

School Districts/ Municipalities Information Memo

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FOIL REQUESTS FROM UNIONS FOR INFORMATION ABOUT EMPLOYEES: NY COURT OF APPEALS RULES DISCLOSURE OF EMPLOYEE NAMES IS NOT REQUIRED

Designated Freedom of Information Law ("FOIL") officers in governmental agencies, such as school districts and municipalities, often have extensive experience responding to FOIL requests. Armed with the understanding that FOIL strongly favors the disclosure of agency records, statutory exemptions to disclosure are sometimes overlooked or given short shrift. A recent case decided by the New York State Court of Appeals, *NYSUT v. Brighter Choice Charter School et. al.*, 15 N.Y.3d 560 (2010), provides a prime example that the exemptions to disclosure are alive and well – particularly in the context of unions seeking personal information about unrepresented employees. In fact, the Civil Service Employees Association ("CSEA") submitted a FOIL request on February 22, 2011 to all school districts in New York which sought various information about unrepresented employees, including a list of employees' names. This CSEA request is a salient reminder that keeping up to date with judicial interpretations of FOIL is a critical component of a FOIL officer's obligations.

As background, FOIL (Public Officers Law § 87 *et seq.*) was created to ensure the public's right to agency records by imposing upon government agencies a broad standard of open disclosure. FOIL's guiding policy is that the public is vested with an inherent right to know and that official secrecy is anathematic to our form of government. FOIL's goal is to help the public make informed choices with respect to the direction and scope of governmental activities. It is this purpose that guides the general rule that all records of an agency are presumptively available for public inspection and copying. Nonetheless, several statutory exemptions are set forth in Public Officers Law §87(2) that permit a responding agency to withhold requested records. To ensure the public has maximum access to government records, these statutory exemptions are narrowly interpreted and the agency invoking the exemption bears the burden of demonstrating that requested material fits squarely within the ambit of the exemption.

In *NYSUT v. Brighter Choice*, Bond, Schoeneck & King, PLLC represented a group of charter schools that objected to disclosure of certain information about their employees to the New York State United Teachers ("NYSUT"). The case was recently decided by the State's highest court, in favor of the charter schools and upholding the decision to withhold the requested information.

In *NYSUT v. Brighter Choice*, the Court considered whether the application of an exemption that turned on the requesting party's purpose for the request was proper. In 2007, NYSUT submitted FOIL requests to Brighter Choice and five other Charter Schools in the Albany area. These requests sought extensive information about the teachers and instructors, including their names and home addresses. The Charter Schools provided title and salary information, but objected to the request for the names and home addresses of its employees. NYSUT eventually dropped its request for home addresses. This left only the Charter School's denial of the union's request for the full names of the employees in dispute.

The Charter Schools objected to disclosing employees' names on the ground that the record, if disclosed, **would constitute an unwarranted invasion of personal privacy**. See Public Officers Law §87(2)(b). FOIL provides a list of eight (8) categories of exemptions that are *per se* unwarranted invasions of personal privacy. Notably, this list is not exclusive and other types of disclosure could constitute an unwarranted invasion of public privacy, depending on the type of information sought to be disclosed. One disclosure that constitutes a *per se* unwarranted invasion of personal privacy is a list of names and addresses, if the list would be used for solicitation¹ or fund-raising purposes. See Public Officers Law §89(2)(b)(iii).

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Attorneys for the Charter Schools argued that the exemption to disclosure had been properly invoked. This exemption is unique because it contradicts the traditional notion that records must be disclosed regardless of the purpose for which the FOIL request is submitted. It permitted the Charter Schools to consider NYSUT's organizational purpose and the nature and format of the information NYSUT sought. The Charter Schools could make a reasonable inference that NYSUT sought the names of employees for the purpose of soliciting new members and increasing the size of its organization and, therefore, apply the exemption to disclosure.

The Court of Appeals, in a 4-3 decision, agreed with the Charter Schools' application of the commercial or fund-raising purposes exemption. According to the Court:

It appears...that NYSUT seeks the teachers' names as a convenient mechanism for contacting prospective members. Although NYSUT certainly possesses a right to seek dues-paying members, it may not rely on FOIL to achieve that end.

15 N.Y.3d at 565.

The Court of Appeals rejected NYSUT's argument that because the Schools were required by Public Officers Law §87(3)(b) to maintain a list of names, they were also obligated to disclose the list of names. Similarly, NYSUT's temporal argument that the union differed from direct mail solicitors in that they would not receive membership dues in direct response to their contact with Charter School teachers, but only after the lengthy process of establishing a union within each school, also lacked merit. In upholding the application of the exemption, the Court of Appeals stressed that its decision did little to undercut the purposes of FOIL. The Court found that disclosure of employees' names to NYSUT:

would do nothing to further the policies of FOIL, which are to assist the public in formulating intelligent, informed choices with respect to both the direction and scope of governmental activities. If anything, it is precisely *because* no governmental purpose is served by public disclosure of this information that section 87 (2) (b)'s privacy exemption falls squarely within FOIL's statutory scheme. (internal quotations omitted, emphasis in original)

15 N.Y.3d at 565.

Therefore, the personal privacy of the employees could be protected by a refusal to disclose their names.

Moving Forward

This decision from the Court of Appeals should provide school districts and municipalities with reason to pause before responding to FOIL requests. Although FOIL's policy remains firmly in favor of disclosure, FOIL officers should consider all statutory exemptions before disclosing a requested record. The Court of Appeals made the proper application of the solicitation/fund-raising exemption clear and it is an indispensable tool for a public agency that may find itself being asked to serve as an errand runner for charities, businesses or unions seeking to increase their coffers.

If a school district or municipality receives a FOIL request seeking a list of the names or home addresses of its employees, the solicitation or fund-raising purposes exemption should be considered. If the FOIL officer can infer from the organizational purpose of the requesting party that the information is being sought to solicit the employees, the names and home addresses may be withheld. Not all requests from the same entity must be treated similarly. For example, disclosure of names and addresses should be made to a newspaper editorial department that submits a FOIL request in preparation for an opinion piece. In contrast, an agency may withhold a list of names and addresses from a newspaper circulation department that submits a FOIL request, as such could be reasonably inferred to have been made for solicitation purposes. The *NYSUT v. Brighter Choice* decision establishes that an agency that is aware that a FOIL request has been submitted for solicitation or fund-raising purposes is on firm ground should it choose to withhold a list of names or home addresses.

¹ At the time the Charter Schools invoked the exemption, the statute read "commercial or fund-raising purposes." Subsequently, an amendment to the statute changed "commercial" to "solicitation."

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