PERSONAL INJURY

Focus on FOIL: Non-Traditional Fact Finding

By Cory Morris

New York's Freedom of Information Law, codified in the Public Officer's Law, is becoming a pivotal tool in litigation. Whether it be records relating to police body cameras, government audits, public schools, wrongful convictions, traffic cameras or infrastructure and design, any member of the public has standing to request such agency records and the attorney(s) who represents a spurned FOIL petitioner in an article 78 proceeding is allowed to request reasonable attorney's fees.

Forty years later, the Court of Appeals repeated and confirmed the simple rationale behind FOIL, that "the public is vested with an inherent right to know and that official secrecy is anathematic to our form of government."[1] Recently, a mandatory award of attorney's fees provision was added to the statute.[2] The enormous expansion of local government agencies, especially throughout Long Island and the five boroughs, has allowed FOIL to become an integral discovery device where no alternative discovery device exists or prior to a more formal filing.

FOIL (Public Officers Law § 89 (3)(a)) mandates that within five business days of receiving a request for a record, an agency shall either make the record 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. "The New York State Legislature enacted FOIL to promote an open government and public accountability."[3] FOIL rests on the premise that the "public is vested with an inherent right to know and that official secrecy is anathematic to our form of government."[4] The statute "imposes a broad duty on government to make its records available to the public."[5] Once challenged, it is the agency that bears the burden of withholding records from the public.

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In accordance with the desire to encourage "open government"[6] and "public accountability,"[7] FOIL generally mandates all agencies to make records available unless the material being sought falls within a statutory exemption. As such, "[a]ll government records are presumptively open for public inspection and copying unless they fall within one of the enumerated exemptions of Public Officers Law § 87(2)." To ensure maximum access to government records, courts are to narrowly construe the exemptions, and the agency retains the burden to demonstrate the requested materials are actually exempt. The agency will typically be bound to the administrative record, the reasons outlined by the agency in response to an appeal as per Public Officers Law § 89 (4)(a). Disclosure may be withheld "[o]nly where the material requested falls squarely within the ambit of one of these statutory exemptions."[8] Anyone can make a request and this powerful tool operates at all levels of local government agencies as defined by Public Officers Law § 86(3).

Even the mayor of New York City is subject to FOIL. On May 1, 2018, the First Department not only affirmed the New York City Supreme Court Order releasing electronic mailings ("e-mail") between Mayor Bill de Blasio and a consulting firm, but it also affirmed the discretionary award of reasonable attorney's fees.[9]

The FOIL requests reviewed by the First Department sought "correspondence exchanged between the mayor and/or certain members of his administration and various private consultants." The reporter who sought these e-mail records was denied access based upon the intra/inter agency exemption. After the reporter exhausted her administrative remedies, she commenced an Article 78 litigation. Over a thousand pages of records were produced after litigation was commenced. The Mayor of New York City's office sought "to broaden the agency exemption to shield communications between a governmental agency and an outside consultant retained by a private organization and not the agency." The First Department rejected this position. In upholding the award of attorney's fees to the reporter, the First Department noted that "after the proceeding had commenced and more than a year after the FOIL requests were made, [the Mayor of New York City's Office] produced approximately 1,500 pages of previously withheld documents."

Personal injury attorneys know that ordinarily litigation may rely on government records, from police reports, video and permits to broken sidewalks.[10] A recent case example from the Second Department, *Trawinski*, shows how records produced from FOIL can change the outcome of a litigation. The plaintiff in *Trawinski* sought to recover personal injuries for falling on a sidewalk. After a complaint was filed and discovery conducted, a motion for summary judgment was filed by the New York City defendants. It was granted by the lower court. On a motion to renew, filed after *Trawinski's* receipt of new facts from a FOIL request, the lower court affirmed the award of summary judgment to the New York City Defendants. An appeal was taken.

The Second Department in *Trawinski* reversed because "she had not received these documents, which were responsive to her FOIL request

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LGBTQ

Divorce for Long Term Same-Sex Relationships that Became Short term Marriages Under the Marriage Equality Act

By Christopher J. Chimeri

This is part three of a three-part series.

This is the final of three articles discussing the legal ramifications and considerations of a divorce in which the spouses are long term same-sex partners, having previously functioned as a family before marriage equality. We continue with the hypothetical couple that have lived together for 20 years with a structured household reminiscent of a "traditional" marriage with children and one spouse functioning as a primary income earner and the other functioning as a spouse, homemaker and parent. Let us say the hypothetical couple, together since 1998 or so, married in 2013. They have now been married only five years but have lived together for four times that duration.

Equitable distribution first requires a court to identify all assets and liabilities that exist when a divorce is commenced. Once such an inventory is established, the next critical step is to classify each item as "marital" or "separate." With limited exception, such as application of other equitable doctrines like constructive trusts, a court may only distribute assets and liabilities that are "marital." Domestic Relations Law § 236(B)(5) provides that all property, regardless of title, acquired during the marriage by either or both spouses before commencement of an action for divorce is marital, unless it falls within the exceptions defined as separate property. Separate property is narrowly defined by statute to include only assets acquired before marriage or inherited/gifted from someone other than the other spouse; personal injury awards; property in exchange for other separate property; or passive appreciation on separate property.

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Once the inventory and all classifications are made, the court must value the marital (and sometimes, separate) assets to aid in the last step, which is distribution of those assets and debts.

In distributing assets and liabilities, the relevant portions of DRL § 236(B)(5) require the court to determine the rights of parties regarding marital and separate property unless there is a valid agreement signed between them as to such rights, requiring that separate property remains as such, and that the court distribute marital property "equitably between the parties, considering the circumstances of the case and of the respective parties."

In "considering the circumstances," as relevant here, court considers, among other factors enumerated in the statute: (2) the duration of the marriage and the age and health of both parties; (3) the need of a custodial parent to occupy or own the marital residence and to use or own its household effects; (4) the loss of inheritance and pension rights after divorce; (5) the loss of health insurance after divorce; (6) any award of maintenance; (7) equitable claims to, or direct or indirect contributions to the acquisition of marital property by the non-titled spouse, including joint efforts or expenditures and contributions and services as a spouse, parent, wage earner and homemaker, and to the career or career potential of the other party. Even though the value of a spouse's enhanced earning capacity from a license, degree, celebrity goodwill, etc., is no longer an asset, "in arriving at an equitable division of

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and in the sole possession and control of the NYC defendants, until after the December 2014 order." Although it was unclear why such records were not obtained through the ordinary course of discovery, such records were readily available by FOIL request. Indeed, in *Trawinski*, "The plaintiff contended . . . she had filed a [FOIL] request for documents . . . pertaining to the subject sidewalk but had not yet received any documents." The Second Department, in granting the renewal noted that the receipt of records from a FOIL request were not previously in her possession at the time that the New York City defendants moved for summary judgment.

In reversing the lower court, the Second Department held that the plaintiff "demonstrated the existence of triable issues of fact concerning the involvement of the NYC defendants in the affirmative creation of a defective condition of the subject sidewalk, upon renewal, that branch of the motion of the NYC defendants which was for summary judgment dismissing the complaint insofar as asserted against them should have been denied." *Trawinski* is just one recent case example where a FOIL request(s) changed the outcome of an otherwise ordinary slip and fall case.

Attorneys who utilize contingency fee retainers would be wise to amend such retainers for the assignment of an award of reasonable attorney's fees associated with the enforcement of FOIL requests in light of the recent amendments to the Public Officer's Law. While a narrow majority of the New York Court of Appeals[xi] recently endorsed a new type of denial to FOIL requests, "the Glomar response, an ambiguous nonanswer that defense and intelligence officials have used for years to hide their deepest secrets,"[xii] FOIL remains a powerful tool for litigants. One should consider filing a FOIL request in tandem with a notice of claim. Along with some other non-traditional forms of fact finding, FOIL is low cost, sometimes free. As discussed in *Trawinski*, just a simple FOIL request can change the outcome of a litigation.

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[i] *Matter of Fink v. Lefkowitz*, 47 NY2d 567, 571 (1979)
[ii] See L. 2006, ch. 492, § 1, Assembly Mem. in Support, at 1, Bill Jacket, L. 1982, ch. 73; Public Officers Law § 89(4)(c).
[iii] *Abrams, Fensterman, Fensterman, Eisman, Formato, Ferrara, Wolf & Carone, LLP v. New York City Police Dep't.*, 2018 N.Y. Slip Op 32334 (NYC Sup. Ct. 2018) (citation omitted).
[iv] *Matter of Madeiros v. New York State Educ. Dept.*, 30 NY3d 67 (2017) (quoting *Matter of Fink v. Lefkowitz*, 47 NY2d 567.
[v] *Miller v. New York State DOT*, 58 AD3d 981 (3d Dep't. 2009)
[vi] *Matter of Newsday, Inc. v. Empire State Dev. Corp.*, 98 NY2d 359, 362 (2002); Public Officers Law § 84.
[vii] *Matter of Gould v. New York City Police Dept.*, 89 NY2d 267, 274 (1996).
[viii] *Matter of Fink v. Lefkowitz*, 47 NY2d 567(1979)
[ix] *Matter of Rauh v. De Blasio*, 2018 N.Y. Slip Op 3115 (1st Dep't. 2018).
[x] *Sabino v. City of New York*, 2018 NY Slip Op 32359 (NYC Sup. Ct. 2018); *Matter of Dilworth v. Westchester County Dep't. Of Correction*, 93 A.D.3d 722, 940 N.Y.S.2d 146 (2nd Dep't. 2012); *Trawinski v. Jabir & Farag Props., LLC*, 154 A.D.3d 991, 63 N.Y.S.3d 431 (2d Dep't. 2017) ("Trawinski")
[xi] *Matter of Abdur-Rashid v. New York City Police Dep't.*, 2018 N.Y. Slip Op 2206 (2018).
[xii] Alan Feuer, *Activists Sue Police Dept. Over 'Can't Confirm or Deny' Tactic,* New York Times (June 14, 2017), https://www.nytimes.com/2017/06/14/nyregion/nypd-secrecy-glomar-response.html.

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marital property, the court shall consider the direct or indirect contributions to the development during the marriage of the enhanced earning capacity of the other spouse;" and the catchall (14) any other factor which the court shall expressly find to be just and proper.

Age and health can often play a contrasting role against the short duration of a marriage in our example family. The relevance of a custodial parent's need to occupy the home may be that durational occupancy of the marital residence, although separate property of the non-custodial parent can be awarded to the non-titled parent if based on child custody. Maintenance, loss of retirement, and health insurance were previously discussed but the simple "problem" is that if your client has spent the last 20 years contributing to the creation of his or her partner's "separate" wealth as defined under the Domestic Relations Law, the court is empowered to consider the level of need and make maintenance and monetary distributive awards accordingly. To that end, under DRL § 236(B)(5)(e) a distributive award calling for the payment of money from one spouse to the other may be an equitable result, and there is no precise calculus for such distributive award, which is explicitly authorized in lieu of dividing ownership of asset(s), "in order to achieve equity between the parties."

When litigating these cases, it is imperative to prepare trial documents, such as a Statement of Proposed Disposition, that relates your arguments to the statutory considerations because under DRL § 236(B)(5)(g), in any decision made . . . the court shall set forth the factors it considered and the reasons for its decision and such may not be waived by either party or counsel."

As cautioned in both the first and second part of this series, this article explores a topic that is not yet "battle-tested," with few or less reported decisions as of the writing of this article that confront the application of the recently changed laws on maintenance and the unquantifiable issues that can arise out of these classes of relationships, which do not fit neatly in a box in one's closet (pun intended). Accordingly, the practitioner must carefully understand the many different family dynamics specifically applicable to same-sex relationships before a) agreeing to take on a case; and b) prior to assuming positions in a case on behalf of a client in need. Once the case is your responsibility as the lawyer, it is even more critical to examine the statute at great length with a deep understanding of the many intricate facts involved in the family to best advocate for your client.

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The Business of Percentages (Continued from page 10)

In affirming an award of 33 percent in a just under a 10-year marriage, the Second Department relied upon the 2008 case of *Kaplan v. Kaplan, supra*, which, unlike in *Westbrook*, was "a marriage of long duration" where the trial court awarded the wife 30 percent of the husband's dental practice and license. *Kaplan* at 637. In doing so, the *Westbrook* Court in essence discounted the duration of the marriage and weighted more heavily the trial court's credibility determinations regarding the wife's early direct contributions towards the start-up of the business and being "primarily responsible for taking care of the parties' children and the household."

That being said, is *Westbrook* the start of an upward trend in the percentages to be awarded to the non-titled spouse or an aberration based upon a unique fact pattern? Will the trial courts begin to acknowledge the work of a caregiver and homemaker as commensurate to the work of the income-producing spouse even in marriages that are not considered "long-term?"

Given the Appellate Court affirmed the award as a provident exercise of the trial court's discretion and did not itself determine the 33.33 percent, going to great lengths to recite the other factors the courts must consider in making an equitable distribution of marital property and not disturbing the trial court's determination unless it was an improvident exercise of discretion, *Westbrook* appears to be specific to its unique fact pattern. This is especially apparent considering other recent decisions from the Second Department wherein the Appellate Court held that that the trial court did not improvidently exercise its discretion in awarding lower percentages of a business in significantly longer marriages. *See*, *Culen v. Cul*en, 157 A.D.3d 926 (2nd Dept 2018) (where the Second Department affirmed an award of 25 percent of the husband's business in a 26 year marriage where the wife was the primary caretaker); *Perdios v. Perdios*, 135 A.D.3d 840 (2nd Dept 2016) (where the Second Department affirmed an award of 20 percent of the husband's business in an 18 year marriage acknowledging that this award did not ignore her contributions as the primary caretaker of the children, which allowed the husband to focus on his businesses).

Thus, it appears that the task of advising our clients of what percentage of their spouse's marital business interests they will likely be awarded by the trial court will remain a challenge to practitioners with *Westbrook* being a friendly reminder that each case is determined on its own unique facts that must be adequately presented to the trial court.

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