



**State of New York
Department of State
Committee on Open Government**

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FOIL

FOIL AO 19879

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The Committee on Open Government is authorized to issue advisory opinions. The ensuing advisory opinion is based solely upon the information presented in your correspondence.

Dear __ and __ :

The Committee on Open Government (Committee) received your request for an advisory opinion on May 30, 2025. Given the volume of concerns expressed and opinions sought, I have organized our response by topics rather than by the categories in your request. Responding by category would result in repetitive content. By using the words “you” or “your” I am generally referencing both __ and __ , unless otherwise indicated.

Please note that we address your concerns to the extent that the content falls within our statutory advisory jurisdiction. We are authorized to provide advice, guidance and legal opinions on issues governed by the Freedom of Information Law (FOIL), the Open Meetings Law (OML), and the Personal Privacy Protection Law (PPPL) only. As a result, we are not authorized to address a number of your concerns, including but not limited to whether: certain action or inaction *violate* FOIL (something only courts can do); patterns of responses constitute systemic noncompliance (same); actions constitute “per se” violations (same); actions or inactions are presumptively unlawful or non-compliant, done in bad faith, or cause spoliation (same); actions or inactions demonstrate impartiality, constitute discrimination, or infringe on constitutional rights (same); actions or inactions create a rebuttal presumption, or conduct violates other law, such as the Penal Laws, or Rules of Professional Conduct (same). Additionally, I must note that the Committee is not an agency with enforcement or quasi-judicial oversight authority. As the agency legislatively tasked with interpreting the statutory language, we provide non-binding advice and opinions regarding whether certain conduct is consistent with the requirements of the FOIL statute, regulations, and controlling caselaw. We hope that our opinions and guidance

are helpful to all concerned, but they are not determinations and do not constitute judicial precedent.

This opinion considers numerous concerns regarding the FOIL process and the handling of the first four FOIL requests (as labeled by ___) that you submitted to your school district. For clarity and ease of reference this opinion refers to the FOIL requests by number (1-4). FOIL # 1 was dated January 17, 2025, describing fifteen categories of records sought. FOIL # 2 was also dated January 17, 2025, describing twenty-three categories of records sought. FOIL # 3 was dated March 3, 2025, describing three categories of records sought. FOIL # 4 was dated April 2, 2025, to which the District did not respond. The first section addresses the relevant principals of law and contains some analysis. The subsequent sections are specific to the FOIL requests.

I. Statements of Law

a. General Principals of FOIL Accessibility

All agency records are presumed available to anyone requesting them, unless the content falls within one or more of the permitted exemptions to disclosure found in § 87(2). The presumption of access extends to anyone requesting the records, regardless of whether they identify themselves or the reason for their request. In essence, the same FOIL request received by two distinct individuals should result in identical responses and records provided from the agency. The only circumstances where that does not hold true are where either: (i) a statute limits accessibility to certain individuals; or (ii) the record contains personal content which, if released to anyone other than the subject of the content, would constitute an unwarranted invasion of personal privacy and may be withheld pursuant to § 87(2)(b).

In our opinion, where two families submitted separate FOIL requests regarding the same incident, the District has an obligation to respond to both requests. It cannot assume that the parents are working together and will share the District's communications or responsive records. Therefore, to the extent ___ submitted FOIL requests separately, any failure to respond within the statutorily required timeframes constitutes in our view a constructive denial of her requests. The appeal ultimately submitted included both sets of FOIL requests and therefore the timeframes and comments provided regarding the appeal determination below are equally applicable to ___.

b. Records Required by Law or Otherwise Presumptively Available

When records are required to be created by law, they generally should be easier to retrieve and are often deemed to be publicly available, eliminating the need for agency review and redaction of exempted content. In our opinion, such records should generally be produced within five business days of receiving a FOIL request, although we recognize that there are

circumstances where production within five business days may not be practicable, including instances in which the request seeks a large number of such records or when the agency is currently processing a large volume of FOIL requests.

You reference access to several types of such records. FOIL requires all agencies to create and maintain an updated subject matter list. See Public Officers Law (POL) § 87(3)(c); 21 NYCRR 1401.6. A subject matter list does not need to contain a list of every record maintained by an agency. Rather, it is a list of the types of records the agency maintains. Often, agencies adopt the applicable records retention schedules, established by the NYS Archives, as its subject matter list. All state agencies are required to post the list on their webpages. However, there is no posting requirement for non-state agencies, such as school districts. That said, in our view there should be no significant delay in providing access to this record.

You also reference access to the District's FOIL policy. Section 87(1)(b) requires that "[e]ach agency shall promulgate rules and regulations . . . pertaining to the availability of records and procedures to be followed, including, but not limited to: i. the times and places such records are available; ii. the persons from whom such records may be obtained; and iii. except when a different fee is otherwise prescribed by statute[,] the permissible fees. Similarly, the Regulations require that agencies produce and post (although not necessarily electronically) a record containing

- (a) The locations where records shall be made available for inspection and copying.
- (b) The name, title, business address and business telephone number of the designated records access officers.
- (c) The right to appeal by any person denied access to a record and the name and business address of the person or body to whom an appeal is to be directed.

21 NYCRR 1401.9.

You note that the District "fail[ed] to make available board-level decisions, including votes, resolutions, and redacted executive session minutes." The OML requires that meeting minutes and resolutions be made available to the public, in their entirety. Further, minutes need not contain content which would fall within one or more of the exemptions to disclosure. Section 106(1) of the OML requires that minutes of open sessions include "a record or summary of all motions, proposals, resolutions and any other matter formally voted upon and the vote thereon." Minutes of an open session must be made available and posted to the agency webpage, unless the agency posts unabridged video or audio recordings or transcripts, within two weeks of the meeting. § 106(3). If it posts unabridged recordings or transcripts to its webpage, the minutes must still be made available within two weeks and provided in response

to a FOIL request. Those minutes must be made available within the requisite timeframe regardless of whether the minutes are in draft form or have been approved by the Board.

Minutes of an executive session are required when the Board takes formal action by vote and must contain “a record or summary of the final determination of such action, and the date and vote thereon; provided, however, that such summary need not include any matter which is not required to be made public by the freedom of information law as added by article six of this chapter.” § 106(2). We recommend that a school board prepare minutes of an executive session so that they do not include content that would be exempt from disclosure pursuant to § 87(2) of FOIL. To the extent that such minutes do contain such content, however, it is our view that they may be redacted before production.

Further, once content has been discussed during an open meeting, the agency has waived its ability to claim any of the statutory exemptions to rights of access and may not subsequently withhold that content in response to a FOIL request. This includes content discussed during an executive session that for whatever reasons is subsequently discussed in an open session.

The law also requires that resolutions be made available to the public. To the extent applicable, the Committee recommends that the resolution be drafted in a manner so as not to defeat the purpose of discussing the resolution in an appropriately entered executive session. Section 103(e) of the OML provides that

[a]gency records available to the public pursuant to article six of this chapter [FOIL], as well as any proposed resolution, law, rule, regulation, policy or any amendment thereto, that is scheduled to be the subject of discussion by a public body during an open meeting shall be made available, upon request therefor, to the extent practicable at least twenty-four hours prior to the meeting during which the records will be discussed.

Such records must also be posted to the agency webpage if it maintains a “regularly and routinely updated website.”

You also express concern regarding being denied access to the District grievance procedures in relation to the Dignity for All Students Act (DASA), noting its “legal obligation to publish and disseminate such procedures annually” pursuant to the Commissioner’s Regulations. You are correct that the Regulations require every District to review and potentially amend its Code of Conduct annually, which must contain provisions addressing bullying and discrimination and be publicly available. See 8 NYCRR 100.2(l). Accordingly, in our view such document should be one that the District is able to produce in response to a FOIL request promptly, as it should be easily located and does not require review for exempt content. Further, I will add that even if such documents are posted to the webpage, agencies continue to have an obligation to provide

direct access (copies, PDF, or direct weblink link depending on how the person requests access) when requested.

c. Records Access Officer and the Appeals Officer

Pursuant to regulations promulgated by the Committee a records access officer has the duty of *coordinating* an agency response to requests for records by ensuring that staff perform the tasks outlined in the Regulations. See 21 NYCRR Part 1401.20(a), (b). Nothing in FOIL requires the records access officer to personally search for records or to respond to FOIL request. As a result, a records access officer may delegate tasks related to disclosing records to any personnel deemed capable of performing the required tasks. Thus, in our opinion, having Ms. Thrash respond on behalf of Ms. Costa, the records access officer, is not inconsistent with the requirements of FOIL.

The only limitation on the records access officer's broad power to delegate is, pursuant to Committee regulation, that the records access officer "shall not be the appeals officer." 21 NYCRR Part 1401.7(b). As such, the appeals officer should be excluded from processing the response to an initial request for records under FOIL.

d. Timeframes

Public Officers Law § 89(3)(a) requires every agency to provide a written response to every FOIL request submitted to the agency Records Access Officer within five business days either: (i) granting access; (ii) denying access and providing the basis for the denial; (iii) stating the agency does not possess the record sought (or that the record cannot be located after a diligent search); or (iv) acknowledging receipt of the request and providing "a statement of the approximate date, which shall be reasonable under the circumstances of the request, when such request will be granted or denied."

Once an agency acknowledges the request, it is generally permitted twenty business days to search for responsive records, grant or deny access and prepare the requested records. If the agency believes it needs more than twenty business days after confirming receipt of the request, it may notify the requestor that it needs more than twenty business days, if doing so is reasonable under the circumstances of the request. The Regulations include factors informing whether the timeframe is reasonable under the circumstances of the request. See 21 NYCRR Part 1401.5(d) (" . . . the volume of a 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 agency, and similar factors . . ."). The notice should include a "date certain" as well as the reasons why the agency cannot fulfill the request within twenty business days. 21 NYCRR 1401.5(c)(4).

Although we recognize that there are occasions when an agency will require an extension of time beyond that which it initially predicted, there is no provision in the statute for an extension beyond the date certain or repeated extensions. The date certain must be reasonable based on attendant facts and circumstances.

If the agency does not respond within the statutorily prescribed timeframes or the requestor believes that the timeframe provided beyond twenty business days is unreasonable, the requestor may consider the request to be constructively denied and file an appeal with the Appeals Officer for the agency. The Appeals Officer must respond within ten business days. When an Appeals Officer either does not respond or the requestor disagrees with the determination provided, the requestor may initiate a Civil Practice Law and Rules Article 78 proceeding in state supreme court seeking judicial review and enforcement of FOIL. The statute of limitations to initiate an Article 78 proceeding is four months from the date of the agency's final decision. The appeals officer's appeal determination is typically the agency's final decision, and the four-month statute of limitations runs from that date forward.

In circumstances where the appeals officer does not deny access but instead remands or directs additional searches to be performed, the requestor must be afforded the opportunity to further appeal any denials after the further search is conducted. The appeals officer's denial thereafter would constitute the agency's final determination, and the four-month statute of limitations would run from that day forward.

In circumstances where the appeals officer fails to respond to an appeal within ten business days, the requestor may consider the appeal to be constructively denied and initiate an Article 78 proceeding within four months of the eleventh business day after the agency received the appeal.

e. Denial Correspondence

If the records access officer denies access to records, whether in whole or in part, the statute requires that the denial be in writing and that "[a] denial of access shall not be based solely on the category or type of such record and shall be valid only when there is a particularized and specific justification for such denial." § 89(3)(a). In addition, the Regulations require that the letter denying access include the reasons for denial. See 21 NYCRR 1401.7(b). In our view, this simply means that the agency is obligated to state the specific statutory exemption or exemptions that apply to the particular record, records, or portions of records that are being withheld. If the appeals officer denies access to records, § 89(4)(a) requires that they "fully explain in writing . . . the reasons for further denial." However, these explanations need not identify or describe the individual records withheld, provide an index of the records withheld with the corresponding exemptions claimed, or otherwise contain details that would defeat the protection provided by that exemption. See [FOIL-AO-14311](#), [12587](#), [10737](#), [9249](#).

In our opinion, the language within the statute contemplates that the appeals process be an internal, administrative agency process. FOIL grants requestors the right to appeal, and states, in relevant part, “. . . any person denied access to a record may within thirty days appeal in writing such denial *to the head, chief executive or governing body of the entity*, or the person therefor designated by such head, chief executive, or governing body . . .” § 89(4)(a) (emphasis added); *see also* 21 NYCRR 1401.7(a) (“[t]he governing body of a public corporation or the head, chief executive or governing body of other agencies shall determine appeals or shall designate a person or body to hear appeals . . .”). Again, the appeals officer cannot be the same person as the records access officer: that is, in essence, the level of “independence” the Law requires as part of the administrative FOIL appeal process. *See* 21 NYCRR 1401.7 (b). To be clear, FOIL contemplates an *internal* review process.

As far as the appeal decision being “ghostwritten” by “subordinates or counsel,” it is our opinion that while the appeals officer has the obligation of reviewing the request, determination, any responsive records, and fully explaining the reasons for further denial, there is nothing improper about the appeal officer consulting with the agency attorney, obtaining language from, or editing language of a determination with the agency attorney. Such consultations are fully within the agency’s right and constitute a generally advisable practice. To the extent that anyone other than the appeals officer drafts the determination, if the appeals officer reviews the materials, is the person or body making the appeal decision, and signs off on the determination letter, there is nothing in FOIL which would prohibit others within the agency from drafting the letter. We would agree that appeal determinations should never be “rubber stamps” of the records access officer’s determination and should not be sent out as the agency final determination unless at the appeal officer’s directive. Whether this has occurred is of course a question of fact for a court.

f. Voluminous Requests

One of the concerns you noted was that the District claimed some requests were overbroad or voluminous and you believed that the District did not comply with its obligations under Regulation 1401.2 to assist in more reasonably describing or narrowing your request. The Regulations require that the agency “[c]ontact persons seeking records when a request is voluminous or when locating the records sought involves substantial effort, so that agency personnel may ascertain the nature of records of primary interest and attempt to reasonably reduce the volume of the records requested.” 21 NYCRR 1401.2(b)(3). You state that the agency did not do so. However, it does not appear that the District denied access to any of the requested records based on an assessment that the responsive records would be overly burdensome to produce.

You also note that the District did not offer you the ability to inspect the records as provided for in the regulations. While it is true that permitting a requestor to inspect records can be an effective method of reducing the scope of copying, agencies are only obligated to allow for

inspection of records when those records are available in their entirety – without redactions of applicable exempt material. If an agency is permitted to redact a record prior to disclosure, it is not obligated to allow for inspection of the original.

g. Grounds for Denial

As stated above, all agency records are presumed available to anyone requesting them, unless the content falls within one or more of the exemptions to disclosure found in § 87(2)(a)-(u). Applying the exemptions to disclosure to a particular FOIL request requires a fact specific analysis based on the content of the records and circumstances of the request. While blanket denials (withholding the entire record or series of records) are generally inconsistent with the disclosure requirements of FOIL, there are limited circumstances when it would be appropriate. If the type of record is deemed confidential by state or federal statute, § 87(2)(a) requires that it be withheld pursuant to the statute deeming it confidential. Additionally, if an agency is unable to perform redactions that would be sufficient to protect the content falling within subsections (b)-(u), it may withhold the entire record. Otherwise, the presumption is that the agency will review the record and redact only the content falling within one of the exemptions to disclosure.

The exemptions addressed in this opinion are those cited by the District in its responses to your requests, as well as those raised in your correspondence.

i. *Unwarranted invasion of personal privacy*

Section 87(2)(b) allows an agency to withhold portions of a record if disclosure would otherwise constitute an unwarranted invasion of personal privacy. Determining whether disclosure of particular content would constitute an unwarranted invasion of personal privacy is generally a fact specific inquiry. Section 89(2)(b) provides some guidance:

An unwarranted invasion of personal privacy includes, but shall not be limited to . . . , 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

When a requestor seeks records containing the personal information of a public employee, the agency may weigh the personal interests of the employee against the degree to which the content of the record is relevant to the performance of the public employee's official duties. The courts have found that, as a general rule, records that are relevant to the performance of a public employee's official duties are available because disclosure would result in a permissible, rather than an unwarranted, invasion of personal privacy. *See Farrell v. Village Board of Trustees*, 372 N.Y.S. 2d 905, 908 (Supr. Ct. Broome Co., 1975); *Gannett Co. v. County of Monroe*,

59 A.D. 2d 309 (4th Dep't 1977), *aff'd* 45 N.Y. 2d 954 (1978); *Capital Newspapers v. Burns*, 67 N.Y.2d 562 (1986); *New York 1 News v. Off. of President of Borough of Staten Island*, 231 A.D.2d 524, 525, 647 (2d Dep't 1996). Conversely, to the extent that records are irrelevant to the performance of one's official duties, courts have held – and the Committee has agreed – that disclosure would constitute an unwarranted invasion of personal privacy. See FOIL [AO 14161](#) (citing *Matter of Wool, Supr. Ct. Nassau Co.*, N.Y.L.J., Nov. 22, 1977 (relating to membership in a union)).

Specifically regarding personal privacy within the context of complaints or allegations of wrongdoing, the Committee has generally opined that a record of an unsubstantiated or unfounded complaint/investigation may be withheld under FOIL where the agency determines that disclosure of such complaint would constitute an unwarranted invasion of personal privacy. On the other hand, portions of substantiated complaints are generally available because the public interests in knowing about the misconduct of public employees is generally thought to outweigh the privacy interests of the employee. However, we must emphasize that the above statements represent a generalized distinction between substantiated and unsubstantiated complaints or allegations of public employee misconduct. FOIL establishes neither blanket access to nor blanket restrictions on access based on the complaint categorization of substantiated or unsubstantiated.

ii. Exempt by statute

Section 87(2)(a) requires an agency to withhold records which are exempt from disclosure by state or federal statute. If the content or type of record is exempt from disclosure pursuant to a state or federal statute, the agency has no discretion and must withhold it.

iii. Intra/inter-agency material

While most communications between an agency and outside entity or person would not fall within the “intra-agency” exemption to disclosure, communications and materials shared between the agency and its consultants are. The portions of inter or intra-agency communications reflecting opinions, advice, recommendations or the deliberative process may be withheld as inter/intra-agency material, unless the advice or recommendations become the final decision of the agency. The exemption protects the deliberative process within and between agencies. Otherwise, the agency must disclose the content/portions within those records reflecting

- i. statistical or factual tabulations or data;
- ii. instructions to staff that affect the public;
- iii. final agency policy or determinations;
- iv. external audits, including but not limited to audits performed by the comptroller and the federal government;

Section 87(2)(g).

If the entire communication consists of intra or inter-agency material and does not contain any of the enumerated content in § 87(2)(g)(i-iv), the record could be withheld in its entirety and redaction would not be necessary. If the record contains any information as described in § 87(2)(g)(i-iv), such as the final decision or other stated facts regarding the property/project, that material should, in our opinion, be disclosed.

h. Certifications

Section 89(3)(a) in relevant part, provides

Upon payment of, or offer to pay, the fee prescribed therefor, the entity shall provide a copy of such record and certify to the correctness of such copy if so requested, or as the case may be, shall certify that it does not have possession of such record or that such record cannot be found after diligent search.

When a certification is requested, the agency must provide it. In our opinion, failure to provide a certification permits the requestor to seek judicial review through an Article 78 proceeding.

You express concern that despite being required by law to maintain certain types of records, like DASA reports or logs, the District's denials indicated that it did not possess or could not locate such records. Additionally discussed below, the District's responses did not distinguish which records it was withholding pursuant to one of the exemptions to disclosure and which it could not locate. Further, the District's ultimate response to your request for certification did not clarify which records had been denied from which ones could not be located. The certification addressing FOIL requests #1-4 stated: "I hereby certify that any record that the Cold Spring Harbor Central School District ("District") identified in its FOIL request responses dated April 7, 2025 as not being maintained by the District, are either not maintained by the District or unable to be located after a diligent search." Often, such language is sufficient to meet the requirements of certification. However, given that the denials and appeal determination did not state which records were denied versus which could not be located, the certification, in our opinion, is inconsistent with the requirements of the statute.

Further, I must note that whether records in fact do exist or should exist is a factual issue beyond the scope of FOIL and most appropriately addressed by the judiciary. Section 89(8) provides that "[a]ny person who, with intent to prevent the public inspection of a record pursuant to this article, willfully conceals or destroys any such record shall be guilty of a violation," and the Penal Law also contains a section with similar language. Whether any

person's conduct constitutes "intent to prevent" or willful concealment or destruction is also a factual issue reserved for the judiciary to determine.

i. Attorney Fees

The law contains two clauses regarding a judge's authority to award attorneys' fees.

- (i) *may* assess, against such agency involved, reasonable attorney's fees and other litigation costs reasonably incurred by such person in any case under the provisions of this section in which such person has *substantially prevailed, and when the agency failed to respond to a request or appeal* within the statutory time; and
- (ii) *shall* assess, against such agency involved, reasonable attorney's fees and other litigation costs reasonably incurred by such person in any case under the provisions of this section in which such person has *substantially prevailed and the court finds that the agency had no reasonable basis* for denying access

Section 89(4)(c) (emphasis added).

Your fee award concerns depend on whether you ultimately prevail, and whether the degree to which you prevail meets the "substantially prevailed" requirement. The term "substantially prevailed" is not statutorily defined. The courts' interpretation has been that a requestor substantially prevails "when it 'receive[s] all the information that it requested and to which it was entitled in response to the underlying FOIL litigation.'" *Matter of Legal Aid Soc'y v. New York State Dep't of Corr. & Community Supervision*, 105 A.D.3d 1120, 1121-22 (3d Dep't 2013) (internal citations omitted). Determinations on entitlement to attorneys' fees are reserved for the courts.

II. **FOIL #1, #2, & #3**

You submitted FOIL #1 and FOIL #2 at 9:01 AM on Friday, January 17, 2025. The District acknowledged receipt on Monday, January 27, 2025. You express concern that this response was provided beyond the statutory five business day requirement. As the request was received during business hours on January 17, that counts as the first business day, making Thursday, January 23, the fifth business day. The District's response timeframe was therefore in our view several days late and as such inconsistent with FOIL.

The January 27 acknowledgement stated that it would provide or deny access within twenty business day or would provide a date certain and reason for the delay. Twenty business days elapsed on February 26, 2025. The District replied on March 3, 2025, stating that the District required another twenty business days, and did not provide a date certain or the reasons why the request could not be granted or denied within the first twenty business days. On March 31, 2025, the District provided another response containing the same language as the March 3 response, again with no date certain or reason why it could not respond to the request within the first twenty business days. In our opinion, the District's responses were inconsistent with the requirements of the Law.

On April 7, 2025, in response to FOIL #1, the District determined

Your request for records under request #1,2,3,4,5,6,7,8,9,10,11,12,13,14,15,16,17,18,22 and 23 is denied, for one of the following reasons: (1) the District does not maintain or possess the records you have requested; (2) information if disclosed would constitute an unwarranted invasion of personal privacy under the provisions of subdivision two of section eightynine of the New York Public Officers Law; (3) information that is specifically exempted from disclosure from state or federal statute; and/or (4) information that is exempt from disclosure as intra/interagency materials which are not: (i) statistical or factual tabulations or data; (ii) instructions to staf that affect the public; (iii) final agency policy or determinations; or (iv) external audits. . .

Your request for records under request #12,13 and 15 is granted, please see the documents attached . . .

(the agency's internal typographical errors remain uncorrected). On April 7, 2025, in response to FOIL #2, the District decided

Your request for records under request #1,2,3,4,5,6,7,8,9,10,11,12,13,14,15,16,17,18,22 and 23 is denied, for one of the following reasons: (1) the District does not maintain or possess the records you have requested; (2) information if disclosed would constitute an unwarranted invasion of personal privacy under the provisions of subdivision two of section eightynine of the New York Public Officers Law; (3) information that is specifically exempted from disclosure from state or federal statute; and/or (4) information that is exempt from disclosure as intra/interagency 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. See Public Officers Law §87(2)(a)(b) and (g). See Public Officers Law §87(2)(a)(b) and (g).

Your re quest for records under request #19,20 and 21 is granted, please see the documents attached . . .

(the agency's internal typographical errors remain uncorrected).

On March 3, 2025, you submitted FOIL #3. The District acknowledged your request on March 10, 2025, stating that it would grant or deny access by April 7, 2025. On April 7, 2025, in response to FOIL #3, the District denied all three items you requested, using as its reasons for denial the same language it used in response to FOIL #1 and FOIL #2.

An agency response indicating that it does not possess records responsive to the request or a portion of a request does not constitute a denial of access under FOIL. In our opinion, such responses should be addressed separately when part of an extensive request. It is entirely unclear which records were withheld and, therefore, eligible for an appeal, and which the District does not possess, which are not eligible for an appeal. In our opinion, such an unclear, vague response is inconsistent with the requirements of the statute. When an agency has some records that are responsive to a request and lacks others, it must make it clear which records have been withheld and which ones it does not possess. To be clear, we are not opining that the agency must provide an itemized list of records and reasons for denial, but it should differentiate between those which it does not possess and those which it does possess but which are denied based on articulated exemptions to disclosure.

The District did not cite the statute it believes rendered confidential as a matter of law the records it withheld pursuant to § 87(2)(a), so it is difficult to assess whether any statute appropriately applies to the withheld content. You cited the DASA and the Family Educational Rights and Privacy Act ("FERPA") as possible applicable statutes. DASA does not contain a specific section which deems confidential records made or gathered pursuant to its requirements. However, in our opinion, FERPA covers the types of records generated or gathered during a DASA complaint and investigation. FERPA requires that the District withhold any "education record" which contains "personally identifiable information." However, for as long as the student is a minor, parents or legal custodians have a right to access the personal information pertaining to the student. FERPA would still restrict access to the extent that other students can be identified based on the content and context of the records. While the District should redact any such information pertaining to other students, it remains true that if redactions would be insufficient to protect the identity of other students, the agency may withhold the entire record. Please also note that FERPA provides the right to inspect educational records, but not necessarily to receive copies.

You also reference seeking “internal communications between administrators and legal counsel. . .” Note that Civil Practice Law and Rules §§ 4503 and 3101 deem attorney-client communications and attorney work product confidential as a matter of law. Therefore, any internal communications between counsel and staff, the administration, or Board members would likely be protected by attorney-client confidentiality and be exempt from disclosure in their entirety pursuant to § 87(2)(a).

Your concerns also included access to records of disciplinary hearings and Civil Service Law Article 75 proceedings. My understanding is that disciplinary hearings for tenured teachers are governed by Education Law 3020-a. Courts have held that records reflecting the name of and charges against a tenured teacher initiated under Education Law § 3020-a that were not yet determined could be withheld as intra-agency materials under FOIL § 87(2)(g). See *Herald Co. v. Sch. Dist. of City of Syracuse*, 430 N.Y.S.2d 460, 464 (Sup. Ct. 1980). In our opinion, where the proceedings have concluded and charges are dismissed, Education Law § 3020-a would require the record of those charges be expunged and withholding pursuant to § 87(2)(a) would be required. See [FOIL-AO-19239](#). Where § 3020-a proceedings have concluded and all charges against the teacher were substantiated, in our view your school district should produce the records and would only be required to withhold records which might identify students pursuant to FERPA. We also opine, as explained above, that disclosing records involving a substantiated claim would likely constitute a warranted, rather than unwarranted, invasion of personal privacy.

My understanding is that Article 75 proceedings involve arbitration and possible judicial review. Absent controlling statutes based on the type of record or content thereof, arbitration is not necessarily a confidential proceeding. Therefore, in our opinion, access to the content of those records would be governed by FOIL and could be withheld if any of the exemptions applied to the content. Generally, if the record is internal between individuals in the same agency, the intra-agency exemption may apply to some if not all of the content. If the record was sent to or shared with someone outside of the intra-agency or attorney-client relationship during the arbitration, it could likely not be withheld as intra-agency material. However, please note that a judge in an Article 75 proceeding could seal the arbitration and court records.

Another concern you raised was the District’s failure to produce copies of records you know exist and are responsive to your request because you either submitted the records to the District or were a party to the communications. Please be aware that the purpose of FOIL is to provide access to government records that have not previously been available for inspection or are not already in an applicant’s possession. An agency is under no obligation to provide duplicate copies of records that originated with the applicant or that are already in the possession of the applicant. See *Moore v. Santucci*, 151 A.D.2d 677, 678 (2d Dep’t 1989) (abrogated on other grounds). In our opinion, a best practice under these circumstances is to note that some responsive records were found but that the applicant already has the records and, therefore, the agency need not produce copies in response to the FOIL request.

III. FOIL #4

Your fourth FOIL request was made within a letter responding to the District's DASA Determination Letter. That letter was dated April 2, 2025. While it was sent to the records access officer, the request for records was made within the context of your concerns regarding the District's actions surrounding the DASA determination. The last full paragraph of your letter states:

Pursuant to FOIL, FERPA, and DASA, I formally request immediate provision of all written statements, internal reports, interview notes, communications, and especially any video footage relied upon in your investigation, as well as the clear written identification of all signatories to your DASA Determination Report dated March 25, 2025, as such signatures are illegible.

I must admit that within the context of your other concerns, the request for records does not stand out as a FOIL request. In the future, I suggest that requests for records be made separately from other correspondence to minimize the chance that it could be overlooked. However, because you sent this request to the records access officer, the District's failure to acknowledge or respond to your request until the appeal determination was in our opinion inconsistent with the requirements of FOIL. Further, in relation to this request, the appeal determination merely states that "[t]his request was denied in its entirety" without providing a reason for the denial. Therefore, the appeal determination was in our view also inconsistent with the requirements of FOIL.

IV. Appeal Response

You appealed the denial of FOIL #1-4 in a single appeal dated April 25, 2025. The District responded to your appeal on May 14, 2025. FOIL requires that appeal determinations be made within ten business days. Business days do not include weekends or legal holidays but do include days when a school district is on break. The appeal determination here was more than ten business days later and, therefore, several days late and accordingly in our view inconsistent with the requirements of FOIL.

The appeal determination restated your requests and the language provided in the records access officer's response. That practice in and of itself is not uncommon or inappropriate. However, rather than "fully explaining the further reasons for denial," the appeal determination simply states

In response to your appeal, the District conducted a second, exhaustive, and thorough search for documents utilizing the

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criteria contained within your appeal. After the conclusion of that search, the District has determined that no further documents can be disclosed pursuant to any of your requests. In addition, I have upheld all of the prior denials for the previously stated reasons.

In our opinion, the District's appeal determination is inconsistent with the requirements of FOIL. As the District's appeal determination constitutes a final agency decision, you may seek judicial review through the initiation of a CPLR Article 78 proceeding in state supreme court. Pursuant to the provisions of FOIL, the statute of limitations to do so is four months from May 14, 2025.

Sincerely,

s/ Christen L. Smith
Senior Attorney