
Frequently Asked Questions: Charter Schools and New York's Freedom of Information Law

GENERAL

1. What is the Freedom of Information Law?

The Freedom of Information Law ("FOIL") is a New York State Law that provides the public an avenue to access certain records of public agencies. FOIL defines an "agency" 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. Public Officers Law §86(3). The law establishes a presumption of openness and access to agency records, although there are exemptions (outlined below) that permit an agency to deny access. The purpose of FOIL is to ensure the public's right to know the process of governmental decision-making and to help the public make informed choices with respect to the direction and scope of governmental activities. The [text of FOIL](#) can be accessed on the website of the Committee on Open Government (the state agency charged with overseeing implementation of the law) (see FAQ 7).

2. Why does it apply to charter schools?

The Charter School Act of 1998 makes charter schools subject to FOIL and its companion law, the Open Meetings Law ("[OML](#)"). See Education Law §2854(1)(e). But an equally fundamental point is that it applies because such "sunshine laws" are a key hallmark of whether charter schools are public in nature. In fact, it is not too much to say that not only is FOIL's application to charter schools entirely consistent with charter schools' legal status as "independent and autonomous public schools," it is a necessary precondition of that status.

3. What does FOIL require in a nutshell?

FOIL requires that charter schools make their records available for public inspection and copying unless the charter school can establish that a particular request falls within one of FOIL's exemptions. Although FOIL is based on a presumption of openness and access to records, there are exemptions that permit a charter school to deny access to records or portions of them (see FAQs 27-35). These exemptions are based primarily on the potential for harm if the agency were to disclose the records. Thus, if disclosure of the records would be damaging to an individual or preclude a government agency from carrying out its duties, it is likely that all or some portions of the records may be withheld.

The statute also provides for a timetable for complying with record requests and any subsequent appeals (see FAQs 36-39). Generally speaking, the school must acknowledge receipt of the request within five business days and give the approximate date for fulfilling the request within twenty business days of the date of the acknowledgement. However, if circumstances reasonably warrant a longer time period (e.g., for large and complex requests), the school should give a reasonable "date certain" for the fulfillment of the request, which may be longer than twenty days.

4. At what point in time do new charter schools come under the requirements of FOIL?

Charter schools become subject to FOIL as well as the OML when a school's charter has been finally approved (either by vote of the Board of Regents or by operation of law in the case of certain schools authorized through SUNY). From that point in time onward, the charter school must comply with both statutes.

5. Who is responsible for evaluating and responding to FOIL requests?

FOIL obligates an agency's "governing body" to designate one or more persons as the "records access officer." In a charter school, the "governing body" is the Board of Trustees. The records access officer is responsible for insuring compliance with FOIL by appropriately responding to public requests for access to records. The records access officer is also responsible for insuring that school personnel maintain the mandated subject matter list of records discussed below in FAQ 10. In addition each school's board of trustees must designate a "records appeals officer" to hear appeals from the decisions of the records access officer. The records appeals officer can be the head, chief executive or governing board of the school, or a person designated by such head, chief executive, or governing board of the school. The records access officer and the records appeals officer must be different people.

6. Do charter schools have an obligation to give notice about how to access records under FOIL?

Yes. Pursuant to Committee on Open Government [Regulation 1401.9](#), every charter school must post a FOIL notice in a public place in the school or publish such notice in a local newspaper of general circulation. A model notice can be found on the Committee on Open Government website [here](#) (scroll down to "Model Public Notice"). The notice should include the name, title, business address and business telephone number of the designated records access officer. The notice should also explain the right to appeal of any person denied access to a record and contain the name and business address of the records appeals officer. Finally, the notice must also contain the locations where the records are available for inspection and copying. Each school must accept requests for public access to records and produce records during all hours that they are regularly open for business.

7. What is the Committee on Open Government?

The Committee on Open Government (COOG) is a committee housed within the New York Department of State that is charged with providing [advisory opinions](#) on FOIL and OML, as well as educating the public about New York State's sunshine laws. The Committee promulgates [model agency rules](#), as well as [regulations implementing FOIL](#), and its site is also a convenient location in which to access the [text of the statute](#). You can access its resources on their website [here](#) (which also includes a searchable index of thousands of advisory opinions as well as training materials, news and other tools), and you can also use its site to get in contact with COOG staff and request advisory opinions. They are ready, willing, and able to answer questions regarding the nature and scope of the law and charter schools should not hesitate contacting them with any questions. While the COOG staff is highly professional, it is worth keeping in mind that, as the agency charged with administering the sunshine laws, its professional ethos is to read the statute broadly and err on the side of providing access. Thus, on close questions, a school may want to consult with COOG but also its own counsel.

RECORDS

8. What is a record within the meaning of FOIL?

FOIL defines "record" very broadly to mean any information in any physical form whatsoever that is kept, held, filed, produced or reproduced by, with or for an agency. FOIL §86(4). Records can be, but are 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. This broad definition of a "record" has allowed FOIL the flexibility to adapt to changes in information technology that were not for the most part foreseen when the law was first adopted over 30 years ago. It is noteworthy that FOIL applies to records kept *by* or *for* an agency.

9. Are emails considered records?

Yes. Emails are viewed in the same way as paper communications; that is, as a means of communicating a record. Emails that pertain to charter school business are “records” subject to FOIL, and more importantly they may also be subject to discovery and subpoena in a lawsuit. Best practices dictate that school personnel and board members should maintain separate email accounts, e.g., gmail, for school-related business and for personal communications.

10. Does FOIL say anything about the records that charter schools are required to maintain?

Yes. FOIL §87(3) provides that charter schools must maintain the following:

- a) a record of the final vote of each trustee in each instance when school trustees vote;
- b) a record setting forth the name, public office address (school address), title and salary of every officer or employee of the school; and
- c) a reasonably detailed current list by subject matter of all records held by the school, whether or not available to the public under FOIL.

11. Does the fact that FOIL requires these records to be maintained also require that they be disclosed?

Not necessarily. Just because FOIL requires that these records be maintained does not mean that FOIL might not also exempt these records from disclosure. For an example, see FAQ 31 below.

12. Does FOIL address how long a charter school must maintain these or any other records?

No. Charter schools are not subject to record retention requirements that school districts must follow. We recommend that a school create a record retention schedule, one which allows them to conduct their business, and stick to it. Remember that simply storing records with a third-party or off-site will not make such records any less subject to FOIL.

13. Do records have to be created in response to a FOIL request?

No. Only existing documents need to be produced (though there are a few documents that FOIL itself requires an agency to always maintain—see FAQ 10). There is no obligation to create a new record in response to a request for information. However, an agency, including a charter school, may be required to extract a portion of a record in order to enable its production; such extractions are not seen as creating a new record but rather simply as disclosing portions of an existing record. In addition, as technology has evolved, courts have held that an agency is required to produce portions of records, *i.e.*, databases, if it is possible to extract or generate those portions with reasonable effort.

RECORD REQUESTS

14. In what form/medium can requests be made?

Record requests can be hand-delivered or submitted by mail or fax to the school’s records access officer. In addition if the school has the ability to accept requests by email, it must do so. ***Furthermore, if the party making the request asks that the information be transmitted by email and the school has the capacity to do so with reasonable effort, it is required to do so.*** Schools must accept requests for public access to records and must produce records during all hours that they are regularly open for business. Finally, if the school chooses, it may accept oral requests.

15. Does the party making the request have to give a reason for seeking the record?

Generally no. An individual or entity submitting a request for records cannot be required to give a reason for their request or to tell how they intend to use the record. Only where the request is for a list of names

and public office addresses and the school concludes that the list will be used for solicitation or fundraising purposes is the school permitted to consider the purposes for which the record is sought. If the school concludes that the list will be used for those exempt purposes, the school can deny access. In addition, just because a person or entity seeking a record wants it for the purpose of litigation, that is no basis to deny access. Indeed, FOIL requires disclosure of nonexempt records to a party in a lawsuit against the school. Of course, whether in litigation or not, FOIL would not require the production of documents that are subject to attorney-client privilege, because such records are exempt under provisions of state and federal law.

16. How specific does a record request have to be?

FOIL provides that the applicant must “reasonably” describe the records requested. It is important to note that a “reasonable” description is not necessarily a “specific” description. Specific descriptions of the exact records are not required. If the school is given a reasonable amount of information to locate the requested record, then the applicant has met the standard for a proper request. In considering whether the request reasonably describes the records, the school’s system for filing and retrieving records is relevant. If the request is consistent with the school’s record-keeping system it would meet the standard.

17. What if the request is too vague or too broad to answer?

If the request is too vague or too broad, the school’s records access officer must, within five business days of the receipt of the request, inform the applicant that the request or portion of the request does not reasonably describe the records sought. According to [Regulation 1401.2\(b\)\(2\)](#), the records access officer is also “responsible for assuring that [school] personnel ... [a]ssist persons seeking records to identify the records sought, if necessary, and when appropriate, indicate the manner in which the records are filed, retrieved or generated to assist persons in reasonably describing records.”

18. In what format must records be transmitted?

The format may vary depending on the format requested by the applicant as well as whether the school maintains the records in the requested format. For example, if the school has the reasonable ability to receive requests and transmit records via email, it should do so. The Committee on Open Government has also taken the view that if an applicant requests that records be scanned in order to transmit them via email, the school should do so if scanning would not involve any additional effort in responding to the request. This situation may arise if the school possesses a copy machine equipped with scanning technology that can create electronic copies of records as easily as paper copies.

If an applicant requests electronic records but the records are not maintained electronically, it may not be reasonable to expect the school to fulfill the request in that format. Nevertheless, if the records are maintained electronically but in a different format from what has been requested, the school must convert the documents to the requested format if it can reasonably do so. Moreover, if extracting the data electronically requires less employee time than engaging in manual retrieval or redactions from non-electronic records, the agency should do so.

FOIL also provides that records provided in a computer format must not be encrypted.

RESPONDING TO REQUESTS: TIMING, FEES, AND ONSITE INSPECTION

19. What is the mandated timeframe for responding to record requests?

Upon receipt of a reasonably described record request the records access officer has five business days to respond in some manner to the request. In cases of email requests, they are deemed “received” on

the first business day on which they might be viewed. For example, if an email request was sent at 3 pm on Saturday, the law will deem it received at 9 am Monday. In addition, if a request is received after 5 pm, it is deemed received on the following business day. All timing requirements will flow from that latter date.

Within that five day period, the records access officer can:

- 1) grant access to the request in whole or in part by providing the records requested;
- 2) acknowledge receipt of the request in writing and deny access to the records in whole or in part; or
- 3) if the school cannot within five business days provide the records or deny the request, it must acknowledge receipt of the request and provide an approximate date by which either some or all records will be made available or by which the request will be denied.

Any denials must be in writing and inform the party making the request of his/her/its right to appeal to the records appeals officer, a body or person that must be identified by name, title, business address and business telephone number. In the case of a failure to locate records, the records access officer must certify that either the school is not the custodian of such records or the records of which the school is a custodian cannot be found after a diligent search.

20. In cases where the school is giving an approximate date for a response, what does FOIL require in terms of timing?

In cases where the school provides an acknowledgement of receipt and an approximate date for a response (see FAQ 19, (3)), the approximate date should be *within twenty business days* of the sending of the acknowledgment of the request (see FAQ 21 below). However, if circumstances prevent disclosure within twenty additional business days, the school can extend the time period (see FAQ 22 below). The law does not mandate any absolute time period for denying or granting a FOIL request – only that the time period be reasonable, that the school explain the delay in writing if it is more than twenty additional business days, and that the school specify a “date certain” for fulfilling the request (see FAQ 22 below).

21. What factors can charter schools consider when formulating a reasonable “approximate date” for fulfilling the request within twenty business days?

In general, a school can take an additional twenty business days to respond to a request, after properly acknowledging the request within five business days. In defining the “approximate date,” the records access officer is to consider the volume of the request, the ease or difficulty in locating, retrieving or generating records, the complexity of the request, the need to review records to determine the extent to which they must be disclosed, the number of requests received by the school, and like factors that affect the school’s ability to grant access to records expeditiously and within a reasonable time.

22. What is the permissible timeframe for responding to requests that are exceedingly large or complex, or where the records are not readily accessible?

Regardless of the size or complexity of the request, the school must still acknowledge receipt of the request within five business days. Nevertheless, if the request cannot be fulfilled or denied within the additional twenty business day period described in FAQs 20-21, the school must provide a written explanation for any delay beyond twenty business days. In addition the school must provide a “date certain” for completing the request. This self-imposed deadline is one by which the school promises to make the records available in whole or in part. The “date certain” must be reasonable under the circumstances.

23. What factors can charter schools consider when formulating a reasonable “date certain” response time?

Again, the records access officer is to consider the volume of the request, the ease or difficulty in locating, retrieving or generating records, the complexity of the request, the need to review records to determine the extent to which they must be disclosed, the number of requests received by the school, and like factors that affect the school’s ability to grant access to records expeditiously and within a reasonable time.

It is worth noting that many if not most government agencies, including school districts, struggle to maintain strict compliance with FOIL. Moreover, there is a long and unhappy history of local, state and federal agencies simply ignoring FOIL requests and basically waiting until a party brings judicial action to respond to such requests on the clear hope that the request, if ignored, will simply go away. However, while we certainly understand that compliance with FOIL can be burdensome—and we know that there are parties that simply use FOIL to harass charter schools (and school districts for that matter)—it should be remembered that charter schools partially stake their moral power to seek public funding on their “publicness.” As such, general compliance with FOIL is something the charter movement should seek to achieve.¹

24. Can charter schools charge fees for paper copies of public records?

Yes, but subject to limitations. The law makes a distinction between disclosures in paper and electronic form (this FAQ deals with the former; FAQ 25 deals with the latter). Schools may provide copies without charging a fee, and FOIL should not be considered a mandate to set or raise fees to the statutorily prescribed amount. That said, under FOIL, the fee for copying records shall not exceed 25 cents per page for photocopies not exceeding 9 by 14 inches. The fee for photocopies of records in excess of 9 by 14 inches shall not exceed the cost of reproduction. In cases where FOIL authorizes the school to redact portions of a paper record and such redaction is accomplished by first making a photocopy of the record before the proper redactions are made, a school is also permitted to charge a fee.

It should be noted that, except when a different fee is otherwise prescribed by statute, no fees can be charged relating to the search for, administrative costs of, or employee time needed to prepare photocopies of records. Schools are also not permitted to impose fees for the time or labor required to review the content of requested records to determine the extent to which records must be disclosed or may be withheld. Schools are permitted to require that any fees for copying or reproducing a record be paid in advance of the preparation of such copies.

25. Can charter schools charge fees for electronic records or for other records not described above in FAQ 24?

Yes. Under a 2008 amendment, FOIL sets fees for providing electronic information and requires charter schools to transfer data into a particular electronic storage medium upon request (see FAQ 18). Specifically, if the record request is for electronic records and the school does not maintain the records in that form, the school can charge for the actual cost of reproducing the records. Where more than two hours are needed to prepare, extract, or generate electronic data, the school can charge a fee based on the cost of the storage medium used, as well as the hourly salary of the lowest paid employee who has the skill to complete the task. In the increasingly rare situations where a school’s information technology equipment is incapable of preparing a copy, the school can charge the actual cost of engaging a private professional service to do so. In either scenario, the applicant must be informed in advance of the

¹ For an instance of the publicity that follows non-compliance, see http://www.philly.com/philly/news/20130514_Pa_official_Charter_schools_routinely_flout_public-records_law.html

estimated cost of preparing a copy of the record. Providing these estimates gives an incentive to the requesting party to narrow the scope of their requests.

The 2008 amendments also require agencies subject to the law, including charter schools, to consider maximum public access when contracting with outside vendors and when designing electronic information systems. Agencies are specifically prohibited from entering into or renewing a contract for the creation or maintenance of records if the contract would impair the right of the public to inspect or copy agency records.

26. Can an individual inspect school records on site instead of paying fees for copies?

Yes, an individual has the right to inspect and search accessible records at no charge. Furthermore, upon request, the records access officer must certify that a record is a true copy. The school cannot charge for any certification of such records. However, if portions of the record are permissibly withheld under FOIL (under one of the exemptions discussed below), the school is permitted to require payment for redacted copies of records. The law also provides that if portions of electronic records can reasonably be redacted prior to disclosure, no fees can be imposed for the time needed to review the records and redact them.

EXEMPTIONS

27. What are the categories of records that are exempt from disclosure under FOIL?

FOIL §87(2) sets out nine categories of records that are exempt from disclosure in whole or in part. These exempt records are those that:

- a) are specifically exempted from disclosure by state or federal statute;
- b) if disclosed, would constitute in an unwarranted invasion of personal privacy under the provisions of subdivision two of section eighty-nine of this article [i.e., FOIL §89(2)];
- 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 and which, if disclosed, would:
 - i. interfere with law enforcement investigations or judicial proceedings;
 - 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;
- 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 or federal government;
- h) are examination questions or answers which are requested prior to the final administration of such questions; or

- 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 *[for example computer codes or passwords]*.

28. What is an example of a state or federal law that specifically exempts disclosure?

FOIL §87(2)(a), set out in FAQ 27 above, notes that FOIL exempts from disclosure records that “are specifically exempted from disclosure by state or federal statute.” Perhaps the most prominent example of a statute that a charter school will encounter in this category is the Federal Family Educational Rights and Privacy Act, more commonly known as FERPA. FERPA protects the privacy of student education records and applies to all schools that receive federal funding. Generally, the law prohibits charter schools from releasing personally identifiable information contained in a student’s educational record without the consent of the parent (if the student is under the age of 18) or of the student (if the student is over the age of 18). It is incumbent upon school leadership to familiarize themselves with their obligations under this law. Note also that FOIL would also not require the production of documents that are subject to attorney-client privilege, because such records are exempt under provisions of state and federal law.

29. Does FOIL clarify what constitutes an “unwarranted invasion of privacy” giving rise to an exemption from disclosure?

Yes. Two provisions are essential in this regard: §§89(2)(b) and (c).

FOIL §89(2)(b) provides that an unwarranted invasion of privacy includes, but is not limited to:

- (i) disclosure of employment, medical or credit histories or personal references of applicants for employment;
- (ii) disclosure of items involving the medical or personal records of a client or patient in a medical facility;
- (iii) sale or release of lists of names and addresses if such lists would be used for solicitation or fundraising purposes;
- (iv) disclosure of information of a personal nature when disclosure would result in economic or personal hardship to the subject party and such information is not relevant to the work of the agency requesting or maintaining it;
- (v) disclosure of information of a personal nature reported in confidence to an agency and not relevant to the ordinary work of such agency; or
- (vi) information of a personal nature contained in a worker’s compensation record, except as provided by section one hundred ten-a of the workers’ compensation law *[this provision deals with subpoenas by a court, law enforcement agency, or administrative agency]*.

However, FOIL §89(2)(c) then adds that disclosure shall not constitute an unwarranted invasion of personal privacy when:

- (i) identifying details are deleted;
- (ii) the person to whom a records pertains consents in writing to disclosure; or
- (iii) upon presenting reasonable proof of identity, a person seeks access to records pertaining to him or her.

The provision regarding removal of identifying details means that charter schools cannot necessarily simply withhold records that are subject to FOIL but contain identifying details. Rather those details should be redacted if they can be and the document made available.

30. Do judicial decisions clarify what constitutes an “unwarranted invasion of privacy” giving rise to an exemption from disclosure?

Yes, the courts have given some further guidance, particularly with regard to public officers and employees. Some courts have held that public officers and employees are entitled to less privacy, if the records in question relate to the execution of official duties. So for example, salary and time records of any public employee would be disclosable, barring any other statutory exemption, but social security numbers could be withheld as they are records that are irrelevant to the performance of one’s duties. In addition, courts consider what would be offensive to a “reasonable person of ordinary sensibilities.” It is likely that you will confront cases in which it is obvious that disclosure of the document would constitute an invasion of privacy that is unwarranted; but it is also likely that there may be close cases. In these latter cases, it is good practice to consult with the school’s counsel.

31. Would a teachers union’s request for the names and addresses of a school’s teachers be an unwarranted invasion of privacy?

Yes. First, specifically as to home addresses, FOIL §89(7) states that the law does not generally require the disclosure. Second, more specifically with regard to privacy, New York State’s highest court, in *Matter of New York State United Teachers vs. Brighter Choice Charter School*, 15 N.Y.3d 560 (2010), held that a charter school could lawfully withhold the names and home addresses of the school’s teaching staff under the “unwarranted invasion of personal privacy” exemption, because the union’s intent was “to expand its membership and, by extension, obtain membership dues.” As such, the request fell within the scope of FOIL §89(2)(b)(iii), which exempts “the release of lists of names and addresses if such names would be used for solicitation or fund-raising purposes.” The court further clarified that simply because FOIL requires the school to *maintain* the record (see FAQ 10 above) it does not mean the record must be *disclosed*, particularly if an exemption applies. Moreover, just because a charter school must afford an employee organization access under the Education Law, the court found that it did not follow that the employee organization could circumvent the FOIL exemptions in achieving those ends.

32. Are charter schools treated as agencies when it comes to exempting inter- and intra-agency materials?

Yes. A charter school is treated as an agency and therefore its internal communications (with the exceptions to the rule noted above and below) are not subject to disclosure under FOIL. In the same vein, communications between the charter school and other governmental agencies (such as your authorizer) are also *generally* not subject to FOIL.

33. Why are certain so-called “inter-agency or intra-agency materials” exempt from disclosure under FOIL and others not?

As interpreted by the courts, FOIL distinguishes between exempt and non-exempt materials that fall into this category. The courts recognize that, to function effectively, agency officers and their employees, including those in charter schools, must be able to express their opinions, recommendations, and advice, without an absolute obligation to disclose. That is the import of FOIL §87(2)(g) discussed in FAQ 27 above. This provision allows charter schools to deny access to records or portions of records that are inter-agency or intra-agency materials, *unless* the records fall into one of four categories of information that must normally be accessible and disclosed (unless there is a separate exemption in the statute authorizing nonproduction). Once again, these four categories of records are: statistical or factual tabulations or data; instructions to staff that affect the public; **final** (emphasis added) agency policy or determinations; or external audits.

34. Do communications between charter schools and consultants, as well as records produced by such consultants relating to the school, fall under the exemption for ‘intra-agency materials’?

Yes, subject to the same limitations governing records produced entirely within the school (see FAQs 27 and 33 above) and to the cautionary note contained at the end of this response. New York’s highest court

has held that records prepared by an outside consultant may be considered intra-agency material, in recognition of the fact that agencies often require opinions and recommendations from professional consultants and such opinions and recommendations do not lose their exempt status simply because they were produced by an outside consultant. However, the courts have emphasized that it is the *content* of the intra-agency materials that determines the extent to which they may be discloseable or withheld, in whole or in part. So, as discussed in FAQ 27 above, charter schools may deny access to records or portions of records that are inter-agency or intra-agency materials, *unless* the records fall into one of four categories of information that must normally be accessible and disclosed (unless there is a separate exemption in the statute authorizing nonproduction). *A word of caution, however:* if communications that would otherwise fall within the intra-agency exemption are then shared with a third party *who does not fall under the consultant category*, the communication would be *accessible under FOIL*.

35. Can a charter school exempt “statistical or factual tabulations or data” by putting them into some alternative form, like a narrative?

No. The courts have found that this information must be released irrespective of its format and how it appears on the page. It can be in the form of narrative expressions of fact or of graphics and/or numbers. The information required to be disclosed can also include estimates and projections, including information in draft and other than final form.

DENIALS, CONSTRUCTIVE DENIALS AND APPEALS

36. Does FOIL address denials and constructive denials of requests?

Yes, or more specifically the regulations of the Committee on Open Government promulgated under FOIL do. Most importantly, according to [Regulation 1401.7](#), a failure to comply with the time limitations for response to a request shall constitute a denial of a request, thus giving rise to a right to appeal. The failure to respond includes situations in which an agency:

1. fails to grant access to the records sought, deny access in writing or acknowledge the receipt of a request within five business days of the receipt of a request;
2. acknowledges the receipt of a request within five business days but fails to furnish an approximate date when it will grant or deny a request in whole or in part;
3. furnishes an acknowledgment of the receipt of a request within five business days with an approximate date for granting or denying access in whole or in part that is unreasonable under the circumstances of the request;
4. fails to respond to a request within a reasonable time after the approximate date given or within twenty business days after the date of its acknowledgment of the receipt of a request;
5. determines to grant a request in whole or in part within twenty business days of its acknowledgment of the receipt of a request, but fails to do so, unless the agency provides the reason for its inability to do so in writing and a date certain within which the request will be granted in whole or in part;
6. does not grant a request in whole or in part within twenty business days of its acknowledgment of the receipt of a request and fails to provide the reason in writing explaining its inability to do so and a date certain by which the request will be granted in whole or in part; or
7. responds to a request, stating that more than twenty business days is needed to grant or deny the request in whole or in part and provides a date certain within which it will do so, but such date is unreasonable under the circumstances of the request.

37. If a school denies a request, what are the rights and timing of an appeal?

FOIL provides that, within 30 calendar days of a denial, a FOIL requester may appeal to the school's records appeals officer. Upon receipt of the appeal, the records appeals officer must transmit a copy to the:

Committee on Open Government, Department of State
One Commerce Plaza, 99 Washington Avenue, Suite 650
Albany, New York 12231.

The records appeals officer is required to respond to the appeal within ten business days of the receipt, by either granting access to the records or fully explaining in writing the reasons for further denial. FOIL §89(4)(b). Similarly, the records appeals officer must also transmit its determination to the Committee on Open Government. If there is no determination within the required ten business days, the failure to do so constitutes a denial of the appeal.

38. If the requesting party is dissatisfied with how the school handled their request, can they bring a lawsuit?

Yes, but they must “exhaust their remedies” at the school level (i.e., go from the records access officer to the records appeals officer within the school, according to the procedures and timing rules described above). If a party has properly exhausted their rights at the school level, then the party has the right to bring a court action against the school (known as an “Article 78 proceeding”) claiming that the school is in violation of FOIL. The Article 78 proceeding must be brought within four months of the appeal denial at the school level. If the court agrees that the school did not properly comply with FOIL, it can award relief. The court also has discretionary authority to award reasonable attorney’s fees and costs when the court finds either that (1) the agency had no reasonable basis for denying access or (2) the agency failed to respond to a request in a timely manner as specified in FOIL.²

39. Beyond a lawsuit, are there any other possible consequences for the school if it fails to comply with FOIL?

Yes. The charter school authorizer (together with the Board of Regents) has explicit responsibility to ensure that your school is in compliance with applicable laws, including FOIL. Thus, a school that is in repeated and egregious violations of its charter, could be placed on probation, have its charter revoked or be denied renewal. It is unlikely that small and infrequent violations would result in such action. As always, good faith and reasonableness are important touchstones.

² See, e.g. <http://www.dos.ny.gov/coog/news/june2013-missedDeadlines.html>