unlikely to cause competitive harm.*
 2. **What is the commercial value of the information to competitors?**
 - Consider “resultant damage to submitting enterprise”
 - “[N]ot required to establish actual competitive harm . . . Rather, ‘actual competition and the likelihood of substantial competitive injury is all that need be shown.’”

INTER-AGENCY/ INTRA-AGENCY MATERIALS

Redactable materials include, but are not limited to, “opinions, ideas, or advice exchanged as part of the consultative or deliberative process of government decision making” (*Matter of the New York Times Co. v City of New York Fire Dept.*, 4 NY3d 477, 487 [2005] [quoting *Matter of Gould v. New York City Police Dept.*, 89 NY2d 267, 277 [1996]]).

These materials may be redacted or withheld if they are not:

- statistical or factual tabulations or data;
- instructions to staff that affect the public;
- final agency policy or determinations;
- external audits, including but not limited to audits performed by the comptroller and the federal government

SECURITY OF AN AGENCY'S INFORMATION TECHNOLOGY ASSETS

This category of exemptions would include:

- Conference call-in numbers
- Internet links to non-public documents

FURTHER CLARIFICATION

If you are unsure how to proceed on a FOIL request, further clarification may be sought from:

- your assigned program attorney
- FOIL counsel – Penny.Zhu@dos.ny.gov