

## **Access with Teeth? Freedom of Information Law and Attorney's Fees**

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Designed as a pro-disclosure rule<sup>1</sup>, the Freedom of Information Law does permit a court to impose attorney's fees to a requestor who gains access to records through an appeal. Yet, the conditions required to receive these fees, make it essentially impossible, leaving this pro-disclosure statute potentially less effective in carrying out its purpose. In 2005, the Legislature added a requirement that a request under FOIL be granted within a specified time or, if no response were forthcoming, the request would be considered "denied," allowing the requestor to appeal the decision. (see, [http://www.hspm.com/education/FOIL\\_update.pdf](http://www.hspm.com/education/FOIL_update.pdf))

Under the Public Officers Law, if the requestor prevails on appeal, the court *may* assess reasonable attorney's fees and other litigation costs reasonably incurred by the requestor. To receive these fees, though, not only does the requestor have to prevail, but the pertinent record has to be of clear significant public interest and the agency denying the request has to have lacked a reasonable basis in law for withholding the record.

These conditions, recently reviewed in Beechwood Restorative Care Center v. Signor, 5 N.Y.3d 435 (2005), seem to make obtaining attorney's fees in these matters practically impossible. In Beechwood, the Appellate Division stated that even if the requestor had met the other requirements, in other words, if he had "substantially prevailed" in the court case and the public agency did not have a reasonable basis for withholding the records – the requestor's claim for attorneys' fees still would have been denied. The Beechwood Court enforced the requirement that the requestor establish that the documents are important to the public as a whole and not just the requestor. Therefore, even though this requestor had a right to the documents and was forced to go to court to compel the production of those documents, attorney's fees were not granted because the requestor could not establish a general public interest in the documents at issue.

In response, the New York State Governor recently passed a law whereby courts would be *required* to consider attorney's fees and other costs solely based on the determination that an agency has not met its obligations under the Freedom of Information Law.<sup>2</sup> To be successful in obtaining attorney's fees, the law requires a finding that: (1) the agency had no reasonable basis for denying access; or (2) the agency failed to respond to a request or appeal within the statutory timeframe. The nature of the public record will no longer be relevant, effectively overturning Beechwood and giving FOIL a more pro disclosure position.

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<sup>1</sup> Matter of Newsday Inc. v. Sise, 71 N.Y.2d 146 (1987).

<sup>2</sup> The bill was signed into law on August 16, 2006.