



# THE SUFFOLK LAWYER

THE OFFICIAL PUBLICATION OF THE SUFFOLK COUNTY BAR ASSOCIATION

VOL. 35, NO. 8 - December 2020

DEDICATED TO LEGAL EXCELLENCE SINCE 1908

WWW.SCBA.ORG

## INSIDE

December 2020

FOCUS ON

REAL PROPERTY

Housing discrimination plaintiffs ..... 12

Buying into a Community Association...13

Are we in an escrow state? ..... 12

New landlord/tenant world ..... 13

Covid and lease provisions ..... 12

Meet Your SCBA Colleague .....5

## FOIL, Spoliation and Litigation Holds, Oh My

By Cory Morris and Victor Yannacone, Jr.

Modern litigation today begins with requests for information from government “Agencies” under FOIL or FOIA and a Litigation Hold letter followed by a Litigation Hold Notice.

### Attorney’s duty

As soon as you, as an attorney, become aware — even through a newspaper article or news broadcast — that a client may become involved in litigation, whether as a plaintiff, defendant or some kind of third-party, you have an immediate, nondelegable duty and legal obligation to send your clients a “Litigation Hold” letter advising them of their obligation to protect and preserve any and all information relevant and material to that possible litigation in whatever form it may exist.

Your letter must explain that if they fail to



CORY MORRIS



VICTOR YANNAZONE, JR.

protect and preserve that information they may be liable to sanctions including an adverse inference charge on the trial, economic damages, and financial penalties imposed by the court. You, as the attorney, may also be liable for economic penalties and financial sanctions imposed by the court.

Situations triggering an obligation to preserve evidence include receipt of a demand letter, formal complaint, records subpoena or occurrence of an event that typically results in litigation. A media report suggesting

impending government investigation and possible litigation may also trigger litigation hold obligations.

In the event that federal or state regulatory agencies may be involved, your client, you, as an attorney, and your law firm may also see criminal sanctions imposed and even face criminal prosecution.

### FOIL

New York’s *Freedom of Information Law* (“FOIL”)<sup>1</sup> establishes a mechanism for the public to hold the government accountable for providing information to its citizens.<sup>2</sup> The Committee on Open Government (“COOG”) is responsible for overseeing implementation of FOIL as well as the Open Meetings Law (“OML”) and the Personal Privacy Protection Law (PPPL). COOG’s website provides information one needs to understand FOIL and how to make and respond to a FOIL request.

(Continued on page 19)

## FOIL (continued from page 1)

As soon as you have reason to believe that a New York State “Agency” may have information which is relevant to the litigation you are considering and evaluating, FOIL for the information.

Every department, board, bureau, division, commission, committee, public authority, public corporation, council, office or other governmental entity in the State of New York performing a governmental or proprietary function is subject to FOIL. Local municipalities, school districts (120+ on Long Island), fire and police departments, are all subject to FOIL.

**If you are Plaintiff or claimant, make sure that you detail with specificity all of the elements of the cause of action upon which you expect to obtain information, not necessarily evidence, just information from the defendants. The more specific the litigation hold notice the better your case for sanctions should it be ignored or should spoliation occur.**

**If you are a defendant in an action of any kind immediately serve a Litigation Hold Notice upon the Attorney of Record for the Plaintiff and every party named in the complaint regardless of their legal status in the action. Make sure that you specifically refer to information you expect to use in developing your client’s defense(s).**

Unless an exception applies, all “records” of an “agency” are available.<sup>3</sup> A “record” is defined as “any information kept, held, filed, produced or reproduced by, with or for an agency or the state legislature, in any physical form whatsoever...”<sup>4</sup> Physical evidence, “articles of clothing and alleged weapons,” does not fall within the statutory definition of a “record” that must be disclosed under FOIL.<sup>5</sup>

Records requested under FOIL must be “reasonably described” to enable an agency to locate and identify the records in question.<sup>6</sup> However, the burden is on the Agency

to establish that “the descriptions were insufficient for purposes of locating and identifying the document sought.”<sup>7</sup>

The statute lists exemptions and you must consider all of them in drafting a FOIL request. The COOG website provides details as to what records are available pursuant to the FOIL. Nevertheless, “The exemptions from disclosure are to be ‘narrowly construed’ so as to ensure maximum public access to government documents.”<sup>8</sup>

There is often a greater opportunity to obtain records through FOIL than under the CPLR.<sup>9</sup> A FOIL request can be made for the same or similar records as have been requested through discovery.<sup>10</sup> It is also easier to obtain an award of attorney’s fees under FOIL for a delay in production than it is under the CPLR for delays in discovery. “[J]udicial review of a FOIL determination is obtained through the commencement of a CPLR Article 78 proceeding, not a motion in a pending action,”<sup>11</sup> and an Article 78 final judgment in the Supreme Court may be appealed of right to the Appellate Division.

### The Litigation Hold

Once your client has decided to file suit and you prepared the complaint for verification, you must also prepare a formal Litigation Hold Notice.

If you are Plaintiff or claimant, make sure that you detail with specificity all of the elements of the cause of action upon which you expect to obtain information, not necessarily evidence, just information from the defendants. The more specific the litigation hold notice the better your case for sanctions should it be ignored or should spoliation occur.

If you are a defendant in an action of any kind immediately serve a Litigation Hold Notice upon the Attorney of Record for the Plaintiff and every party named in the complaint regardless of their legal status in the action. Make sure that you specifically refer to information you expect to use in developing your client’s defense(s).

### Spoliation

“Spoliation is the destruction or significant alteration of evidence, or the failure to preserve property for another’s use as evidence in pending or reasonably foreseeable litigation.” “Documents create a paper reality we call proof.”<sup>12</sup>

With respect to spoliation — damage or

loss of relevant, material information with respect to litigation — the courts are interested in whether you, as an attorney, your law firm, and/or your client were negligent or grossly negligent and whether the spoliation was deliberate. Attorneys probably should not have to worry about whether the spoliation was deliberate since attorneys never deliberately violate the law or disobey an order of the court.

Once the duty to preserve has attached, the following facts can support a finding of gross negligence:

The failure to issue a written litigation hold.

The failure to preserve and collect information from former employees when the information remains in a party’s possession, custody, or control.

The failure to halt the deletion of business records, emails and social media; and

The failure to preserve backup tapes.

### Warning and admonition

FOIL and Litigation Holds are complicated and the parties to whom they are directed tend to make them more complicated.

Comment 8 of the American Bar Association Model Rules of Professional Conduct provides that, “To maintain the requisite knowledge and skill, a lawyer should keep abreast of changes in the law and its practice, including the benefits and risks associated with relevant technology...” which has been interpreted to mandate that attorney competence in litigation requires, “at a minimum, a basic understanding of, and facility with, issues related to e-discovery, including the discovery of electronically stored information (ESI).”

Failure to understand FOIL and Litigation Holds creates a genuine risk of legal malpractice and professional liability. There are really only three options for attorneys “lacking the required competence:” Acquire sufficient learning and skill before performance is required; associate with or consult technical consultants or competent counsel; decline to represent the client.<sup>13</sup>

*Note: Named a SuperLawyer, Cory Morris is admitted to practice in N.Y., EDNY, SDNY, Florida and the SDNY. Mr. Morris holds an advanced degree in psychology, is an adjunct professor at Adelphi University and is a CASAC-T. The Law Offices of Cory H.*

*Morris focuses on helping individuals facing addiction and criminal issues, accidents and injuries, and, lastly, accountability issues.*

*Note: Victor John Yannacone Jr. is an advocate, trial lawyer, and litigator practicing today in the manner of a British barrister by serving of counsel to attorneys and law firms locally and throughout the United States in complex matters. He has been continuously involved in computer science since the days of the first transistors in 1955 and actively involved in design, development, and management of relational databases. He pioneered in the development of environmental systems science and was a cofounder of the Environmental Defense Fund. He can be reached at (631) 475-0231, or vyannacone@yannalaw.com, and through his website <https://yannalaw.com>.*

1 Public Officers Law, Article 6.

2 Public Officers Law § 84.

3 Public Officers Law § 89.

4 Public Officers Law § 86(4).

5 Sideri v Off. of Dist. Atty., New York County, 243 AD2d 423, 423 (1st Dept 1997).

6 Pflaum v. Grattan, 116 AD3d 1103, 1104 (3d Dept 2014).

7 Konigsberg v. Coughlin, 68 NY2d 245,249 (1986); see Bader v. Bove, 273 A.D.2d 466, 467, 710 N.Y.S.2d 379, 379 (2000); cf. Stein v. New York State Dep’t of Transp., 25 A.D.3d 846, 848, 807 N.Y.S.2d 208, 210 (3d Dep’t. 2006) (“the administrative burden of reviewing this correspondence for relevance fails to establish that the request is insufficiently descriptive.”).

8 Livson v. Town of Greenburgh, 141 A.D.3d 658, 660, 34 N.Y.S.3d 612, 615 (2nd Dep’t. 2016).

9 FOIL-AO-18056 (2010).

10 M. Farbman & Sons, Inc. v. N.Y.C. Health & Hosp. Corp., 62 NY2d 75, 78 (1984). (“Nowhere in FOIL, enacted 11 years after the CPLR, is there specific reference to records already subject to production under article 31, and no provision of FOIL bars simultaneous use of both statutes.”).

11 Doe v. Riback, 7 Misc. 3d 341, 343, 788 N.Y.S.2d 590, 594 (Albany Sup. Ct. 2005) (citing Public Officers Law § 89 (4)(b)).

12 Zubulake v. UBS Warburg, 220 F.R.D. 212, 214 (S.D.N.Y. 2003) (Zubulake IV)

13 State Bar of California in its Formal Opinion No. 2015-193, <http://ethics.calbar.ca.gov/Portals/9/documents/Opinions/CAL%202015-193%20%5B11-0004%5D%20%2806-30-15%29%20-%20FINAL.pdf>