

CIVIL RIGHTS

Focus on FOIL: Attorney's Fees Award No Longer Discretionary

By Cory Morris

Next time you are asked about New York's Freedom of Information Law, remember that attorneys can receive an award of reasonable attorney's fees for representation in an Article 78 proceeding. Adopting previous Committee on Open Government recommendations, Governor Cuomo¹ recently signed a bill that removes the discretion of trial court judges in awarding reasonable attorney's fees against governmental agencies that fail to comply with FOIL in certain circumstances.

New York's Freedom of Information Law

FOIL mandates that within five business days of receiving a request for records, an agency shall either make the record(s) available to the requestor; deny the request in writing; or furnish a written acknowledgment of the receipt of the request with a statement setting forth the approximate date when the request will be granted or denied.² Public Officers Law Section 89(4)(c) allows for an award of reasonable attorney's fees and other litigation costs when the moving party has substantially prevailed³ in its Article 78 petition. This fee shifting provision (see, e.g., 42 U.S.C. § 1988) should, at its best, serve as a strong disincentive for agencies to deny access to such records and, at its worst, become a new way for legal professionals to obtain awards of reasonable attorney's fees in testing agencies that routinely fail to follow the Public Officers Law.

FOIL is a statutory civil right. "The Legislature enacted FOIL to provide the public with a means of access to governmental records in order to encourage public awareness and understanding of and participation in government and to discourage official secrecy."⁴ An agency's records "are presumptively open to public inspection, without regard to need or purpose of the applicant." When faced with a FOIL request, an agency must either disclose the record sought, deny the request and claim a specific exemption to disclosure, or certify that it does not possess the requested document and that it could not be located after a diligent search.

The award of attorney's fees in a FOIL litigation became necessary decades ago. The provision for attorney's fees was added to FOIL in 1982, based upon the Legislature's recognition that persons denied access to documents must engage in costly litigation to obtain them and that "[c]ertain agencies have adopted a 'sue us' attitude in relation to providing access to public records," thereby violating the Legislature's intent in enacting FOIL to foster open government.⁵ The provision was amended

shortly thereafter to add that the failure to respond within the statutory time would become an alternative basis for an award of counsel fees⁶ "to create a clear deterrent to unreasonable delays and denials of access [and thereby] encourage every unit of gov-

ernment to make a good faith effort to comply with the requirements of FOIL."⁷

Prior to the New York Court of Appeals decision in the *Beechwood* case, FOIL's fee-shifting provision provided that "a court may award reasonable coun-

sel fees and litigation costs to a party that 'substantially prevailed' in the proceeding if the court finds that (1) 'the record involved was, in fact, of clearly significant interest to the general pub-

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Cory Morris

FLORIDA ATTORNEY

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Pro Bono Attorney of the Month – John Joseph Leonard (Continued from page 14)

brought him before Judge Crecca because they provided exposure to the Integrated DV Part and the experienced attorneys appearing there. Mr. Leonard was impressed by the depth of Judge Crecca's understanding of domestic violence, his compassion for the DV victims, and his cultural sensitivity. Looking back in his first few appearances in the Integrated DV Part, he notes, "I was particularly impressed with Judge Crecca's holistic approach and the way in which the Part pulls together all the facets of the victim's experience, allowing the multiple legal matters to be handled in one courtroom, rather than the usual scattershot approach to addressing these types of family issues."

Mr. Leonard still eagerly accepts new Project referrals, despite now having a

busy and successful general practice, which includes not only family law, but also real estate, contractual and light criminal matters, as well as litigation and will drafting. He takes pro bono referrals not just from the Project, but also from The Retreat. In addition, he is a volunteer as a member of the board of the Sag Harbor Community Food Pantry, a defense bar team member of the East End Regional Intervention Court ("Drug Court") in Hampton Bays, which helps people facing drug charges get much needed access to drug treatment, and is a member of the board of the Sag Harbor Chamber of Commerce. In addition, his acting aspirations are stifled no more. Mr. Leonard has appeared in five productions at the Southampton Cultural Center, perform-

ing in comedies, dramas and musical productions.

Congratulations go out to Mr. Leonard on not only this special recognition as the Project's Pro Bono Attorney of the Month, but also his recent engagement to Eugenio (Gene) Valle. Their wedding, which they plan to have on the beach in the East End, will take place in mid-September. The Pro Bono Project is indebted to Mr. Leonard for the great work he has done for our matrimonial clients. We are moved by the compassion and concern he has shown for these clients. It is with great pleasure that we honor him as our Pro Bono Attorney of the Month.

The Suffolk Pro Bono Project is a joint effort of Nassau Suffolk Law Services, the Suffolk County Bar Association and the Suffolk County

Pro Bono Foundation, who, for many years, have joined resources toward the goal of providing free legal assistance to Suffolk County residents who are dealing with economic hardship. Nassau Suffolk Law Services is a non-profit civil legal services agency, providing free legal assistance to Long Islanders, primarily in the areas of benefits advocacy, homelessness prevention (foreclosure and eviction defense), access to health care, and services to special populations such as domestic violence victims, disabled, and adult home resident. The provision of free services is prioritized based on financial need and funding is often inadequate in these areas. Furthermore, there is no funding for the general provision of matrimonial or bankruptcy representation, therefore the demand for pro bono assistance is the greatest in these areas. If you would like to volunteer, please contact Ellen Krakow, Esq. 631 232-2400 x 3323.

Note: Ellen Krakow is the Suffolk Pro Bono Project Coordinator for Nassau Suffolk Law Services.

Recruiting Employees Through Social Media: #Lawful or #Unlawful? (Continued from page 14)

these purposes. Specifically, for employers it is important for them to be aware that when they engage in recruitment efforts, they should not resort solely to social media. Additionally, if an employer decides to use social media to conduct a background check, a third party should be involved in this process and not the person making the ultimate hiring decision. Having someone who is not the company's decision-maker, is an affirmative defense, which an employer may be able to use in the event that a discrimination lawsuit is ever filed against them.

On the flip side, practitioners representing current employees and job ap-

plicants should let their clients know the importance of proceeding with caution when deciding to share information online. Further, they should remain cognizant of the fact that a potential employer is likely "snooping" on their Facebook, Twitter, LinkedIn, Instagram, and any other social media site they may use. Thus, to prevent unwanted disclosure of certain social media posts, job applicants and current employees should also understand the importance of regularly monitoring their privacy settings and double checking that their desired level of privacy is properly selected.

Love it or hate it, social media is here

to stay. So, in the meantime it is imperative that employers and employees alike continue to be mindful of the discrimination concerns posed by the increased popularity of social media use in the workplace.

Note: Peter J. Famighetti is partner at Famighetti & Weinick, PLLC in Melville, New York, which specializes in Labor & Employment law. For the past five years, Peter has been counsel for the New York State Police, Investigators Association for Troop L and Troop NYC. He has been peer-selected as a Thomas Reuters "Super Lawyer" in the area of employment

law for the years 2014, 2015, 2016 and 2017. Contact Peter at (631) 352-0050 or pjf@fwlawpllc.com.

ⁱ U.S. EQUAL EMP'T OPPORTUNITY COMM'N, SOCIAL MEDIA IS PART OF TODAY'S WORKPLACE BUT ITS USE MAY RAISE EMPLOYMENT DISCRIMINATION CONCERNS (2014).

ⁱⁱ 42 U.S.C.A. § 2000e-2 (West, Through Pub. L. No. 115-90).

ⁱⁱⁱ 29 U.S.C.A. § 623 (West, Through Pub. L. No. 115-90).

^{iv} 42 U.S.C.A. § 12112(a) (West, Through Pub. L. No. 115-90).

^v N.Y. EXEC. LAW § 296 (McKinney 2017).

^{vi} Class Action Complaint at 1, Comm'ns Workers of Am. v. T-Mobile U.S., Inc., No. 17-07232 (N.D. Cal. filed Dec. 20, 2017).

^{vii} *Id.*

^{viii} Rob Goldman, *This Time, Pro Publica, We Disagree*, FACEBOOK NEWSROOM (Dec. 20, 2017), <https://newsroom.fb.com/news/h/addressing-targeting-in-recruitment-ads/>.