

Regulation of the Chancellor

Category: **PERSONNEL**

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Subject: FREEDOM OF INFORMATION LAW (FOIL) PROCEDURES

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SUMMARY OF CHANGES

This regulation supersedes Chancellor's Regulation D-110 dated June 18, 2009.

Changes:

- Section I has been amended to define certain terms and abbreviations used throughout the regulation.
- Certain provisions in this regulation, and in particular provisions found in Sections II, III and VII of this regulation, have been corrected to mirror corresponding provisions found in the N.Y. Freedom of Information Law, including provisions in Sections II and III concerning records that are exempt from disclosure.
- Certain provisions have been incorporated into this regulation that are found in the N.Y. Freedom of Information Law, but which were not found in the previous version of this regulation, including provisions concerning additional bases for concluding that disclosure would constitute an unwarranted invasion of personal privacy, and requirements that requesters must satisfy before certain information is released
- Section II.B has been amended to include a more complete explanation of how the Family Educational Rights and Privacy Act applies in the context of the N.Y. Freedom of Information Law, when student records have been requested through FOIL or are otherwise implicated.
- Section IV has been revised to reflect the DOE's internal process for assigning, processing and determining FOIL requests, to clarify the responsibilities of both records access officers and central FOIL designees, and to clarify that the Chancellor may designate multiple records access officers to process and determine FOIL requests.
- Section V has been amended to clarify that FOIL requests may be submitted to the DOE through the City of New York's Open Records portal, and to require Citywide and Community Education Councils to post on their respective websites information on how the public may submit FOIL requests to the Councils for Council-based records.
- Section VI has been amended to establish new procedures for responding to FOIL requests, including procedures concerning (a) communications with requesters seeking clarification of their requests; (b) the setting of timeframes for responses; (c) communications explaining why additional time is needed to respond; (d) guidelines related to issuing denials and responding on a rolling basis; and (e) requirements when records do not exist or are not in DOE's possession.
- The revisions to Section VIII clarify how the DOE will respond to FOIL appeals.

ABSTRACT

This regulation governs the submission, processing and determination of requests made pursuant to the Freedom of Information Law ("FOIL"), Public Officers Law § 84, et seq. and 21 NYCRR Part 1401, to inspect or obtain copies of records maintained by the New York City Department of Education. This regulation supersedes Chancellor's Regulation D-110, Freedom of Information Law (FOIL) Procedures, dated June 18, 2009.

I. DEFINITIONS AND ABBREVIATIONS; MANDATED RECORDS

A. Definitions and Abbreviations

1. "Central FOIL Designee" or "CFD" is a person responsible for ensuring that his or her division or office complies with its obligations under FOIL.
2. "Central FOIL Requests" are requests to inspect or obtain copies of records by, with or for central DOE offices and offices not otherwise falling within the purview of a Council, superintendent, school or locally-based program.
3. "Central FOIL Unit" is, collectively, the group of RAOs designated by the Chancellor to determine Central FOIL requests and the staff assigned to perform administrative tasks associated with Central FOIL Requests.
4. "Council" is any of the Community Education Councils or any of the Citywide Councils on (i) Special Education, (ii) English Language Learners, (iii) District 75 or (iv) High Schools.
5. "Council FOIL Requests" are requests to inspect or obtain copies of records by, with or for any Council.
6. "District FOIL Requests" are requests to inspect or obtain copies of records by, with or for DOE superintendents, schools or locally based programs, or Field Support Centers.
7. "DOE" is the New York City Department of Education.
8. "FERPA" is the Family Educational Rights and Privacy Act, 20 U.S.C. § 1232g, together with its implementing regulations, 34 C.F.R. Part 99.
9. "Local Records Access Officer" or "LRAO" is a person responsible for determining Council FOIL Requests.
10. "Record" is any information kept, held, filed, produced or reproduced by, with or for the DOE, 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.
11. "Records Access Officer" or "RAO" is a person responsible for determining Central FOIL Requests and/or District FOIL Requests.
12. "Student and Family Personally Identifiable Information" includes, but is not limited to (a) a student's name; (b) the name of the student's parent or other family members; (c) the address of the student or student's family; (d) a personal identifier, such as the student's social security number, student number (for example, the student OSIS number), or biometric record; (e) other indirect identifiers, such as the student's date of birth, place of birth, and mother's maiden name; (f) other information that, alone or in combination, is linked or linkable to a specific student that would allow a reasonable person in the school community, who does not have personal knowledge of the relevant circumstances, to identify the student with reasonable certainty; and (g) information requested by a person who the educational agency or institution reasonably believes knows the identity of the student to whom the education record relates.

B. Mandated Records

The DOE must maintain the following records:

1. A record of the final vote of each member of the Panel for Educational Policy and the Councils;
2. A record setting forth the name, public office address, title, and salary of every officer and employee of the DOE; and
3. A reasonably detailed current list by subject matter of all records in the possession of the DOE whether or not available under FOIL for public inspection and copying. The list is to be updated annually, and the date of the most recent update shall be conspicuously indicated. ED-1, the State Education Department's Records Retention and Disposition Schedule, may serve as the subject matter list or be used as a model. It is available at:
http://www.archives.nysed.gov/a/records/mr_pub_ed1.shtml

Apart from the records listed above, the DOE shall not be required, in response to a FOIL request, to prepare or create any record not already maintained by or for the DOE.

II. RECORDS EXEMPTED FROM PUBLIC ACCESS

- A. The DOE shall make available for public inspection and copying all records requested, except that the DOE may deny access to records or portions of records that:
1. Are specifically exempted from disclosure by state or federal statute, including but not limited to FERPA;
 2. If disclosed, would constitute an unwarranted invasion of personal privacy under the provisions of Public Officers Law § 89(2) (see Section III below);
 3. If disclosed would impair present or imminent contract awards or collective bargaining negotiations;
 4. 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;
 5. Are compiled for law enforcement purposes and which, if disclosed, would:
 - a. interfere with law enforcement investigations or judicial proceedings;
 - b. deprive a person of a right to a fair trial or impartial adjudication;
 - c. identify a confidential source or disclose confidential information relating to a criminal investigation; or
 - d. reveal criminal investigative techniques or procedures, except routine techniques and procedures;
 6. If disclosed could endanger the life or safety of any person;
 7. Are inter-agency or intra-agency materials which are not:
 - a. statistical or factual tabulations or data;
 - b. instructions to staff that affect the public;
 - c. final agency policy or determinations; or
 - d. external audits, including but not limited to audits performed by the comptroller and the federal government;
 8. Are examination questions or answers which are requested prior to the final administration of such questions; or
 9. 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 as assets encompassing both electronic information systems and infrastructures.

- B. Access to student records is governed by FERPA and Chancellor's Regulation A-820, *Confidentiality and Release of Student Records; Records Retention*. Generally, FERPA prohibits disclosure of Student and Family Personally Identifiable Information derived from or constituting education records. All such Student and Family Personally Identifiable Information must be withheld in response to a FOIL request absent (1) verification that the FOIL requester is the student or, if the student is under age 18, the parent of the student whom the Student and Family Personally Identifiable Information concerns or (2) an authorization that is valid under FERPA (see Attachment No. 1). If either of these conditions is met, personally identifiable information covered by the authorization may not be redacted, unless redaction is otherwise required by law.

III. UNWARRANTED INVASION OF PERSONAL PRIVACY

- A. An unwarranted invasion of personal privacy includes, but is not limited to:
1. Disclosure of employment, medical or credit histories or personal references of applicants for employment;
 2. Disclosure of items involving the medical or personal records of a client or patient in a medical facility;
 3. Sale or release of lists of names and addresses if such lists would be used for solicitation or fund-raising purposes;
 4. 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 DOE;
 5. Disclosure of information of a personal nature reported in confidence to the DOE and not relevant to the ordinary work of the DOE;
 6. Information of a personal nature contained in a workers' compensation record, except as provided by N.Y. Workers Compensation Law §110-a; or
 7. Disclosure of electronic contact information, such as an e-mail address or a social network username, that has been collected from a taxpayer under N.Y. Real Property Tax Law § 104.
- B. An employee's name, job title and salary are not exempt under this provision.
- C. To prevent an unwarranted invasion of personal privacy, a RAO must redact identifying details such as social security or file number, date of birth and personal/home contact information prior to releasing records, except as provided in Section III.D below.
- D. Disclosure shall not be construed to constitute an unwarranted invasion of personal privacy and redaction is not required when the person to whom a record pertains consents in writing to the disclosure or when a person seeks access to records pertaining to himself/herself and presents reasonable proof of identity.
- E. The DOE may require a person requesting lists of names and addresses to provide a written certification that such person will not use such lists for solicitation or fund-raising purposes and will not sell, give or otherwise make available such lists to any other person for the purpose of allowing that person to use such lists for solicitation or fund-raising purposes.

IV. DESIGNATION AND RESPONSIBILITIES OF THE RECORDS ACCESS OFFICERS, SENIOR FIELD COUNSEL, CENTRAL FOIL DESIGNEES AND LOCAL RECORDS ACCESS OFFICERS

- A. The Chancellor is required to designate one or more persons to act in the capacity of RAO to determine Central FOIL Requests. Each Senior Field Counsel is designated pursuant to this regulation to act in the capacity of RAO to determine District FOIL Requests. The RAOs are the sole persons authorized to determine Central and District FOIL Requests. The Central FOIL Unit, in its discretion, may assign any Central or District FOIL request to any RAO.

- B. Each central division (or office within the division, if the division head prefers) is required to designate an individual as its CFD, forward his/her name and contact information to the Central FOIL Unit and update the information as needed. The obligations of the CFD include, but are not limited to, (1) gathering and identifying responsive records, (2) providing them to the Central FOIL Unit for review, (3) responding to inquiries of the Central FOIL Unit and assisting the Central FOIL Unit as needed, (4) ensuring that the CFD's division or office addresses its FOIL requests in a timely manner, and (5) compiling and updating on an annual basis the subject matter list required by Section I.B.3 of this regulation (or in the alternative, supplementing the Record Retention Schedule ED-1 with additional types of records) and providing a copy to the Central FOIL Unit.
- C. The Administrative Assistant of each Council is designated pursuant to this regulation to act in the capacity of LRAO. The LRAO is the sole person authorized to determine a Council FOIL Request. As agreed to by the LRAO and the Central FOIL Unit, the Central FOIL Unit may assist the LRAO in processing Council FOIL Requests.
- D. If a FOIL request includes a combination of Council and Central or District records, the Central FOIL Unit and LRAO should work together to determine how the request should be processed and determined.
- E. If a Central or District FOIL request has been sent directly to a person who is not part of the Central FOIL Unit, the person receiving the request must forward it to the Central FOIL Unit. If a Council FOIL request has been sent directly to a person who is not the LRAO, the person receiving the FOIL request must forward it to the LRAO for that Council.

V. **PROCEDURES FOR OBTAINING ACCESS TO RECORDS**

- A. Central and District FOIL Requests must be submitted in writing. Such requests may be submitted either in person, or by mail, facsimile or electronic mail, to:

Central Records Access Officer
Office of Legal Services
New York City Department of Education
52 Chambers Street, Room 308
New York, NY 10007
Fax: (212) 374-5596
FOIL@schools.nyc.gov

Central and District FOIL Requests may also be made via New York City's OpenRecords portal at <http://www.nyc.gov/openrecords>. Requests must reasonably describe the records being requested so that an effective search can be conducted. No specific form or format is required for the FOIL request.

- B. Each Council shall include on its website both a physical location and an email address to which Council FOIL requests may be submitted. Council FOIL Requests must be submitted in writing. They may be submitted either in person, or by mail, facsimile or electronic mail, to the Council at the address indicated on the Council's website. Alternatively, Council FOIL Requests may be submitted as set forth in Section V.A, specifying the Council(s) to which the request is directed.
- C. Representatives of the press/media submitting FOIL requests must submit such requests as set forth in this section, and should send a copy of such requests to the Office of Communications and Media Relations.

VI. **RESPONSES TO FOIL REQUESTS**

- A. Within five (5) business days of receipt of a written request for a record reasonably described, the RAO shall take one of the following actions:
 - 1. Make the record available to the requester. If records are maintained on the DOE's website, the RAO may provide the requester with the specific URL address (link) where the records may be accessed. If the requester does not have internet access, the RAO must provide a printed copy.

2. Deny the request in writing, and provide a reason for the denial.
 3. In writing, acknowledge the receipt of the request and state the approximate date, which must be reasonable under the circumstances, when the request will be granted or denied.
- B. While requesters should strive to submit FOIL requests that are reasonably described, the DOE recognizes that requesters may not know in advance whether a request is clear enough for the DOE to process, or how the DOE stores and maintains its records. In addition, when making a request, requesters may not realize that a particular request will prove voluminous or otherwise burdensome for the DOE. To address these issues, the RAO will take any of the following actions, as appropriate:
1. The RAO must promptly inform the requester in writing of (a) any identified ambiguity, lack of clarity or intelligibility in the way the request is phrased, or (b) other deficiency in the request's phrasing that arises from the manner in which the requested records are filed, retrieved or generated. When possible, given how the request is phrased, the RAO should indicate the manner in which the records are filed, retrieved or generated to assist requesters in reasonably describing records.
 2. The RAO will advise the requester when a request is likely to involve (a) voluminous records, (b) records which are likely to be exempt from disclosure in whole or in part or (c) substantial effort to locate, retrieve or generate records. The purpose of doing so is to afford the requester the opportunity to obtain a response more promptly by reasonably reducing the volume or types of records requested, or by informing the RAO of the nature of records of primary interest.

When the RAO takes either of these actions, the period of time for the DOE to respond to a request will be extended for the time period during which the DOE is waiting for the requester to provide information that the DOE has reasonably requested. When the DOE makes inquiries under Section VI.B.1, the DOE may advise the requester at the time of the inquiry that, if the requester fails to respond within twenty (20) business days, the DOE may thereafter deem any portion of the request that is the subject of such inquiry to be withdrawn by the requester. When the DOE makes inquiries under Section VI.B.2, if the requester fails to respond within twenty (20) business days to the DOE's inquiry, the DOE must resume processing the request as submitted.

- C. The RAO will (a) consult with the custodian of records or CFD responsible for the records, as needed, (b) estimate the amount of time it will take to locate, collect, transmit and review records responsive to the request, and (c) determine whether any or all of the records or portions thereof are exempt from disclosure. If the RAO determines to grant a request in whole or in part, and if circumstances prevent disclosure within twenty (20) business days from the date of the acknowledgement, he/she must state, in writing, both the reason for the inability to grant the request within twenty (20) business days and a date certain within a reasonable period, depending on the circumstances, when the request will be granted in whole or in part.

In accordance with state regulations,¹ the factors that may be considered in determining a reasonable time for responding to a request are: "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; and similar factors that bear on the ability to grant access to records promptly and within a reasonable time."

At any time that it is reasonably determined that more time is needed to respond to a request, the RAO must (a) to the extent the RAO can determine them at the time, cite all applicable factors for why more time is reasonably needed and, if relying on any "similar factors" as stated above, describe such factors in reasonable detail; (b) explain why such factors are applicable to the request; (c) provide a reasonable date by which a response is anticipated;

¹ 21 NYCRR 1401.5 (d).

and (d) if it had previously been determined pursuant to Section VI.C that more time was needed for the DOE to respond to the request, provide an additional explanation, in reasonable detail, of the reasons why the DOE was unable to complete its response by the date provided, and of the efforts DOE is undertaking or intends to undertake to complete the response by a reasonable final date.

- D. When practicable, the RAO must:
1. After determining to deny a request, or any item listed in a request, issue a determination promptly; and
 2. Respond to a request in part or on a rolling basis, if appropriate.
- E. A response to a request may be sent by electronic mail as long as the request does not seek a response in some other form.
- F. The letter of acknowledgement may inform the requester that he/she may be charged for copies of records made available under FOIL pursuant to Section VII below. The letter of acknowledgement should state, when applicable and if practicable:

If responsive records are located and identified for release, you will be notified of the cost of reproduction. At that time, please make your check or money order payable to the New York City Department of Education and include the FOIL reference number (and the Open Records number, if applicable) on the instrument of payment. Please be advised that Public Officers Law § 87(1)(b)(iii) permits the DOE to charge a copying fee of 25¢ per photocopy not in excess of nine inches by fourteen inches, or the actual cost of reproducing any other record in accordance with Public Officers Law § 87(1)(c). [*Once payment is requested, add:* Please make your check or money order payable to *New York City Department of Education* and indicate the FOIL and/or Open Records numbers on the document.]

In the event the records requested are voluminous, the requester may be advised of the estimated cost of reproduction and asked to pay for and authorize the reproduction before copies are made. However, copies of records may be released prior to receiving payment. Although the DOE is not required to charge for copies of records that are provided, charges should be imposed when it is cost effective to do so, especially when responsive documents are voluminous. The DOE may waive fees in its discretion.

- G. The Central FOIL Unit must forward copies of the request and acknowledgement to the CFD of the division(s) or office(s) maintaining the records sought, or to the RAO, as appropriate. The CFD or RAO, as appropriate, must gather the records from the appropriate division, office, school, or Council. The records must be forwarded to the Central FOIL Unit, or other appropriate RAO, in a timely manner that is reasonable under the circumstances for the Central FOIL Unit or RAO to review and make a determination.
- H. If records are voluminous and reproduction is not practicable, the DOE must inform the requester, and may suggest, as an alternative to reproduction, a place where the records may be inspected.
1. Records may be inspected or copied at the office specified by the DOE, at a time mutually agreed upon, on any regular business day during regular business hours (usually between 9:00 a.m. and 5:00 p.m.). In the event that the records are maintained at a school, any appointment must be scheduled on a school day and approved by the school in advance.
 2. Records will be made available for inspection subject to the following conditions:
 - a. No records may be altered or destroyed by the requester;
 - b. No original records may be removed by the requester from the location where their inspection has been authorized;
 - c. Records made available for inspection will be kept available for at least ten (10) business days after the requester has been notified of their availability. Failure of

the requester to inspect the records within that time will terminate processing of the request, and the request will be closed.

- d. If records require redaction prior to disclosure, a request for inspection may be denied and the requester informed that the records are only available as copies, for which appropriate payment must be made.
- I. If the RAO or LRAO believes that records or portions of records are subject to an exemption from disclosure, he/she may redact such records before releasing them and must inform the requester of the applicable ground(s) for denying access within the relevant time frame.
- J. Upon request, the DOE shall certify to the correctness of the copies of the records being provided (see Attachment No. 2).
- K. If the records sought do not exist or are not in the possession of the DOE, the DOE must inform the requester, and will so certify if requested, that (a) the DOE is not the custodian of such records; (b) such records do not exist and/or were never created; or (c) no responsive records were found after a diligent search (see Attachment No. 2).
- L. Any letter denying access to records or portions of records also must contain a notice of appeal rights (see Section VIII below).

VII. FEES; ELECTRONIC INFORMATION

- A. Where copies of records are being provided, the records may be provided for no fee. However, pursuant to Public Officers Law § 87(1), if fees are charged, the following fee schedule applies:
 1. Twenty-five cents per page for documents up to 9 x 14 inches in size, subject to modifications consistent with the law;
 2. For other records, the actual cost of reproducing the record, in accordance with this paragraph. In determining the actual cost of reproducing a record, an RAO may include only:
 - a. an amount equal to the hourly salary attributed to the lowest paid DOE employee who has the necessary skill required to prepare a copy of the requested record;
 - b. the actual cost of the storage devices or media provided to the person making the request in complying with such request; and
 - c. the actual cost of engaging an outside professional service to prepare a copy of a record, but only when the DOE's information technology equipment is inadequate to prepare a copy, if such service is used to prepare a copy.
 3. Preparing a copy shall not include search time or administrative costs, and no fee shall be charged unless at least two hours of DOE employee time are needed to prepare a copy of the record requested. A person requesting a record shall be informed of the estimated cost of preparing a copy of the record if more than two hours of a DOE employee's time are needed or if an outside professional service would be retained to prepare a copy of the record.

The period of time for the DOE to respond to a request may be extended for the time period that the DOE is waiting for the requester to respond to correspondence regarding fee assessment.
- B. A request may not be denied on the basis that it is voluminous or that locating or reviewing the requested records or providing the requested copies is burdensome because the DOE lacks sufficient staffing or on any other basis if the DOE may engage an outside professional service to provide copying, programming or other services required to reproduce the records, the costs of which the DOE may recover pursuant to Section VII.A above.
- C. When the DOE has the ability to retrieve or extract a record or data maintained in a computer storage system with reasonable effort, it shall be required to do so. When retrieving or extracting a record or data maintained in a computer storage system requires less employee

time than engaging in manual retrieval or redactions from non-electronic records, the DOE shall be required to retrieve or extract such record or data electronically.

- D. Any programming necessary to retrieve a record maintained in a computer storage system and to transfer that record to the medium requested by a person or to allow the transferred record to be read or printed shall not be deemed to be the preparation or creation of a new record.
- E. The DOE shall provide records on the medium requested if it can reasonably make such copy or have such copy made by engaging an outside professional service. Records provided in a computer format shall not be encrypted.
- F. The DOE shall not enter into or renew a contract for the creation or maintenance of records if such contract impairs the right of the public to inspect or copy the DOE's records.
- G. No fee shall be charged for the inspection of or search for records, for a certification that the records are accurate or that a diligent search was conducted and no records were located, or for document(s) that have been printed or reproduced for current distribution to the public.
- H. The above-noted fee schedule is subject to modification consistent with the law.
- I. When records maintained electronically include items of information that would be available pursuant to FOIL, as well as items of information that may be withheld, the DOE in designing its information retrieval methods, whenever practicable and reasonable, shall do so in a manner that permits the segregation and retrieval of available items in order to provide maximum public access.

VIII. APPEALS

A. Constructive Denial

A requester who believes that the DOE has not conformed to the provisions of Public Officers Law § 89(3)(a) may file an appeal with the DOE Records Access Appeals Officer asserting that the request has been constructively denied, in accordance with the procedures set forth below. The DOE Records Access Appeals Officer will issue an appeal determination as to whether there has been a constructive denial.

- B. All FOIL determinations shall specifically note whether the determination is an interim, partial determination or the final determination of the request. If a requester is denied access to a record or a portion of a record in an interim, partial determination, the requester shall be informed that: (a) the time to file an administrative appeal shall not begin until the final determination is made; (b) at the time of the final determination, the requester will be given the contact information of the Records Access Appeals Officer, and (c) the requester may direct the administrative appeal to the Records Access Appeals Officer if he or she wishes to appeal at the time of the final determination.
- C. The DOE's General Counsel is designated pursuant to this regulation as the DOE Records Access Appeals Officer. A requester denied access to any DOE record may, within 30 days of the final determination, appeal such denial by writing to:

The General Counsel
Office of Legal Services
New York City Department of Education
52 Chambers Street, Room 308
New York, NY 10007
FAX: (212) 374-5596

To expedite the process, the requester should provide a copy of the request and a copy of the denial of access and give the basis for the appeal. The General Counsel shall issue a written decision on the appeal within ten (10) business days following receipt of the appeal and fully explain in writing the reasons for further denial, or provide access to the record sought. A copy of the appeal and the written determination shall be forwarded to the Committee on

Open Government.² A copy of the written determination shall be forwarded to the CFD/RAO also.

IX. INQUIRIES

Inquiries pertaining to this regulation should be addressed to:

Telephone:

212-374-6888

Office of Legal Services
N.Y.C. Department of Education
52 Chambers Street – Room 308
New York, NY 10007
FOIL@schools.nyc.gov

Fax:

212-374-5596

² Address: NYS Department of State, Committee on Open Government, One Commerce Plaza, 99 Washington Avenue, Albany, NY 12231. In addition, copies of the FOIL law, state regulations, advisory opinions and other information on FOIL can be found on the Committee's website at <http://www.dos.state.ny.us/coog>.