



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

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FOIL AO 19885

November 26, 2025

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.

Dear:

The Committee on Open Government (“Committee”) received on November 17, 2025, your request for an advisory opinion addressing concerns with the determination of your appeal on the basis of a constructive denial by the Town of Forestburgh (“Town”).

You submitted a request on September 16, 2025, seeking records containing eight specific keywords involving four specific individual email accounts from January 1, 2019, to present. Five business days from September 16, 2025, is September 23, 2025. You received a response acknowledging your request on the seventh business day, September 25, 2025. That response indicated that the Town would respond within twenty business days, “but not later than October 24, 2025.” Having received no response from the Town by October 27, 2025, you appealed. The Town issued its appeal determination on the tenth business day, November 12, 2025.

Your first concern involves the timeliness of the Town’s acknowledgment. The appeal determination indicates that the acknowledgement was timely. It also indicates that the Clerk’s Office is only open part time, on Tuesdays, Wednesdays, and Thursdays. The determination does not explain how it calculated September 25, 2025, to be a timely acknowledgment. However, I offer the clarification that “business days” as defined in Public Officers Law (POL) means any day other than Saturday, Sunday, or a public holiday. POL § 62. Based upon this statutory definition, it is our view that only Saturdays, Sundays, and public holidays, as defined by General Construction Law § 24, can be excluded from the calculation of business for purposes of responding to a FOIL request or appeal.

You note a separate concern that the appeal determination indicates that your appeal based on a constructive denial is “granted” yet provides for additional extended timeframes for responses. It is noted that the appeal response was issued thirty-eight business days after the initial request. Although your appeal was “granted,” the Appeals Officer remands the request to the records access officer and requires that a “preliminary search” be conducted and correspondence issued to you indicating “(a) the approximate number of search ‘hits’ per custodian and term, and (b) an estimate of the overall data volume” within 60 business days. Sixty business days from November 12, 2025, is February 10, 2026. If the RAO takes the full 60 business days, it will have taken 98 *business* days to merely run preliminary searches. Then the Appeals Officer requires that “[a]fter consultation and payment of any estimated

cost, the RAO shall begin producing non-exempt records on a rolling basis, with written status updates issued at least every 20 business days until completion.”

POL § 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 a request, agencies are 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 of the Committee 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 that bear on an agency’s ability to grant access to records promptly and within a reasonable time”). Such notice should include a “date certain” as well as the reasons why the request cannot be fulfilled within twenty business days. *Id.* at Part 1401.5(c)(4). The Committee has advised that agencies may not issue multiple extensions for time, although the courts have indicated that such extensions could be appropriate if reasonable under the circumstances of the request. *See* [FOIL-AO-19865](#). Therefore, if an agency is going to do so, the agency must ensure that the set timeframe is reasonable under the circumstances of the request.

You present concerns regarding whether providing (i) an estimated number of responsive records within another 60 business days and (ii) releasing records on a rolling basis with no date certain for completion are practices consistent with the requirements of FOIL. In our opinion, the timeframes provided in the appeal determination are inconsistent with the requirements of FOIL. Taking 98 business days to run preliminary searches of even a voluminous request far exceeds the twenty business days envisioned in the statute. The agency did not provide an additional notice providing a date certain and the reasons why it will require at least an additional 60 business days and up to an unspecified amount of time to fully process the request. The appeals officer writes:

The Town of Forestburgh maintains a part-time clerk’s office (Tuesday–Thursday, 9:00 a.m.–3:00 p.m.) with no full-time staff, and FOIL processing represents only one of the Records Access Officer’s statutory duties. Considering the scope of the request and the Town’s limited operational capacity, a phased approach and extended timeframe are necessary and reasonable under Public Officers Law § 89(3)(a).

The Town does not explain how “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” justify the protracted, uncertain timeframe. It does not include a date certain and instead instructs the RAO to release records on a rolling basis with updates every twenty business days for an unspecified amount of time. This in our view is inconsistent with the requirements of FOIL and it is our opinion that the agency must provide you a reasonable date certain by which it will complete production of records.

You also express concerns with the appeals officer's statements regarding fees. The determination states: "Consultation and Cost Estimate. Upon completion of the initial scoping, the RAO is to provide a written estimate of any chargeable staff or vendor time consistent with Public Officers Law § 87(1)(b)(iii)." For electronic records, agencies are permitted to charge for the "actual cost of reproduction," which allows the agency to charge:

- i. an amount equal to the hourly salary attributed to the lowest paid agency employee who has the necessary skill required to prepare a copy of the requested record;
- ii. the actual cost of the storage devices or media provided to the person making the request in complying with such request;
- iii. the actual cost to the agency of engaging an outside professional service to prepare a copy of a record, but only when an agency's information technology equipment is inadequate to prepare a copy, if such service is used to prepare the copy; and
- iv. preparing a copy shall not include search time or administrative costs, and no fee shall be charged unless at least two hours of agency employee time is 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 an agency employee's time is needed, or if an outside professional service would be retained to prepare a copy of the record.

The statute does not permit charging requestors for "consultations." Additionally, agencies may only charge the cost of "an outside professional service to prepare a copy . . . [if its] information technology equipment is inadequate to prepare a copy." It is unlikely that the Town lacks the ability to prepare copies of its own emails. Additionally, since the agency may not include the time it takes to search for, review, and redact responsive records, the two hours of staff time may only include the time it takes to "prepare a copy" of the responsive records. Therefore, only very voluminous requests tend to justify charging the requestor for the time it takes staff to prepare copies.

Lastly, you ask whether a local law imposing a stricter deadline than FOIL is consistent with FOIL. Specifically Local Law § 37-6(D) requires the Town to either grant or deny access within ten business days of acknowledgement and that failure to do so constitutes a constructive denial which may be appealed. In our opinion, imposing a stricter deadline for response is consistent with the requirements of FOIL.

Sincerely,

s/Christen L. Smith

Senior Attorney