

Your Top 10 FOIL and OML Questions Answered



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QUESTION NO. 1:

What's the first thing I should do after receiving a FOIL request?

- Within five business days - Make the record available, deny the record in writing, or acknowledge receipt of the request and provide an approximate date by which it will be granted or denied.
 - Within 20 business days - Give full response or estimate time when records will be provided.
 - Records must be provided on the medium requested, if reasonable.
- § 87(5)(a).

If the request is denied:

- The requesting party has 30 days to appeal the denial in writing to the school's chief executive, governing body, or the person designated to handle appeals.
- The school has 10 business days from receipt of the appeal to fully explain in writing the reasons for further denial or to provide access to the record sought.
 - Additionally, the school must forward a copy of the appeal and determination to the Committee on Open Government ("COOG").



QUESTION NO. 2:

Can I charge any costs/fees in relation to a FOIL request?

- Yes.

Paper copies - \$0.25 per page

Electronic copies- only charge if it requires more than two hours of time to “prepare” records.

- Charge hourly wage of lowest paid employee able to prepare records.
- Must notify requestor of estimated cost beforehand.
- May charge for zip drive, CD, or other storage device.
- In limited circumstances, you may engage a professional service to provide copying, programming, or other services required to provide the copy with the actual cost of such service charged to the requestor.
 - Applies only when district’s IT equipment is inadequate to prepare a copy.
 - Must notify of need for professional service and cost beforehand.



QUESTION NO. 3:

Does a requestor have to provide a reason as to why they want public records?

- No. A person requesting records cannot be required to provide a reason or indicate what the intended use of the record might be.
 - The only instance in which the purpose of a request is relevant is when the request is for a list of names and residence addresses. In that instance, the school is authorized to seek certification that the list will not be used for solicitation or fundraising purposes; if it is determined that a list will be used for those purposes, the school may deny access.
 - If a FOIL request is vague, you may ask the requestor to “reasonably describe” what documents they are seeking.



QUESTION NO. 4:

Can I deny a FOIL request on the basis that it is voluminous?

No. Generally, a school cannot deny a FOIL request because it is voluminous.

- Strategies to address voluminous requests:
 - Is there a “reasonable description” of the records requested?
 - A request for “any and all email” does not “reasonably describe” what is being sought. *FOIL-AO-18949*.
 - Do the records exist and/or can they be obtained with reasonable effort?
 - School staff are not required to engage in ***herculean or unreasonable efforts*** in locating records to accommodate a request (e.g. entry by entry search of an entire directory). *FOIL-AO-18949; FOIL-AO-15751*.
- Insufficient staff cannot be used as a basis to deny a request for a large amount of records if an outside service can be retained to perform the necessary work and the applicant agrees to pay the actual cost of reproducing the records.



QUESTION NO. 5:

Is student information subject to disclosure under FOIL?

Generally, no.

Such information would fall within one of the enumerated FOIL exemptions pursuant to Section 87(2)(a): “are specifically exempted from disclosure by state or federal statute.”

The Family Educational Rights and Privacy Act (“FERPA”) requires that school districts keep students’ personally identifiable information (“PII”) confidential.

Other information that might be exempted by statute are library user information, attorney/client privileged communications, counseling/social work privileged communications.



Question No. 5 – cont'd.

§ 87(2): Each agency shall, in accordance with its published rules, make available for public inspection and copying all records, except that such agency may deny access to records or portions thereof that:

- Are specifically exempted from disclosure by state or federal statute.
- If disclosed would constitute an unwarranted invasion of personal privacy (as defined in § 89).
- If disclosed would impair present or imminent contract awards or collective bargaining negotiations.
- 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.
- Are compiled for law enforcement purposes.
- If disclosed could endanger the life or safety of any person.
- Are inter-agency or intra-agency materials.
- Are examination questions or answers which are requested prior to the final administration of such questions.
- If disclosed, would jeopardize [an agency's] security of its information technology assets.



QUESTION NO. 6:

Is data stored electronically subject to FOIL?

- Yes, provided such data does not fall into any of the enumerated exemptions.
- REMEMBER: What is a record?
 - Any information kept, held, filed, produced, or reproduced by, with or for an agency or the state legislature, 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. See N.Y. Pub. Off. Law §86(4).
- FOIL only extends to **existing** documents—no duty to create documents or answer questions.
- Documents “**held for**” a public agency can be subject to FOIL.



QUESTION NO. 7:

Can a Board member participate in a meeting by videoconference?

- Yes.
- A public body may use videoconferencing to conduct its meetings as long as a minimum number of members are present to fulfill the public body's quorum requirements in the same physical location or locations where the public can attend. § 103-a.
- Beforehand, the governing board of a public body must:
 - Adopt a resolution following a public hearing, authorizing the use of videoconferencing.
 - Establish written procedures governing member and public attendance during videoconferencing, and such written procedures must be conspicuously posted on the public website of the public body.
 - Members of the public body are to be physically present at any meeting absent extraordinary circumstances (i.e. disability, illness, caregiving responsibilities, or any other significant or unexpected factor or event which precludes the member's physical attendance).



Question No. 7 – cont'd

- Except during executive sessions, the public body must ensure that members of the public body can be heard, seen and identified while the meeting is being conducted.
- Minutes of meetings involving videoconferencing must include which, if any, members participated remotely and be available to the public.
- Public notice for the meeting must inform the public that videoconferencing will be used, where the public can view and/or participate in such meeting, where required documents and records will be posted or available, and identify the physical location for the meeting where the public can attend.
- Meetings conducted using videoconferencing must be recorded and such recordings posted or linked on the public website of the public body within five business days following the meeting, and must remain available for a minimum of five years thereafter.
- If videoconferencing is used, the public body must provide the opportunity for members of the public to view and participate in the meeting via video in real time where public comment or participation is authorized.



QUESTION NO. 8:

Can a public body close a public meeting to discuss “personnel matters?”

- No.
- Citing "personnel matters" is not a sufficient ground for going into an executive session. The motion to go into executive session should be more specific.
 - Example: Make a motion to enter into executive session to discuss "the employment history of a particular person." The person does not have to be identified.
- 3 procedural steps must be followed to enter into executive session:
 - The public body must convene an open meeting.
 - A majority of the public body’s membership must pass a motion to enter into executive session.
 - The motion must identify the general area or subject to be discussed. N.Y. Pub. Off. Law § 105.



Question No. 8 – cont'd.

- Topics for which an executive session may be called:
 - Matters which will imperil the public safety if disclosed.
 - Any matter which may disclose the identity of a law enforcement agent or informer.
 - Information relating to current or future investigation or prosecution of a criminal offense which would imperil effective law enforcement if disclosed.
 - Discussions regarding proposed, pending, or current litigation.
 - Collective negotiations.
 - Medical, financial, credit or employment history of a particular person or corporation, or matters leading to the appointment, employment, promotion, demotion, discipline, suspension, dismissal or removal of a particular person or corporation.
 - Preparation, grading, or administration of examinations.
 - Proposed acquisition, sale or lease of real property or the proposed acquisition of securities, or sale or exchange of securities held by the public body, but only when the publicity would substantially affect the value thereof.



QUESTION NO. 9:

Is a Board retreat considered a public meeting?

- Generally, no.
- It is lawful for school boards to hold private retreats conducted for the purpose of:
 - Receiving training.
 - Improving teamwork or communication skills.
 - Discussing interpersonal relations among board members.
- Notably, COOG has advised that the following topics presented at retreats were public business that should have been discussed in a meeting open to the public:
 - Superintendent's goals and district goals. (OML-AO-3709)
 - Policies and procedures under which the board and its members operate. (OML-AO-3709)
 - Roles and responsibilities of board officers and board committees. (OML-AO-3185)
- **NOTE:** "Meeting" has been interpreted broadly by the courts. Any gathering of a quorum of a public body for the purpose of conducting public business is a meeting regardless of how it is characterized.



Question No. 10:

How much notice do I have to give of a board meeting and how does notice have to be provided?

- If the meeting is scheduled one week or more in advance, must provide notice of time and place of meeting at least 72 hours prior to meeting.
- If the meeting is scheduled less than one week in advance (or rescheduled), provided notice of time and place of meeting to the extent practicable and posted in designated locations a reasonable time before the meeting.
- Post conspicuously on school website and provide timely and accurate updates!

SAVE THE DATE

Join us for our **29th Annual School Client Conference**
on **January 12, 2024!**

This year's conference will be
held at a **NEW** location:

M Hotel Buffalo

2040 Walden Ave.

Buffalo, NY 14225

*This event will be **in-person only**.

Register by scanning
the QR code:



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registration page:

<https://bit.ly/47ZoHDj>

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