



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

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FOIL AO 19883

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By email only

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.

Good morning,

The Committee on Open Government is authorized to provide information, guidance, and legal opinions regarding the Open Meetings Law (OML), the Freedom of Information Law (FOIL), and the Personal Privacy Protection Law (PPPL). Any issues not controlled by those laws, such as duties to retain records or document the destruction or disposition of records generally, are not within our statutory authority to offer an opinion.

Section 89(3)(a) of FOIL requires agencies to respond to reasonably described records for requests. The Court of Appeals has recently held that when an agency, based on the description provided, “understands what documents petitioner seeks and knows they are located in the agency’s” possession, the request for records is reasonably described. *Matter of Wagner v. New York City Department of Education*, --- N.E.3d ----, 2025 WL 2955704, 2025 N.Y. Slip Op. 05783 (Ct. App. 2025). In response to a reasonably described request for records, if an agency “can retrieve the documents with reasonable effort, it must do so” in accordance with FOIL § 89(3)(a), and the burden to demonstrate that it cannot do so falls on the agency. *Id.*

In our view, if your request was reasonably described based on how the Research Foundation for the State University of New York (RFSUNY) maintains the records sought, and RFSUNY can retrieve those records given reasonable effort, a diligent search for those records must be performed and those records disclosed pursuant to FOIL. This may involve searching for and retrieving records from storage systems within the agency’s control. In our opinion, records transferred to the New York State Archives are considered records of Archives and are no longer records of the originating agency. FOIL requests for records of the New York State Archives should be submitted directly to that agency.

However, as FOIL § 89(3)(a) does not require agencies to “prepare any record not possessed or maintained by such entity” at the time of a request, agencies have no duty to provide information or answer questions in response to FOIL requests besides disclosing responsive records. In other words, agencies are not required by FOIL to provide information concerning where records not in their possession might be located or requested, even if those records may be in the possession of other agencies subject to FOIL, or provide proof of destruction or disposition of records sought. A person may require a records access officer to provide a written certification that an agency “does not have

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possession of such record or that such record cannot be found after diligent search” under § 89(3)(a), which the agency must provide “if so requested” in such cases.

A subsequent FOIL request can, in our view, be submitted seeking records pertaining to the transfer or destruction of records.

Sincerely,

Miguel-Carlo Bautista
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