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July 17, 2019

**VIA ELECTRONIC MAIL AND  
UPS/OVERNIGHT DELIVERY**

Ms. Mary Ellen Odell  
Putnam County Executive  
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2019 JUL 19 AM 8:02  
COUNTY EXECUTIVE  
PUTNAM COUNTY, N.Y.

Re: Proposed Amendments to Chapter 55 of the Putnam County Code  
Public Hearing Scheduled for July 24, 2019

Dear Ms. Odell:

We represent the New York News Publishers Association, which represents fifty-three news publishers (newspapers and corresponding websites) in communities throughout New York State, including *The Highlands Current* in Cold Spring. I write regarding the recent proposal to amend Chapter 55 of the Putnam County Code of Ethics and Financial Disclosure (the “Code”) to prohibit the disclosure of any record designated as “Confidential” by any Putnam County officer or employee, or by outside legal counsel or consultant to any agency or the Legislature of Putnam County (the “Proposed Amendment”).<sup>1</sup> Specifically, we respectfully request that you make this letter part of the record considered at the public hearing scheduled for July 24, 2019, at 3:30 p.m., so as to allow the public to consider the points addressed herein in connection with comment and deliberation on the Proposed Amendment. For the reasons detailed more fully below, the Proposed Amendment should be rejected because it violates both the letter and spirit of New York State’s Freedom of Information Law (“FOIL”), *Public Officers Law*, Article Six, §§ 84 *et seq.*—the purpose of which is to promote the public’s right to be informed about the processes of governmental decision-making and to prevent attempts to shroud governmental information in secrecy. Indeed, the New York Court of Appeals has consistently rejected attempts by local governments to create legislative loopholes to New York’s open government mandates, explaining that FOIL renders promises or mandates of confidentiality contained in local codes, laws, charters and ordinances necessarily unenforceable.

<sup>1</sup> A copy of the Proposed Amendment can be found online at <https://highlandscurrent.org/wp-content/uploads/2019/06/Pages-from-Rules-06-20-19.pdf>.

**A. New York State's Legislative Commitment to Open Government.**

The purpose of New York State's FOIL is to promote the public's right to be informed about the processes of governmental decision-making. *N.Y. Pub. Off. Law* § 84; *Capital Newspapers v. Burns*, 67 N.Y.2d 562, 566-67 (1986); *Westchester Rockland Newspapers, Inc. v. Moczydlowski*, 58 A.D.2d 234, 236 (2d Dep't 1977). The Legislature enacted FOIL based on its finding that public access to governmental information "should not be thwarted by shrouding it with a cloak of secrecy or confidentiality." Legislative Declaration, *Public Officers Law* § 84. In signing FOIL into law, then Governor Wilson stressed the importance of open government to a free society and the need for FOIL to engender public understanding and participation. Governor's Memorandum L. 1974, Chs. 578-80, 1974 Legis. Ann., at 392 (*cited in Russo v. Nassau Comm. College*, 81 N.Y.2d 690, 697 (1993)).

The New York Court of Appeals has consistently ruled that "FOIL is to be liberally construed and its exemptions narrowly interpreted so that the public is granted maximum access to the records of government." *Newsday, Inc. v. Sise*, 71 N.Y.2d 146, 150, *cert. denied*, 486 U.S. 1056 (1988). FOIL's broad standard of disclosure is intended to maximize public access to records and information possessed by all state and local government agencies. *Matter of Newsday v. Empire State Develop. Corp.*, 98 N.Y.2d 359, 361-62 (2002). "In short, FOIL gives a sweeping right to public records and only narrow grounds for resisting disclosure." *Journal Publ'g v. Office of Special Prosecutor*, 131 Misc.2d 417, 420 (N.Y. Cnty. Sup. Ct., 1986).

Under FOIL, all governmental records are presumptively subject to disclosure unless they fall within one of the specified exemptions provided in Public Officers law § 87(2). *Matter of Fink v. Lefkowitz*, 47 N.Y.2d 567, 571 (1979) ("The balance is presumptively struck in favor of disclosure"); *Scott, Sardano & Pomeranz v. Records Access Officer of City of Syracuse*, 65 N.Y.2d 294, 296-97 (1985). Putnam County is a government agency subject to FOIL, *N.Y. Pub. Off. Law* § 86(3), and is therefore obligated to provide full and unrestricted access to any agency records set forth in a FOIL request, unless the County can justify nondisclosure by demonstrating entitlement to a specific exemption in the statute. *Capital Newspapers Div. of Hearst Corp. v. Whalen*, 69 N.Y.2d 246, 252 (1987) ("[t]he agency seeking to prevent disclosure carries the burden of demonstrating that the requested material falls squarely within a FOIL exemption by articulating a particularized and specific justification for denying access"). The agency claiming a FOIL exemption bears the burden of proving that the requested records are exempt from disclosure. *Pub. Off. Law* § 89(4)(b); *Russo v. Nassau Comm. College*, 81 N.Y.2d at 697-98. To that end, "[c]onclusory assertions that certain records fall within a statutory exemption are not sufficient; evidentiary support is needed" since FOIL is "based on a presumption of access to the records." *Matter of Westchester Rockland Newspapers v. Kimball*, 50 N.Y.2d 575, 580 (1980); *Hamilton v. Bd. of Educ. of the Jordan-Elbridge Cent. Sch. Dist.*, 29 Misc.3d 1201(A) (Onondaga Cnty. Sup. Ct., 2010).

**B. The Proposed Amendment.**

The Proposed Amendment seeks to amend and/or add new Sections 55-2, 55-3(J), and 55-4(G) to the Code so as to prohibit the disclosure of any record designated as “Confidential” by any Putnam County officer or employee. Specifically, the proposal would add definitions of “Confidential Material” and “Record” to Section 55-2. Pursuant to the proposal, in addition to any record found to be exempt from disclosure under FOIL, Section 55-2’s definition of “Confidential Material” would include “[a]ny record designated ‘Confidential’ by any Putnam County officer or employee, or by outside legal counsel or consultant to any agency or the Legislature of Putnam County, who is the creator or sender of such record”—whether or not the record at issue falls within any of FOIL’s enumerated disclosure exemptions. The proposal would also add a new subsection 55-3(J) to the Code prohibiting any Putnam County officer or employee from disclosing any “Confidential Material” to any person who is not a County officer or employee, or who is not outside legal counsel for Putnam County. Proposed Section 55-4(G) delineates instances wherein Confidential Material may be disclosed, including pursuant to a FOIL request approved by the County Attorney, the FOIL appeals officer, or by court order, or by a unanimous vote of the County Legislature.

**C. As an Attempt to Circumvent FOIL, the Proposed Amendment is Unenforceable As a Matter of Law.**

As discussed above, the purpose of FOIL is to instruct governmental agency determinations regarding disclosure—effectively balancing the rights of citizens to know how their government works with protection for narrowly drawn categories of information that may be withheld from disclosure. New York courts have consistently relied on FOIL alone to strike this balance and, accordingly, have rejected attempts by local governments to create legislative loopholes or exceptions to FOIL by enacting codes, local laws, charters or ordinances conferring, requiring, or promising confidentiality.

As relevant here, an agency may deny access to records that “are specifically exempted from disclosure by state or federal statute.” *Public Officers Law* § 87(2)(a). It is well-understood, however, that a local enactment of the kind at issue does not constitute a “statute” for purposes of this exemption. See *Brownstone Publishers, Inc. v. N.Y.C. Dep’t of Fin.*, 150 A.D.2d 185, 186 (1st Dep’t 1989) (rejecting attempt to exempt from disclosure certain records concerning transfers of real property under FOIL § 87(2)(a) on the ground that the disclosure sought will violate the “secrecy” provision of the city’s Real Property Transfer Tax Law, set forth in Administrative Code of the City of New York § 11-2115, because such local ordinances do not constitute state or federal statutes for purposes of FOIL § 87(2)(a) (citing *Morris v. Martin, Chairman of the State Bd. of Equalization and Assessment*, 440 N.Y.S.2d 365, rev’g 55 N.Y.2d 1026 (1982)); *Matter of Zuckerman v. N.Y. State Bd. of Parole*, 53 A.D.2d 405 (3d Dep’t 1976) (explaining that exemptions from FOIL may only be created by state or federal statute, not by administrative regulation or local enactments). Put simply, the Proposed Amendment would not affect or displace an analysis under FOIL as to whether a record marked Confidential under its terms could be withheld from disclosure. In fact, other than its apparent attempt to circumvent the transparency objectives of

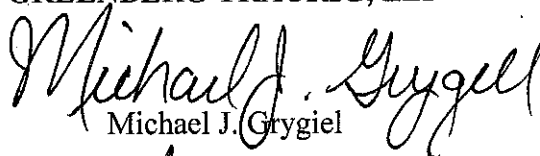
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FOIL, the Proposed Amendment would only serve to highlight those records that certain Putnam County officers would wish to keep secret.

For all the foregoing reasons and on behalf of the New York News Publishers Association, the undersigned respectfully requests that your office make this letter a part of the public record for the hearing scheduled for July 24th and that you refuse to sign the Proposed Amendment into law.

Very truly yours,

**GREENBERG TRAUIG, LLP**

  
Michael J. Grygiel

  
Kelly L. McNamee

MJG//KLM/rsb