THE IMPACT OF TECHNOLOGY ON THE FREEDOM OF INFORMATION LAW, a/k/a the "FOIL"

When the New York Freedom of Information Law (FOIL) was enacted in 1974[1], state and local government, like much of the rest of society, was tied to the typewriter and the photocopy machine. Many of us actually used carbon paper for our "cc's". Most searches for records were accomplished by pulling records from filing cabinets and reviewing them to determine the extent to which they must be disclosed.

Like the use of the term "FOIL", changes in technology have required us to reconsider a variety of words that now have new meanings. Foil is still used to wrap leftovers, but now "FOIL" can be a noun used to identify a statute or when requesting records ("I submitted a FOIL to obtain the plan submitted by the developer."); it has also become a verb ("I FOILed the record", or from the government agency's perspective, "We were FOILed."). "Encryption" was a word associated with wartime and spy novels. Now it's a part of communications that have become routine. A "password" used to be associated with a knock on the door. Now it's a tool that let's you in, or more importantly, keeps others out of your electronic information system. We've become concerned about viruses very different from those that kept our kids home from school. Going "online", engaging in "E-commerce", building "firewalls", "digital signatures" and developing an "Intranet" involve the use of terms redefined or that are completely new. For some of us, they have become part of our everyday vocabulary. And if they are not now, they will be soon.

Technology is changing the nature of the relationship between the government and the public it serves. At the heart of the relationship are the expectations of citizens in terms of the information they can acquire, the means by which they can acquire it, and the speed with which government can respond.

What Is A "Record"?

Soon after the enactment of FOIL, it became clear that the means by which we generate, exchange and maintain our records was changing, and by 1978, the original version of the FOIL was repealed and replaced with a modern statute that was drafted in a manner adaptable to changing information technology[2]. Since that time, FOIL has been based upon a presumption of access. Stated differently, all records of an agency are available, except to the extent that records or portions thereof fall within one or more grounds for denial appearing in §87(2)(a) through (i). Most of the grounds for denial involve the ability of a government agency to withhold records to the extent that disclosure would result in harm to an individual with respect to an invasion of personal privacy, to a commercial entity when the release of records would cause injury to its competitive position, or to the government in terms of its capacity to carry out its duties effectively on behalf of taxpayers.

Perhaps as important as the statute's presumption of access is its scope. FOIL pertains to agency records, and §86(4) defines the term "record" to include:

> "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."

Based upon the language quoted above, if information is maintained by or for an agency in some physical form, it constitutes a "record" subject to rights of access conferred by the FOIL. The definition includes specific reference to computer tapes and discs, and it was held soon after the reenactment of the FOIL that "[i]nformation is increasingly being stored in computers and access to such data should not be restricted merely because it is not in printed form."[3]

"Creating" Records

FOIL pertains to existing records states that an agency is not required to create a record in response to a request.[4] That was an easy concept to understand and implement in the era of paper. If an agency did not have a "list" of certain items or had no total of the cost of heating the town hall, it would not be required to prepare a list or review its twelve monthly heating bills and add the figures to arrive at a total. However, when information is maintained electronically, if the information sought is available under FOIL and may be retrieved by means of existing computer programs, an agency is required to disclose the information. In that kind of situation, the agency would merely be retrieving data that it has the capacity to retrieve. Disclosure may be accomplished either by printing out the data on paper or perhaps by duplicating the data on another storage mechanism, such as a computer tape or disk. On the other hand, if information sought can be retrieved from a computer or other storage medium only by means of new programming or the alteration of existing programs, those steps would be the equivalent of creating a new record. As suggested earlier, since §89(3) does not require an agency to create a record, an agency is not required to reprogram or develop new programs to retrieve information that would otherwise be available.[5]

Often information stored electronically can be extracted by means of a few keystrokes on a keyboard. While some have contended that those kinds of minimal steps involve programming or reprogramming, so narrow a construction would tend to defeat the purposes of the FOIL. Morever, extracting information and creating it clearly involve different functions.

If, for example, an applicant knows that an agency's database consists of 10 items or "fields", asks for items 1, 3 and 5, but the agency has never produced that combination

of data, would it be "creating" a new record? The answer is dependent on the nature of the agency's existing computer programs; if the agency has the ability to retrieve or extract those items by means of its existing programs, it would not be creating a new record; it would merely be retrieving what it has the ability to retrieve in conjunction with its electronic filing system. An apt analogy may be to a filing cabinet in which files are stored alphabetically and an applicant seeks items "A", "L" and "X". Although the agency may never have retrieved that combination of files in the past, it has the ability to do so, because the request was made in a manner applicable to the agency's filing system. On the other hand, if the applicant makes a second request, this time for items 7, 8 and 9, but the agency has no method of retrieving or extracting those items except by means of new programming, i.e., changing the means by which it may retrieve or extract data, the act of reprogramming would be the equivalent of creating a new record, and an agency would not be required to do so. Going back to the filing cabinet in which the records are maintained alphabetically, the analogy would involve a request for the records filed, for example, between April and July of 1997. The agency knows that the items sought are kept within its files, but there may be no way of locating them, except by reviewing each individually. In that situation, the agency would not be required to alter its filing system, i.e., change it from alphabetical to chronological order, in an effort to accommodate the applicant. Based on the same logic, an agency would not be required to create a new program to extract that data that may be stored, but which cannot be retrieved or generated by means of its existing programs.

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. Moreover, it may be more cost efficient to engage in reprogramming than to delete portions of a printout by hand, for example, or to engage in a physical search of paper records. Redactions made manually and extensive searches are time consuming and labor intensive, but minor reprogramming may often be done quickly.

Format: Paper, Disk or Tape?

FOIL's statement of intent indicates that agencies are required to make records available "wherever and whenever feasible." What if the agency chooses disclose record by means of a computer printout, but the applicant has requested the record on a computer tape or disk? In Brownstone Publishers Inc. v. New York City Department of Buildings[6], the question involved an agency's obligation to transfer electronic information from one electronic storage medium to another when it had the technical capacity to do so and when the applicant was willing to pay the actual cost of the transfer. As stated by the Appellate Division:

> "The files are maintained in a computer format that Brownstone can employ directly into its system, which can be reproduced on computer tapes at minimal cost in a few hours time-a cost Brownstone agreed to assume (see, POL

> [section] 87[1] [b] [iii]). The DOB, apparently intending to discourage this and similar requests, agreed to provide the information only in hard copy, i.e., printed out on over a million sheets of paper, at a cost of $10,000 for the paper alone, which would take five or six weeks to complete. Brownstone would then have to reconvert the data into computer-usable form at a cost of hundreds of thousands of dollars.
>
> "Public Officers Law [section] 87(2) provides that, 'Each agency shall...make available for public inspection and copying all records...' Section 86(4) includes in its definition of 'record', computer tapes or discs. The policy underlying the FOIL is 'to insure maximum public access to government records' (Matter of Scott, Sardano & Pomerantz v. Records Access Officer, 65 N.Y.2d 294, 296-297, 491 N.Y.S.2d 289, 480 N.E.2d 1071). Under the circumstances presented herein, it is clear that both the statute and its underlying policy require that the DOB comply with Brownstone's reasonable request to have the information, presently maintained in computer language, transferred onto computer tapes."[7]

In another decision, it was held that: "[a]n agency which maintains in a computer format information sought by a F.O.I.L. request may be compelled to comply with the request to transfer information to computer disks or tape."[8]

In short, assuming that the conversion of format can be accomplished, that the data sought is available under FOIL, and that the data can be transferred from the format in which it is maintained to a format in which it is requested, an agency would be obliged to do so. Under those conditions, production of the record would not involve creating a new record or reprogramming, but rather merely a transfer of information into a format usable to the applicant.

Fees

Section 87(1)(b)(iii) of FOIL stated until October 15, 1982, that an agency could charge up to twenty-five cents per photocopy or the actual cost of reproduction unless a different fee was prescribed by "law". Chapter 73 of the Laws of 1982 replaced the word "law" with the term "statute". As described in its annual report to the Governor and the Legislature by the Committee on Open Government (created by the enactment of FOIL in 1974 and reconstituted in the current statute[9]), which was submitted in December of 1981 and which recommended the amendment that is now law:

> "The problem is that the term 'law' may include regulations, local laws, or ordinances, for example. As such, state agencies by means of regulation or municipalities by means of local law may and in some instances have established fees in excess of twenty-five cents per photocopy, thereby resulting in constructive denials of access. To remove this problem, the word 'law' should be replaced by 'statute', thereby enabling an agency to charge more than twenty-five cents only in situations in which an act of the State Legislature, a statute, so specifies."

Therefore, prior to October 15, 1982, a local law, an ordinance, or a regulation for instance, establishing a search fee or a fee in excess of twenty-five cents per photocopy or higher than the actual cost of reproduction was valid. However, under the amendment, only an act of the State Legislature, a statute, would permit the assessment of a fee higher than twenty-five cents per photocopy, a fee that exceeds the actual cost of reproducing records that cannot be photocopied, or any other fee, such as a fee for search. In addition, it has been confirmed judicially that fees inconsistent with the Freedom of Information Law may be validly charged only when the authority to do so is conferred by a statute.[10]

The specific language of FOIL and the regulations promulgated by the Committee[11] indicate that, absent statutory authority, an agency may charge fees only for the reproduction of records. Section 87(1)(b) of the Freedom of Information Law states:

> "Each agency shall promulgate rules and regulations in conformance with this article...and pursuant to such general rules and regulations as may be promulgated by the committee on open government in conformity with the provisions of this article, pertaining to the availability of records and procedures to be followed, including, but not limited to...
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> > (iii) the fees for copies of records which shall not exceed twenty-five cents per photocopy not in excess of nine by fourteen inches, or the actual cost of reproducing any other record, except when a different fee is otherwise prescribed by statute."

The regulations promulgated by the Committee state in relevant part that:

> "Except when a different fee is otherwise prescribed by statute:
>
> (a) There shall be no fee charged for the following:

(1) inspection of records;
(2) search for records; or
(3) any certification pursuant to this Part."[12]

Based upon the foregoing, it is likely that 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., a computer tape) to which data is transferred.

Although compliance with FOIL involves the use of public employees' time and perhaps other costs, the Court of Appeals has found that the Law is not intended to be given effect "on a cost-accounting basis", but rather that "Meeting the public's legitimate right of access to information concerning government is fulfillment of a governmental obligation, not the gift of, or waste of, public funds."[13]

E-mail Under FOIL

When I finished a draft of this article, I called Patricia Salkin at the Government Law Center and asked her if she wanted me to drop off a paper copy at her office, fax it to her, or to transmit it via e-mail. Among those choices, e-mail is clearly the easiest, the quickest and the cheapest. Once she received the article, she could download it, format it in a way appropriate for the *Journal*, and edit it. In short, by using e-mail, we can do a great deal that we could not do nearly as efficiently in the recent past.

What had been yesterday's fantasy in terms of written communications has become today's reality. But along with the reality is a need to raise consciousness, a need to think of e-mail not merely as an instant means of leaving or responding to messages in a manner similar to phone calls and voice mail. Rather, we should think about e-mail for what it really is: an equivalent, in actuality and legally, to an old-fashioned letter or memo. In consideration of public rights of access, retention and disposal, and the functions and responsibilities of public employees, e-mail should be treated in most respects just like paper.

This is not to suggest that all e-mail communications must be disclosed. While FOIL is based on a presumption of access, it includes exceptions to rights of access. If e-mail is transmitted from one public employee to another, the most pertinent provision in analyzing rights of access would be §87(2)(g), which deals with "inter-agency" and "intra-agency" materials. "Inter-agency" materials consist of written communications between or among employees of two or more agencies. “Intra-agency” materials are in-house communications. The letter from me at the Department of State to a school district official, for example, would constitute "inter-agency" material; the memo from the city clerk to the mayor would be "intra-agency" material. In both of those instances, §87(2)(g) would bear upon rights of access, and it would apply whether the communications are transmitted on paper or via e-mail.

That provision permits an agency to withhold records that:

> "are inter-agency or intra-agency materials which are not:
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> i. statistical or factual tabulations or data;
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> ii. instructions to staff that affect the public;
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> iii. final agency policy or determinations; or
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> iv. external audits, including but not limited to audits performed by the comptroller and the federal government..."

It is noted that the language quoted above contains what in effect is a double negative. While inter-agency or intra-agency materials may be withheld, portions of such materials consisting of statistical or factual information, instructions to staff that affect the public, final agency policy or determinations or external audits must be made available, unless a different ground for denial could appropriately be asserted. Concurrently, those portions of inter-agency or intra-agency materials that are reflective of opinion, advice, recommendation and the like could in my view be withheld.

Several points should be emphasized in relation to the foregoing. First, that an internal communication does not represent or relate to a final agency determination does not remove it from the scope of rights of access. On the contrary, the content of the communication is the key to ascertaining how much can be withheld, or conversely, how much must be disclosed.[14] Second, "factual" information available under §87(2)(g)(i) does not have to consist of numbers, charts or graphs; it might be a factual statement. "I looked out the window and the sky was blue" would be factual information that must be disclosed. And third, the exception does not apply to communications with persons or entities outside of government. An e-mail sent to or received by a member of the public or a private company, for example, would be neither inter-agency nor intra-agency material.

This communication from me at the Department of State, which is an "agency" as defined by FOIL, and the Government Law Center, which is part of Albany Law School and not a government agency, would not be covered by §87(2)(g) and would have to be disclosed. Whether it is printed and delivered, sent by U.S. mail, faxed, or transmitted via e-mail, the result is the same: it is a "record" subject to FOIL that an agency would be required to disclose on request.

Retention and disposal

Article 57 of the Arts and Cultural Affairs Law and the "Local Government Records Law", Article 57-A of that chapter, deal respectively with the management, custody, retention and disposal of records by state agencies and local governments.

With regard to the retention and disposal of records, §57.05(11)(b) pertaining to state agencies and §57.25 concerning local governments preclude state and local governments from destroying or disposing of records without folllowing applicable procedures and until a minimum required period of retention has been reached. The provisions relating to the retention and disposal of records are carried out by a unit of the State Education Department, the State Archives and Records Administration (SARA). SARA has published *Managing Records in E-mail Systems*, which offers guidelines for developing policies and procedures for the effective management of records created and captured in e-mail systems.

Many of us have received e-mail messages, read them and then deleted them, for we have treated those communications like phone messages. For reasons described earlier, e-mail clearly constitutes a record for the purposes of FOIL, and it may have to be preserved under a SARA retention schedule. It is also important to know that hitting the delete key does not mean that the record has been destroyed. Frequently the message that has been deleted can be found by hitting the "trash" key. In that situation, because the message still exists, it would be subject to FOIL or perhaps more importantly, to a subpoena or discovery in a lawsuit.

E-mail And The Open Meetings Law

There is nothing in the Open Meetings Law[15] that would preclude members of a public body, such as a city council or the board of a public authority, from conferring individually, by e-mail or telephone. However, a series of communications between individual members or telephone calls among the members which results in a collective decision, a meeting held by means of a telephone conference, 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.[16]

The Open Meetings Law is intended to provide the public with the right to *observe* the performance of public officials in their deliberations. That intent cannot be realized if members of a public body conduct public business as a body or vote by e-mail or phone.

A recent decision indicates that action taken by means of series of telephone calls violated the Open Meetings Law, and the same conclusion would likely be reached with respect to action taken through a series of e-mail communications. In Cheevers v. Town of Union[17], the court stated that:

> "There was no physical gathering, but four members of the five-member board discussed the issue in a series of telephone calls. As a result, a quorum of members of the Board were 'present' and determined to [take an action]. The failure to actually meet in person or have a telephone conference in order to avoid a 'meeting' circumvents the intent of the Open Meetings Law (see e.g., 1998 Advisory Opns Committee on Open Government 2877). This court finds that telephonic conferences among the individual members constituted a meeting in violation of the Open Meetings Law..."

If a majority of the members of a public body engage in "instant e-mail" or communicate in a chat room in which the communications are equivalent to a conversation, it is likely that a court would determine that communications of that nature would run afoul of the Open Meetings Law. In essence, the majority in that case would be conducting a meeting without the public's knowledge and without the ability of the public to "observe the performance of public officials" as required by the Open Meetings Law.[18]

E-mail can be a magical tool. An agency's well-designed and managed e-mail system can expedite business communications, reduce paperwork, increase productivity and diminish costs. Nevertheless, there should be an awareness of a variety of legal obligations, particularly those relating to FOIL, records management and even the Open Meetings Law.

The Need For Legislation

FOIL has clearly enhanced the ability of the public to know what the government is doing and to obtain information from or about government. Large amounts of information can be stored in electronic media and be made available quickly, efficiently and at low cost. Further, agencies are increasingly making information available via websites through which any person, anywhere can acquire data at virtually no cost, and without submitting a formal request under FOIL.

Despite the substantial improvements in the capacity of the public to use and agencies to comply with FOIL in a manner consistent with its intent, information technology can be used to make the law work better. The same technology has also created new pitfalls, danger in relation to the security of information maintained electronically, and new challenges for the State Legislature.

Guaranteeing information security

In 1984, FOIL was amended to enable agencies to withhold "computer access codes".[19] The idea was that disclosure of a code could result in unauthorized access to

information stored in a computer. That was a first step toward protecting government records and information maintained electronically, but it is now clearly insufficient to guarantee against the legal disclosure of records that could be used not only to obtain information, but also to alter or even destroy it.

Not long ago, a description of an agency's security procedures concerning the protection of its records would not, if disclosed, compromise the ability to guard against unauthorized access. Even if written procedures were available, without the first key to unlock the door to the room in which the records were stored, and more importantly, without the second key needed to unlock the filing cabinet, records could be protected with reasonable certainty. In contrast, today's disclosure of an agency's security procedures could result in devastating attacks and incursions on its electronic information systems. The use of the key to unlock the door or filing cabinet, being physically present, is no longer necessary; an electronic attack can emanate from anywhere.

To ensure that the FOIL cannot be used to facilitate the unauthorized access to information stored electronically or to require the disclosure of security procedures that could damage an agency's information or information system, the Committee on Open Government has urged that the existing exception regarding computer access codes be replaced with a new provision that permits agencies to withhold records or portions thereof that:

> "...would if disclosed facilitate unauthorized access to an agency's electronic information systems or clearly jeopardize or compromise information security."

Using technology to protect privacy and maximize access

> "One of the bedrock principles of electronic access is that format should not dictate the availability of information. In other words, if the information is available on paper, the fact that it is in electronic form should not be an obstacle to its availability."[20]

It is becoming increasingly critical to consider the design of information systems used by government in order 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.[21] "The move to maintain and collect more government information in electronic form continues and it seems more likely that almost all records will at some time become electronic...[and] the real problems of balancing access and privacy will have to be faced and resolved in an electronic world."[22]

Through the design of information systems that provide appropriate disclosure coupled with the protection of personal privacy, often an agency need only delete certain

fields from a database. Once the fields containing protected information are deleted, the database becomes fully public. Clearly that course of action, accomplished in consideration of access and privacy, is far preferable to a denial of access or the hours expended by agency employees making deletions with magic markers so that disclosure requirements can be met while recognizing the need to protect privacy.

In conjunction with the foregoing, the Committee on Open Government has recommended that a new §89(9) be added to FOIL as follows:

> "When records maintained electronically include items of information that would be available under this article, as well as items of information that may be withheld, an agency in designing its information retrieval methods, whenever practicable and reasonable, shall do so in a manner that permits the segregation and retrieval of available items in order to foster maximum public access."

Conclusion

It is clear that information technology has revolutionized the manner in which society, including government, creates, disseminates, stores and protects its information resources. In most respects, FOIL is adaptable to changing technology: it can and should be implemented in a manner that guarantees maximum public access to government records, while concurrently protecting against disclosures in accordance with exceptions to rights of access and a recognition of the need to assure security.

Endnotes

1. Originally Public Officers Law, Article 6, §§85-89.

2. Ch. 933, L. 1977, Public Officers Law, Article 6, §§84-90.

3. *Babigian v. Evans*, 427 NYS 2d 688, 691 (1980); aff'd 97 AD 2d 992 (1983); see also, *Szikszay v. Buelow*, 436 NYS 2d 558 (1981).

4. Public Officers Law, §89(3).

5. *Guerrier v. Hernandez-Cuebas*, 165 AD 2d 218 (1991).

6. 166 AD2d 294 (1990).

7. *id.*, at 295.

8. *Samuel v. Mace*, Supreme Court, Monroe County, December 11, 1992.

9. Public Officers Law, §89(1).

10. ***Gandin, Schotsky & Rappaport v. Suffolk County*****, 640 NYS2d 214, 226 Ad2d 399 (1996);** ***Sheehan v. City of Syracuse*****, 521 NYS 2d 207 (1987).**

11. 21 NYCRR Part 1401.

12. 21 NYCRR 1401.8.

13. ***Doolan v. BOCES*****, 48 NY 2d 341, 347 (1979).**

14. ***Gould, Scott and DeFelice v. New York City Police Department*****, 653 NYS2d 54, 89 NY2d 267 (1996);** ***Xerox Corporation v. Town of Webster*****, 65 NY2d 131, 490 NYS2d 488 (1985);** ***Ingram v. Axelrod*****, 90 AD2d 568 (1982).**

15. Public Officers Law, Article 7, §§100-111.

16. General Construction Law, §41.

17. Supreme Court, Broome County, September 3, 1998.

18. See §100.

19. Ch. 283, L. 1984.

20. Columnist Harry Hammitt in ***Government Technology*****, November, 1997.**

21. Public Officers Law, §§87(2)(b), 89(2), 96.

22. ***Government Technology, supra.***