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NEW YORK STATE
ASSOCIATION OF COUNTIES

Understanding State Law Enforcement Reforms: What Does the 50-a Repeal Mean for Your County Government?

Webinar – July 15

Stephen J. Acquario
Executive Director
NYSAC



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NYMIR

Chris Walsh (*left*)
Marty Mack (*right*)

MACK & WALSH PLLC



The background features a complex, abstract pattern of blue and purple wavy lines that create a sense of depth and movement. Overlaid on this is a grid of small, glowing dots, which together form a digital or data-like aesthetic. The overall color palette is dominated by deep blues and purples, with some lighter, almost white highlights where the lines and dots intersect.

REPEAL OF CIVIL
RIGHTS LAW 50a
New Additions to POL
Article 6 Freedom of
Information Law

CIVIL RIGHTS LAW 50-a

Permitted law enforcement officers to refuse disclosure of “personnel records used to evaluate performance toward continued employment or promotion.”

PURPOSE: 50a was adopted in 1976 to prevent criminal defense lawyers from using such records in cross examination of police witnesses during criminal prosecution.

EFFECT: “This narrow exemption has been expanded in the courts to allow police departments to withhold from the public virtually any record that contains any information that could conceivably be used to evaluate the performance of a police officer.” STATE COMMITTEE ON OPEN GOVERNMENT

LEGISLATURE'S JUSTIFICATION FOR REPEAL

- The evolution of Civil Rights Law 50-a “defeated FOIL’s goal of accountability and transparency.” Section 50a “became a legal shield that prohibits disclosure even when it is known that misconduct has occurred.”
- FOIL already provides all public employees, including those protected under 50-a, the protections necessary to guard against unwarranted invasions of privacy and from disclosure that could jeopardize their security or safety.
- Courts have the ability to protect against improper cross-examination and determine if police records are admissible in a trial, without the denial of public access to information regarding police activity created by 50-a.

CONCURRENTLY
WITH REPEAL
OF 50-a: New
FOIL Law
Provisions


**OVERVIEW: Freedom of
Information Law (Public
Officers Law Article 6**

**FOIL is based on a
presumption of disclosure
to ensure transparency**

**Unless there is an
exception, records must
be disclosed**



TWO KEY THEMES IN FOIL EXCEPTIONS

- Would an individual be harmed?
 - Would disclosure hamper effective functioning of government?
- 

FOIL: Key Factors

- **Embarrassment** is not a factor. Embarrassment is not harm.
- **Timing of request** is a factor. Disclosure may cause harm today, but not a month or a year from today.
- **Discretion** to disclose is a factor when a FOIL exception to disclosure applies. There is always authority to disclose unless disclosure is prohibited by state or federal law.




FREEDOM OF INFORMATION LAW (POL ARTICLE 6): New Definitions




- Section 86-6 “Law Enforcement Disciplinary Records”
- Section 86-7 “Law Enforcement Disciplinary Proceeding”
- Section 86-8 “Law Enforcement Agency”
- Section 86- 9 “Technical Infraction”

LAW ENFORCEMENT DISCIPLINARY RECORDS (POL Section 86-6)

- Any record created in furtherance of a law enforcement disciplinary proceeding, including but not limited to:
 - (a) the complaints, allegations, and charges against an employee;
 - (b) the name of the employee complained of or charged;
 - (c) the transcript of any disciplinary trial or hearing, including exhibits introduced at the trial or hearing;
 - (d) the disposition of any disciplinary proceeding, and
 - The final written opinion or memorandum supporting the disposition and discipline imposed including the agency's complete factual findings and its analysis of the conduct and discipline imposed
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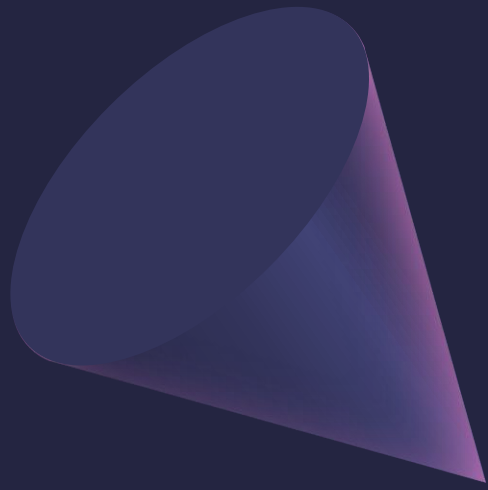



LAW ENFORCEMENT DISCIPLINARY PROCEEDING (POL section 86-7)


- The commencement of any investigation and any subsequent hearing or disciplinary actions conducted by a law enforcement agency.
- 



LAW ENFORCEMENT AGENCY (POL section 86-7)

- A police agency or department of the state or any political subdivision thereof, including authorities or agencies maintaining police forces of individuals defined as police officers in section 1.20 of the criminal procedure law, a sheriff's department, the department of corrections and community supervision, a local department of correction, a local probation department, a fire department, or force of individual employed as firefighters or firefighter/paramedics.
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TECHNICAL INFRACTION (POL section 86-9)

- A minor rule violation by a person employed by a law enforcement agency as defined in this section as a police officer, peace officer, or firefighter or firefighter/paramedic, solely related to the enforcement of administrative departmental rules that
 - (a) do not involve interactions with members of the public,
 - (b) are not of public concern, and
 - (c) are not otherwise connected to such person's investigative, enforcement, training, supervision, or reporting responsibilities.
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FREEDOM OF INFORMATION LAW (POL Article 6) New: Redaction Provisions

- **Section 87 4-a** A law enforcement agency responding to a request for law enforcement disciplinary records **shall** redact any portion of such record containing the information specified in subdivision two-b of section eighty-nine of this article prior to disclosing such record.
- **Section 87 4-b** A law enforcement agency responding to a request for law enforcement disciplinary records **may** redact any portion of such record containing the information specified in subdivision two-c of section eighty-nine of this article prior to disclosing such record.

FREEDOM OF INFORMATION LAW (POL Article 6) New: When Redaction Required

- **Section 89 2-b** For records that constitute law enforcement disciplinary records a law enforcement agency **shall redact** the following information from such records prior to disclosing such records:
- **Section 89 2-b (a)** items involving medical records of a person employed by a law enforcement agency as a police officer, peace officer, or fire fighter, of firefighter paramedic, not including records obtained during the course of an agency's investigation of such person's misconduct that are relevant to the disposition of such investigation;
- **Section 89 2-b (b)** the home addresses, personal telephone/cell phone numbers, e-mail addresses of a person employed by a law enforcement agency as a police officer ,peace officer, or firefighter or fire fighter/paramedic, of a family member of such person, a complainant or any other person named in a law enforcement disciplinary record, except where required by the Civil Service Law. This shall not prohibit other provisions of law regarding work related , publicly available information such as title, salary and dates of employment.

FREEDOM OF INFORMATION LAW (POL Article 6) New: When Redaction Required

- Section 89 2-b (c) any social security numbers
- Section 89 2-b (d) disclosure of the use of an employee assistance program, mental health service, or substance abuse assistance service by a person employed by a law enforcement agency as a police officer, peace officer, or fire fighter or firefighter paramedic, unless such use is mandated by a law enforcement disciplinary proceeding that may otherwise be disclosed pursuant to this Article.



FREEDOM OF INFORMATION LAW (POL Article 6) New: When Redaction Optional



- **Section 89 2-c** For records that constitute law enforcement disciplinary records, a law enforcement agency may redact records pertaining to technical infractions as defined in subdivision nine of section eighty–six prior to disclosing such records under this article.

FOIL CHECKLIST FOR FOIL # _____

- ✓ Documents requested are attached
- ✓ This County department/agency does not possess any responsive documents
- ✓ Description insufficient for purposes of locating and identifying documents sought
- ✓ Documents are exempt from disclosure because they are subject to attorney/client privilege (CPLR 4503 (a))
- ✓ Documents are exempt from disclosure because they constitute attorney work product (CPLR 3101(c))
- ✓ Documents are exempt from disclosure by state or federal statute (POL 87(2)(a))(specify):
- ✓ Disclosure would constitute an unwarranted invasion of personal privacy (POL 87(2)(b))
- ✓ Disclosure would constitute an unwarranted invasion of personal privacy (POL 87(2)(b))

FOIL CHECKLIST FOR FOIL # _____

- ✓ Records requested are trade secrets or are submitted to an agency by a commercial enterprise or derived from information obtained from a commercial enterprise and which, if disclosed, would cause substantial injury to the competitive position of the subject enterprise (POL 87(2)(d))
- ✓ Records are compiled for law enforcement purposes and which, if disclosed, would:
 - ✓ interfere with law enforcement investigations or judicial proceedings. (POL 87(2)(e)(i))
 - ✓ deprive a person of a right to a fair trial or impartial adjudication (POL 87(2)(e)(ii))
 - ✓ Identify a confidential source or disclose confidential information relating to a criminal investigation. (POL 87(2)(e)(iii));
 - ✓ Reveal criminal investigative techniques or procedures, except routine techniques and procedures (POL 87(2)(e)(iv))
- ✓ Documents relate to a request for law enforcement disciplinary records and is subject to mandatory redaction (POL 87 4-a) & (POL 89 (2-b))

FOIL CHECKLIST FOR FOIL # _____

- ✓ Documents relate to a request for law enforcement disciplinary records and is subject to discretionary redaction for “technical infractions” (POL 87 (4-b)) & POL 89 (2-c))
- ✓ Disclosure could endanger the life and safety of any person (POL 87(2)(f))
- ✓ Records are inter-agency or intra-agency materials (POL 87(2)(g)) which 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
- ✓ Records are examination questions or answers which are requested prior to the final administration of such questions (POL 87(2)(h)) _____
- ✓ Disclosure would jeopardize the capacity of a County department/agency or entity that has shared information with an agency to guarantee the security of its information technology assets, such assets encompassing both electronic information systems and infrastructures. (POL 87(2)(i)); _____
- ✓ Records are photographs, microphotographs, videotape or other recorded images prepared under authority of section 1111-a of the vehicle and traffic law. POL 87(2)(j)) _____

MACK &
WALSH
PLLC

Marty Mack

martymack@mackwalshpllc.com

Chris Walsh

chriswalsh@mackwalshpllc.com

607-236-5575

www.mackwalshpllc.com

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