



**Committee on
Open Government**

Freedom of Information Law: Refresher and Update

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CONTACT INFORMATION

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Committee on
Open Government

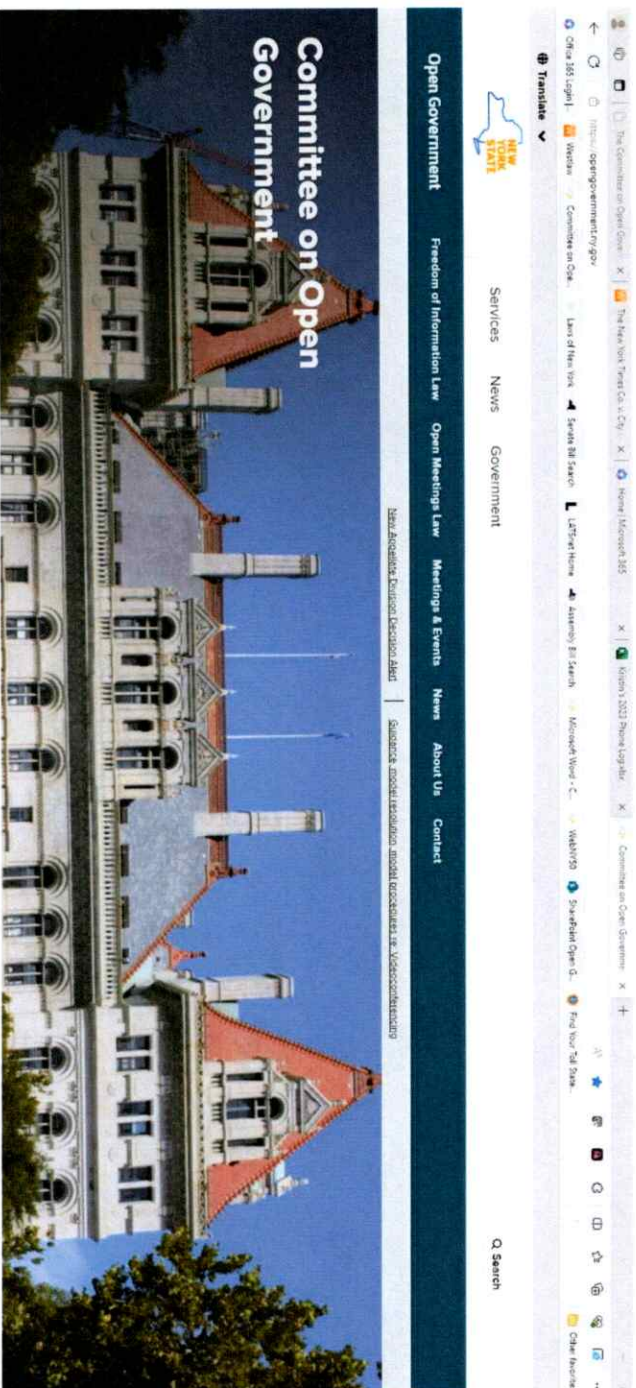


Public Officers Law

Article 6

Sections 84-90

The Committee's Home Page



OVERVIEW

The Committee on Open Government oversees and advises the government, public, and news media on Freedom of Information, Open Meetings, and Personal Privacy Protection Laws. The Committee offers guidance in response to above inquiries, prepares written legal advisory opinions, and provides training to government and other interested groups.

Enactment

- The original law was enacted in 1974 and was limited in scope – access to 9 categories of records.
- Repealed and replaced with the current law in 1978 – presumption of access

Presumption of Access

Every agency should start with the assumption that all government records are subject to FOIL disclosure and then review to determine whether the record or portion of the record fits into one of the permissible grounds for denial.

Who is covered by FOIL?

FOIL governs access to agency records and the term “agency” is defined as:

“any state or municipal department, board, bureau, division, commission, committee, public authority, public corporation, council, office or other governmental entity performing a governmental or proprietary function for the state or any one or more municipalities thereof, except the judiciary or the state legislature.”

Records Access Officer

The position of records access officer is established by regulations promulgated by the Committee on Open Government.

The governing body of a public corporation and the head of an executive agency or governing body of other agencies shall be responsible for insuring compliance with the regulations herein, **and shall designate one or more persons as records access officer by name or by specific job title** and business address, and when requests are accepted via email, an email address, who shall have the duty of coordinating agency response to public requests for access to records.

“Records”

POL §86(4) “Record” means **any information kept, held, filed, produced or reproduced by, with or for an agency ... in any physical form whatsoever** including, but not limited to, reports, statements, examinations, memoranda, opinions, folders, files, books, manuals, pamphlets, forms, papers, designs, drawings, maps, photos, letters, microfilms, computer tapes or discs, rules, regulations or codes.



Not Required to Create Records

1. FOIL does not obligate an agency to answer questions or to manually create a new record in order to provide information.
2. Making a copy of an existing record does not constitute “creating a new record.”
3. An agency is required to provide records on the medium requested by a person, if the agency can reasonably make such copy or have such copy made by engaging an outside professional service.
4. When an agency has the ability to retrieve or extract a record or data maintained in a computer storage system with reasonable effort, it shall be required to do so.
5. Any programming necessary to retrieve a record maintained in a computer storage system and to transfer that record to the medium requested by a person or to allow the transferred record to be read or printed **shall not be deemed to be the preparation or creation of a new record**



Three Records Mandated by FOIL

- a record of votes of each member in every session and every committee and subcommittee meeting in which the member votes;
- a record setting forth the name, public office address, title, and salary of every officer or employee; and
- a current list, reasonably detailed, by subject matter of any records required to be made available for public inspection and copying pursuant to this section
 - Municipalities frequently adopt the Record Retention and Disposition schedule (LGS-1) established by the NYS Archives as their “subject matter list.”

Reasonably Describe Records

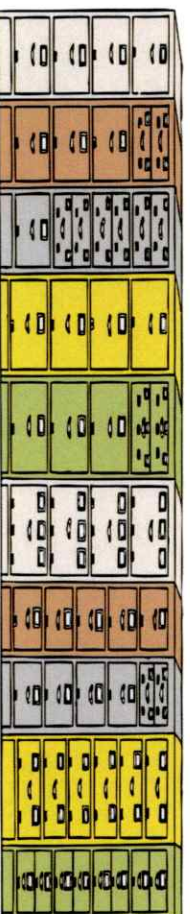
Has the applicant provided **sufficient detail to allow the agency to identify the records sought?**

How does your agency **maintain its files?**

Can the agency locate or retrieve the record with **reasonable effort?**

Would locating the record involve searching for the “**needle in the haystack**”?

Answer may be very different depending on whether they are **paper or electronic records.**



Time Limits

- 5 business days
- 20 business days
- Date Certain - Reasonable under the circumstances
- 30 calendar days to appeal denial
- 10 business days for agency to respond to appeal



Email Requests

- Agencies must accept requests via e-mail.
- Agency cannot require a requestor to use its form (including electronic forms and portals), but can require that requests be made in writing
- Unless there are personal privacy concerns, an applicant for records should be permitted to remain anonymous

Permissible Grounds for Denial

- (a) are specifically exempted from disclosure by state or federal statute;
- (b) if disclosed would constitute an unwarranted invasion of personal privacy under the provisions of subdivision two of section eighty-nine of this article;
- (c) if disclosed would impair present or imminent contract awards or collective bargaining negotiations;
- (d) are trade secrets or are submitted to an agency by a commercial enterprise or derived from information obtained from a commercial enterprise and which if disclosed would cause substantial injury to the competitive position of the subject enterprise;
- e) are compiled for law enforcement purposes only to the extent that disclosure would:
 - i. interfere with law enforcement investigations or judicial proceedings, provided however, that any agency, which is not conducting the investigation that the requested records relate to, that is considering denying access pursuant to this subparagraph shall receive confirmation from the law enforcement or investigating agency conducting the investigation that disclosure of such records will interfere with an ongoing investigation;
 - ii. deprive a person of a right to a fair trial or impartial adjudication;
 - iii. identify a confidential source or disclose confidential information relating to a criminal investigation; or
 - iv. reveal criminal investigative techniques or procedures, except routine techniques and procedures
- (f) if disclosed could endanger the life or safety of any person;

Permissible Grounds for Denial

- (g) are inter-agency or intra-agency materials which are not:
- i. statistical or factual tabulations or data;
 - ii. instructions to staff that affect the public;
 - iii. final agency policy or determinations; or
 - iv. external audits, including but not limited to audits performed by the comptroller and the federal government; or
- (h) are examination questions or answers which are requested prior to the final administration of such questions;
- (i) if disclosed, would jeopardize the capacity of an agency or an entity that has shared information with an agency to guarantee the security of its information technology assets, such assets encompassing both electronic information systems and infrastructures;

REMAINDER RELATE TO RECORDS MAINTAINED PURSUANT TO VEHICLE AND TRAFFIC LAW

Exempt by Statute

Are exempt by state or federal statute

- Attorney-client communications – CPLR
- Student records – FERPA
- Mental health records – Mental Hygiene Law
- Autopsy Records – County Law
- County Operated E911 Records – County Law
- Social Security Numbers - Public Officers Law 96-a

Unwarranted Invasion of Personal Privacy

Examples:

- Employment application of person not hired
- Home telephone numbers or personal cell numbers
- Medical information
- Public employee home addresses
- Lists of names and addresses of natural persons if used for solicitation or fund-raising purposes
- Mugshots

****** Public Employees enjoy a lesser degree of privacy than others



Public Employee Notification Policy

On September 4, 2024, FOIL was amended by Chapter 302 of the Laws of 2024 to include a mandate that:

All agencies subject to the requirements of this article shall develop a policy regarding providing a notification to public employees in the event that the agency is responding to a request for such employee's disciplinary records. Public Officers Law § 87(6).

The Committee prepared an advisory opinion in response to several inquiries relating to the implementation of the mandate and the notification it contemplates. See [FOIL AO 19867](#).

Impair Contract Awards

An agency may withhold records or portions of records which:

if disclosed would impair present or imminent contract awards or
collective bargaining negotiations.

Key word is “impair.” Would disclosure of the record give one party an unfair advantage over another or put your agency in a weakened bargaining position?



Trade Secret or Substantive Competitive Harm

An agency may withhold records or portions of records which:

are trade secrets or are submitted to an agency by a commercial enterprise or derived from information obtained from a commercial enterprise and which if disclosed would cause substantial injury to the competitive position of the subject enterprise.

At the state agency level, there is a specific statutory process that must be followed in order for a record to be afforded “trade secret” protection.

At the local level, the agency must establish its own process but ultimately has the burden of defending non-disclosure.

Intra-Agency and Inter-Agency Material

- Intended to protect the deliberative process
- Required to disclose
 - Statistical or factual information
 - Instructions to staff that affect the public
 - Final agency policy or determinations
 - External audits



Obligation to Redact

In the past few years, the Appellate Division, First Department has issued four decisions relating to rights of access under FOIL specifically concerning the obligation to redact portions of records to protect information exempt under FOIL, which we believe are *inconsistent with binding Court of Appeals precedent* on the issues addressed therein. See [FOIL Advisory Opinion 19866](#) for additional guidance.

In sum, it is the opinion of the Committee that when a record contains both exempt and non-exempt material, the agency:

- must withhold the record in its entirety if it is exempt from FOIL disclosure by state or federal statute and access is governed by that separate statute (POL § 87(2)(a));
- may withhold the record if disclosure “would constitute an unwarranted invasion of personal privacy under the provisions of subdivision two of section eighty-nine of this article” (POL § 87(2)(b)), but that “disclosure shall not be construed to constitute an unwarranted invasion of personal privacy . . . when identifying details are deleted” (POL § 89(c)(i)); and
- with respect to records other than those that are exempt from FOIL disclosure by state or federal statute, and which contain both “exempt” and “non-exempt” material, *may* redact the portions subject to one or more of the permissible grounds for denial, but *must* disclose the remaining portions

Certification

1. When an agency indicates that it does not maintain or cannot locate a record, an applicant for the record may seek a certification to that effect. Section 89(3) of FOIL states, in part that, upon request, an agency “shall certify that it does not have possession of such record or that such record cannot be found after diligent search.”
2. When an agency provides a copy of a record, the applicant may request a certification that the copy provided is a “correct” copy of the original. This is not a certification that the content is accurate, but that the copy is a true copy of the original.

Appeals

- **Express Denial of Access** - a record possessed by an agency is withheld in whole or in part.
- **Constructive denial of access** – agency fails to respond to request within time limits set forth in statute.
- When denied access to a record or any portion thereof, applicant has **30 calendar days to appeal**.
- FOIL Appeals Officer is “**head or governing body**” of agency, or person or persons designated by head or governing body.
- FOIL Appeals Officer cannot be the same as the Records Access Officer;
- Within 10 business days, FOIL Appeals Officer must either provide records sought or “**fully explain**” reasons for further denial (or a combination of both).
- The law **does not contemplate** a “**remand**” back to the Records Access Officer – it is the responsibility of the Appeals Officer to review records at the appeal level.
- **Agency is required to send a copy of the appeal and the appeal determination to COOG.**



Fees

Two Fee Structures (Cannot be combined!):

1. \$.25 per photocopy for copies up to 9x14 inches
 - Agency **may not charge for search or review time**
2. Actual cost of reproduction for all other records
 - This is the cost of preparing **a copy** of the record
 - Hourly salary of lowest paid employee capable of **preparing copy** – but only if it takes at least **2 hours**
 - Cost of **electronic storage device**
 - Cost of having copy made by **third party vendor**
 - **May not charge for search or review time**



Fees

In *Forsyth v. City of Rochester*, 185 A.D.3d 1499, 1500, 129 N.Y.S.3d 220, 222 (4th Dep’t 2020), the court held:

[R]espondents may not charge petitioner a fee for the costs associated with their review or redaction of the BWC footage requested by petitioner (see *Matter of Time Warner Cable News NY1 v. New York City Police Dept.*, 53 Misc. 3d 657, 678, 36 N.Y.S.3d 579 [Sup. Ct., N.Y. County 2016]).



In the *Time Warner Cable* decision, the court held that the “NYPD may not pass the costs associated with reviewing or redacting the footage requested onto petitioner.”

New Requirements for Public Authorities

On April 20, 2024, Governor Kathy Hochul signed into Law Chapter 58 of the Laws of 2024 which amended Public Authorities Law to add a new § 2829 to clarify and reinforce the fact that state and local authorities are subject to both FOIL and the OML:

All state and local authorities, as such terms are defined in section two of this chapter, as well as all subsidiaries of such state and local authorities, as such terms are defined in section two of this chapter, shall be subject to the provisions of articles six and seven of the public officers law relating to the freedom of information and open meetings laws respectively.

The amendment further provides that all such authorities and their subsidiaries

shall, to the extent practicable, stream all open meetings and public hearings on their website in real-time, post video recordings of all open meetings and public hearings on their website within five business days of the meeting or hearing and maintain such recordings for a period of not less than five years.

This amendment relating to public authorities went into effect on May 20, 2024

Enforcement

The Committee on Open Government DOES NOT have enforcement authority.

Via a CPLR Article 78 Proceeding

Attorney's Fees and other reasonable litigation costs can be awarded:

- Mandatory on part of judge when requestor “has substantially prevailed and the court finds that the agency had no reasonable basis for denying access.”
- Discretionary on part of judge when requestor “has substantially prevailed, and when the agency failed to respond to a request or appeal within the statutory time.”

QUESTIONS??

- ANYONE is welcome to contact our office by phone or by email with questions (government employees, members of the public, media representatives, etc.)
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