

APPENDIX 2 - FREEDOM OF

INFORMATION LAW (FOIL)

This section discusses how a citizen or oil and gas operator may request access to information on file with the Department, and the criteria the Department must use in determining whether to permit or deny access to that information under the Freedom of Information Law (Public Officers Law, sections 84-90).

All of the information maintained by State agencies is accessible to the public, except for records or portions of records which fall within one of eight categories specifically exempted from disclosure under Section 87(2)(d). Two of these categories apply to the Oil, Gas, Solution Mining and Gas Storage Programs. The Department may deny access to records or portions of records that:

- a. are specifically exempted from disclosure by State or Federal statute;
- b. are trade secrets or are maintained for the regulation of commercial enterprise which if disclosed would cause substantial injury to the competitive position of the subject enterprise.

The Environmental Conservation Law restricts public access to records which reveal the amounts of oil or gas produced, sold, purchased, acquired, stored or transported within the State. Section 23.0305.8 (f) of the ECL states that production records must be kept confidential for six months after the period to which those records or reports apply. In addition, permit applications are subject to environmental review, and the Department has established a policy that permit applications are accessible to the public.

Access to all other types of information falls under the guidelines of the Freedom of Information Law (FOIL).

Under the Freedom of Information Law regulations, each agency must maintain a list of all the subjects or filing categories used in keeping its

records, and must appoint a records access officer to coordinate the agency's response to public requests for access to those records. The records access officer keeps the subject matter lists up-to-date, assists the requester in identifying the records sought, makes copies of the records or assists the requester in making copies, certifies that the copies are accurate and, if the records cannot be found, certifies that the agency does not have possession of the requested records or that they cannot be found after a diligent search.

A request for access must be made in writing, and must "reasonably describe" the record of interest by providing dates, titles, file designations, or any other information which will help to find the requested records (section 89(3)). A request for oil and gas or solution mining information should be directed to the Records Access Officer, Department of Environmental Conservation, 50 Wolf Road, Albany, NY 12233-0001. Within five business days after receiving of a written request, the agency must make the record available, deny access in writing and give the reasons for denial, or furnish a written acknowledgement of receipt of request and a statement of the approximate date when the request can be granted or denied. A fee may not be charged for inspection, certification, or a search for the records, but fees up to \$.25 may be charged for each photocopied page, or a fee which is based on the actual cost of reproduction may be imposed (section 87(1)(b)(iii)).

When a request is received, the Department must follow the criteria in paragraph (d), subdivision (2), section 87 of the Public Officers Law in making its determination to grant or continue an exception from disclosure. The same criteria are listed in 6 NYCRR 616.7 (c)(2) of the Official Compilation of the Rules and Regulations of New York State, and pertain specifically to the Oil, Gas, and Solution Mining Programs. The criteria the Department must consider are:

1. Whether or not the records are trade secrets or are maintained for the regulation of commercial enterprise which if disclosed would cause substantial injury to the competitive position of the commercial enterprise.
2. Factors pertaining to determining whether or not a trade secret exists:
  - a. the extent to which the information is known outside of the business of the person submitting the information;  
For example, if the depth to the producing horizon can be easily determined using data from other nearby wells, or from publically available reference sources, then the information may be well known outside the business of the submitter.
  - b. the extent to which it is known by the person's employees and other involved in his business;  
For example, if information is disseminated among the company's employees, investors, or partners, it may not be considered confidential.
  - c. the extent of the measures taken by the person to guard the secrecy of the information;  
For example, if the information is generally kept in a locked safe, it may be considered confidential.
  - d. the value of the information to the person and to his competitors;  
For example, if the company's long-term leasing strategy is based on information contained in the records from a well or wells, and this information cannot be generated from other available sources, it may be considered exempt from disclosure.
  - e. the amount of effort or money expended by the person in

developing the information;

For example, if a company invested in seismic data in a wildcat area, the information may be determined to be exempt from disclosure.

- f. the ease or difficulty with which the information could be properly acquired or duplicated by others.

For example, despite a sizable investment in a specific well location, the well has been drilled in an old, existing field, and other operators can easily acquire or develop the information from that particular well.

A written denial of access must state the reasons for the denial, and advise you of your right to appeal to the person designated to hear appeals by the Commissioner of the Department. If your request is denied, you may appeal the decision within 30 days. Upon receiving an appeal, the agency has 10 business days to fully explain in writing the reasons for further denial to access or provide access. Copies of all appeals and the determinations made in those appeals must be sent to the Committee on Open Government, which monitors compliance with the Freedom of Information Law among New York State agencies, and intercedes when a denial has been made improperly. An applicant may seek a full judicial review of a final agency denial by initiating a proceeding under Article 78 of the Civil Practice Law and Rules. A court may, at its discretion, award reasonable attorney's fees to persons challenging a denial of access to records in court under certain circumstances. The court must find that the record was of "clearly significant interest to the general public," and that the agency "lacked a reasonable basis of law for withholding the record".