Litigation & Foil: Is There Any Relationship?

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Key Aspects of Foil

- ❑ "Agency" includes all local governmental entities
- ❑ What is a "Record" Subject to FOIL
- ❑ Presumption of Access
- ❑ What may be withheld?

Records

- Everything you have
  - Even if no relationship to your agency
- Even things you don't have
  - Records in possession of consultants
  - Private emails

Presumption of Access

- If you can, you must
  - Extraordinarily difficult
  - Create with reasonable effort

What May Be Withheld

- No record creation required
- Exempt by State or Federal Law
  - Attorney-client communications
  - Student records
  - Health records [Mental Hygiene law & HIPAA]
  - Civil rights law
- Unwanted invasion of personal privacy

Personal Privacy

- Unwanted invasion of personal privacy
- Public officials have lesser entitlement to privacy

Electronic Records

- ❑ Form of Data
- ❑ Form of Production
- ❑ Email

Litigation

- ❑ Reasonably Anticipated
- ❑ Preservation Letter
- ❑ Ligation Hold

Reasonably Anticipated Triggers

- ❑ Emails or letters threatening litigation
- ❑ Settlement of prior action
- ❑ Distribution of internal document hold memoranda
- ❑ Notice of claim
- ❑ Notice to insurance company
- ❑ Press

Internal Preservation Memo

- ❑ At earliest trigger event
- ❑ Include:
  - ❑ Description of subject matter
  - ❑ Describe documents (and date range)
  - ❑ Mention hard and electronic records
  - ❑ Direct that files should not be deleted, copied or moved
  - ❑ If Warranted, ask for contact person
  - ❑ This Hold supersedes retention policies and remains in effect until further written notice

CPLR Article 78 Proceedings

- Not true "action"
- More like a motion
- CPLR 7804 (e): Certified transcript of record

Actions: Discovery Phase

- FOIL goes out the window
- CPLR 3101: "full disclosure of all matter material and necessary…"
- Exceptions:
  - Privilege
  - Attorney work product
- Must assert – court order may be necessary

Documents

- ❑ Copies
- ❑ "Bates" Stamping
- ❑ Work with attorney to assert privilege
- ❑ Redaction possible

Electronic Discovery

- ❑ Form of data
- ❑ Volume of data to be produced
- ❑ "Predictive coding"

Trial Production

- Subpoena: People, books, papers & Other Things
  - Ad TestiFicandum
  - Duces Tecum
- Command of Court – short Notice

Trial Production

- CPLR 4520: Certificate or Affidavit of Public officer
- CPLR 4521: Lack of Record
- CPLR 4540: Authentication of copies of government record

Protection

- CPLR 2340:
  - Request to withdraw or Modify
  - Motion to Quash

Practical

- Work with attorney
- Return of documents