

New York Coalition



For Open Government, Inc.

Advocating for timely access to information & meaningful citizen participation

www.nyopengov.org

New York State Agencies Are Not Tracking FOIL Requests And They Should

May 2, 2024

The New York Coalition for Open Government, is comprised of journalists, activists, attorneys, educators, news media and concerned citizens who value government transparency and freedom of information laws.

Mission Statement:

Through education and civic engagement, the New York Coalition For Open Government advocates for open, transparent government and defends citizens' right to access information from public institutions at the city, county, and state levels.

Statement of Purpose:

We believe that, if government is of the people, by the people and for the people, it should also be open to the people. Government exists to serve its citizens, so access to public information should be simple. New York's Freedom of Information and Open Meetings Law makes access to public records a right.

We, the people, can hold our elected officials responsible when government operates openly and honestly. The New York Coalition For Open Government works to ensure that all people have full access to government records and proceedings on the city, county, and state levels. Such access fosters responsive, accountable government, stimulates civic involvement and builds trust in government.

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The following members and interns also contributed to the completion of this report:

Annmarie Reeb, Research/Project Coordinator; Ken Guarino, Patricia Irving, Maria Tisby, David Siffert, Surveillance Technology Oversight Project Interns: JD Mireles and Andy Ratto; Lynne Bruning, Gary Rhodes, Susan Laurilliard, Suzanne Kelley and Mary Louise Kling.

Our meetings are held at 6:30 p.m. the second Thursday of the month via Zoom. Board President Paul Wolf, Esq. can be contacted at (716) 435-4976, or by email at paul.wolf@nyopengov.org. Our website is www.nyopengov.org and we have a [Facebook page](#).

Are New York State Agencies Complying with The Freedom of Information Law?

In 2021, at the start of her administration, Governor Hochul pledged a new era of greater transparency and accountability. Hochul directed the heads of seventy New York State agencies to assess and evaluate their existing policies and practices and create a plan detailing their efforts to increase transparency and accessibility in their work and operations.

In July 2023, we filed a Freedom of Information Law (FOIL) request with each of these state agencies to determine compliance with the law and to obtain information regarding the FOIL requests they received and processed in 2022. See **Exhibit A**. We asked for records containing the following:

- How many FOIL requests did your agency receive in calendar year 2022
- How many FOIL requests were granted in full or in part
- What is the average processing time to complete a FOIL request
- How many administrative appeals were received
- How many appeals upheld the initial denial fully/partially

The list of the 70 state agencies that we sent a FOIL request are attached as **Exhibit B**.

Compliance with Acknowledging a FOIL Request

New York's Freedom of Information Law (FOIL) requires that government officials within five business days of the receipt of a request, shall make the documents available, deny such request in writing or furnish a written acknowledgment of such request and a statement of the approximate date, when such request will be granted or denied.

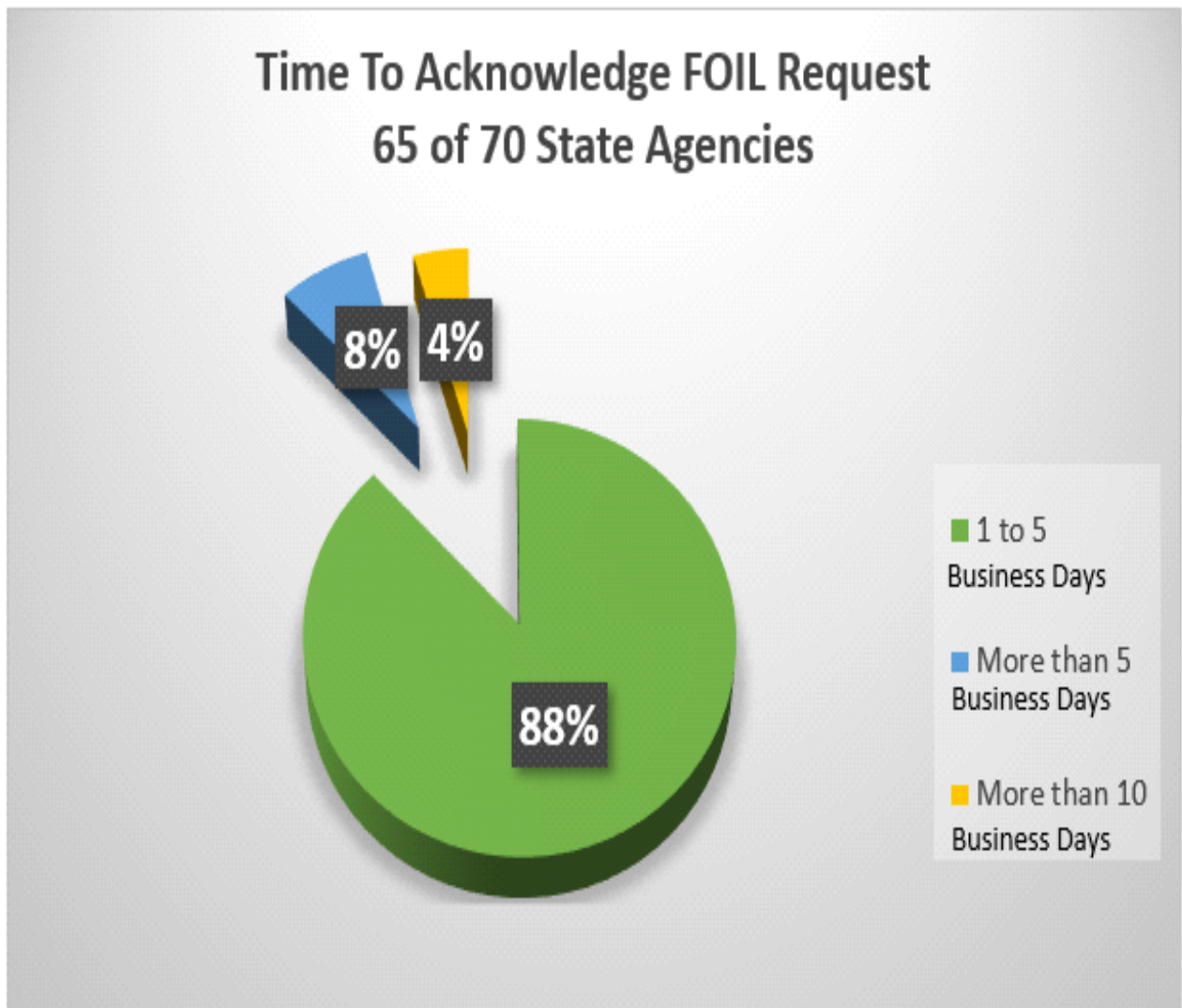
Sixty-five of the seventy agencies acknowledged our FOIL request. As indicated in the chart below, 88% of the agencies acknowledged our request within five business days as required by law. Eight percent of the agencies took more than five business days and four percent took more than ten business days.

The agencies that took more than five business days but less than ten days to respond: Canal Corporation, New York Power Authority, Office of Renewable Energy Siting, Department of Environmental Conservation, and Office of Victim Services.

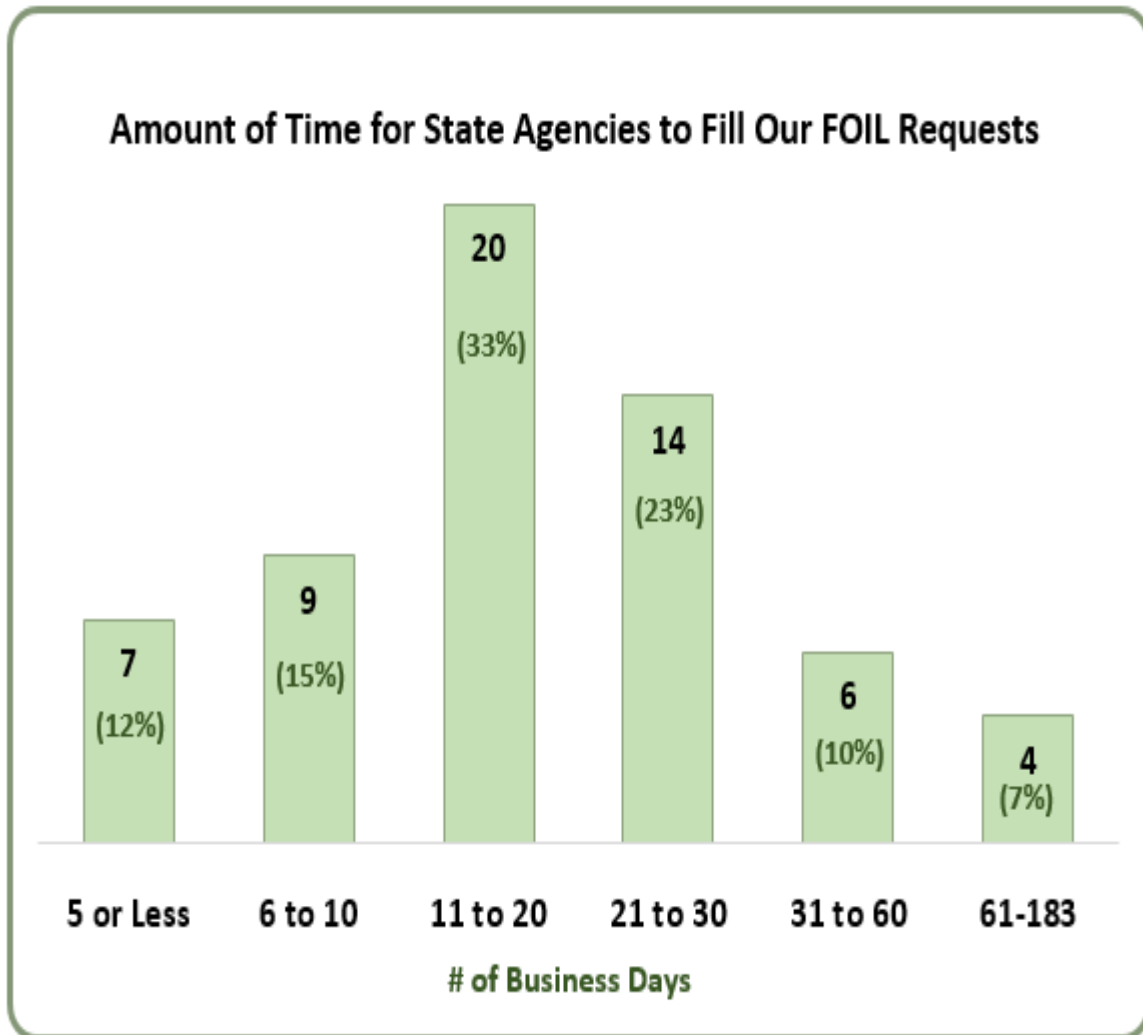
The agencies that took more than ten business days to respond: Division of Human Rights, Environmental Facilities Corporation, and Higher Education Services Corporation.

The agencies that did not acknowledge our original FOIL Request: Department of State, Division of Military and Naval Affairs, Office for the Aging, Office for the Prevention of Domestic Violence, State Liquor Authority.

How long did State Agencies take to Acknowledge Our Initial FOIL Request?



**What was the Length of Time to Fill Our FOIL Requests?
(See Exhibit C)**



Results of 60 State Agencies - doesn't include FOIL Appeals or Unresponsive Agencies.

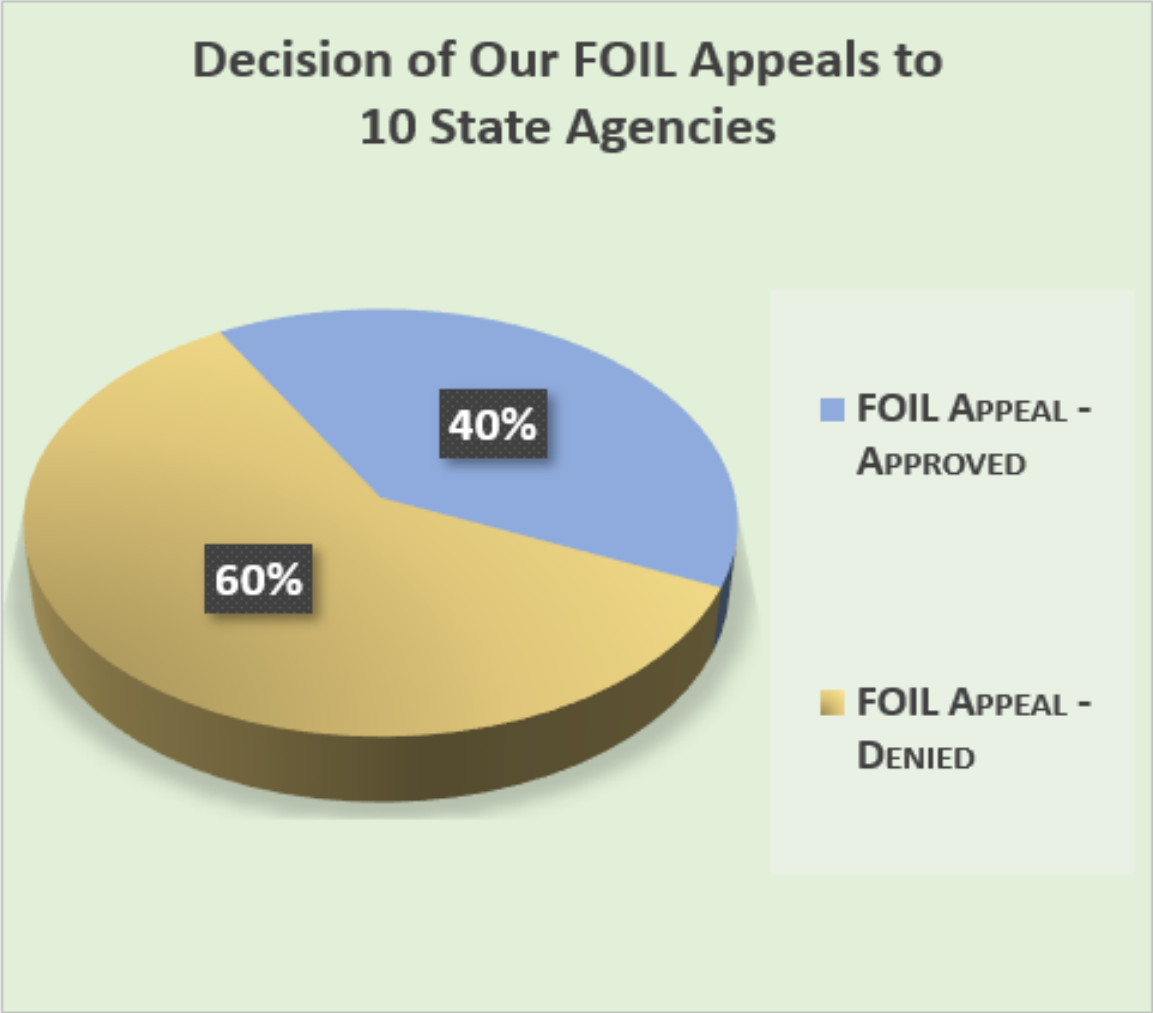
State Agency

**Business Days to
Complete FOIL
Request**

1	Adirondack Park Agency (APA)	1
2	Hudson River Black River Regulating District (HRBRRD)	1
3	Public Employment Relations Board (PERB)	1
4	Lake George Park Commission	2
5	Hudson River Valley Greenway (HRVG)	4
6	Council on Children and Families	5
7	Energy Research and Development Authority (NYSERDA)	5
8	Jacob Javits Convention Center	6
9	Canal Corporation/NYS Power Authority	7
10	Council on the Arts (NYSCA)	7
11	Unemployment Insurance Appeals Board	8
12	Board of Elections (BOE)	9
13	Olympic Regional Development Authority	9
14	Department of Public Service Commission (PSC)	10
15	Department of Transportation (DOT)	10
16	Roosevelt Island Operating Corporation (RIOC)	10
17	Division of Criminal Justice Services (DCJS)	12
18	Environmental Facilities Corporation (EFC)	12
19	Higher Education Services Corporation (HESC)	12
20	Office of Mental Health (OMH)	12
21	Gaming Commission	13
22	Hudson River Park Trust (HRPT)	13
23	Office of Parks, Recreation and Historic Preservation (OPRHP)	13
24	State Insurance Fund (SIF)	14
25	Department of Veterans' Services	16
26	Office for People with Developmental Disabilities (OPWDD)	16
27	Division of Budget	17
28	Long Island Power Authority (LIPA)	18
29	Department of Agriculture and Markets	19
30	Department of Environmental Conservation (DEC)	19

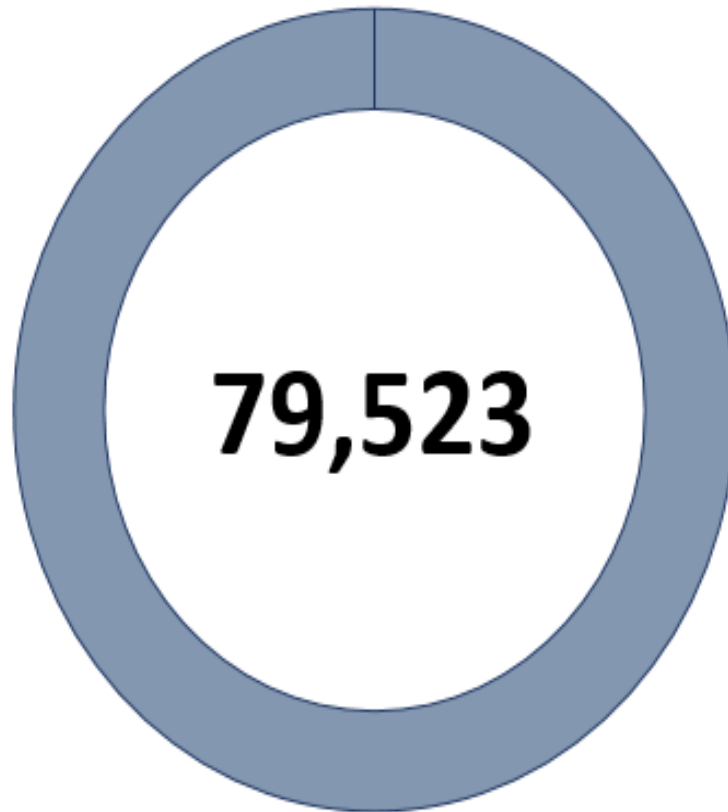
	State Agency	Business Days to Complete FOIL Request
31	Industrial Board of Appeals	19
32	Office of Inspector General (OIG)	19
33	Workers' Compensation Board (WCB)	19
34	Department of Financial Services (DFS)	20
35	Justice Center	20
36	State Commission of Corrections (SCOC)	20
37	Executive Chamber	21
38	Governor's Office of Employee Relations (GOER)	21
39	Office of Addiction Services and Supports (OASAS)	21
40	Bridge Authority	22
41	Office of Medicaid Inspector General (OMIG)	22
42	Dormitory Authority (DASNY)	24
43	Office of Children and Family Services (OCFS)	24
44	City University of NY (CUNY)	25
45	Department of Civil Service (DCS)	25
46	Office of General Services (OGS)	25
47	Thruway Authority	25
48	Department of State (DOS)	27
49	Empire State Development (EESD)	27
50	Department of Motor Vehicles (DMV)	28
51	Metropolitan Transportation Authority (MTA)	32
52	Office of Temporary and Disability Assistance (OTDA)	34
53	Office of Renewable Energy Siting (ORES)	42
54	Division of Human Rights	51
55	Battery Park City Authority (BPCA)	55
56	Department of Corrections and Community Supervision (DOCCS)	56
57	Department of Health (DOH)	62
58	Department of Taxation and Finance (DTF)	133
59	Division of Homes and Community Renewal (HCR) and Governor's Office of Storm Recovery (GOSR)	146
60	Department of Labor (DOL)	183

What were the Results of Our FOIL Appeals? (See Exhibit D)



How Many FOIL Requests Did State Agencies Receive in 2022?

Total FOIL Requests for 2022



Based on 63 State Agencies responding of 70

One State Agency was deemed a Duplicate FOIL Response (due to consolidation) Canal Corporation and New York Power Authority.

Another state agency, the Division of Homes and Community Renewal (HCR) provided the FOIL data for the Governor's Office of Storm Recovery (GOSR) but did not specify that this was the GOSR's data. We have combined these two agencies as one.

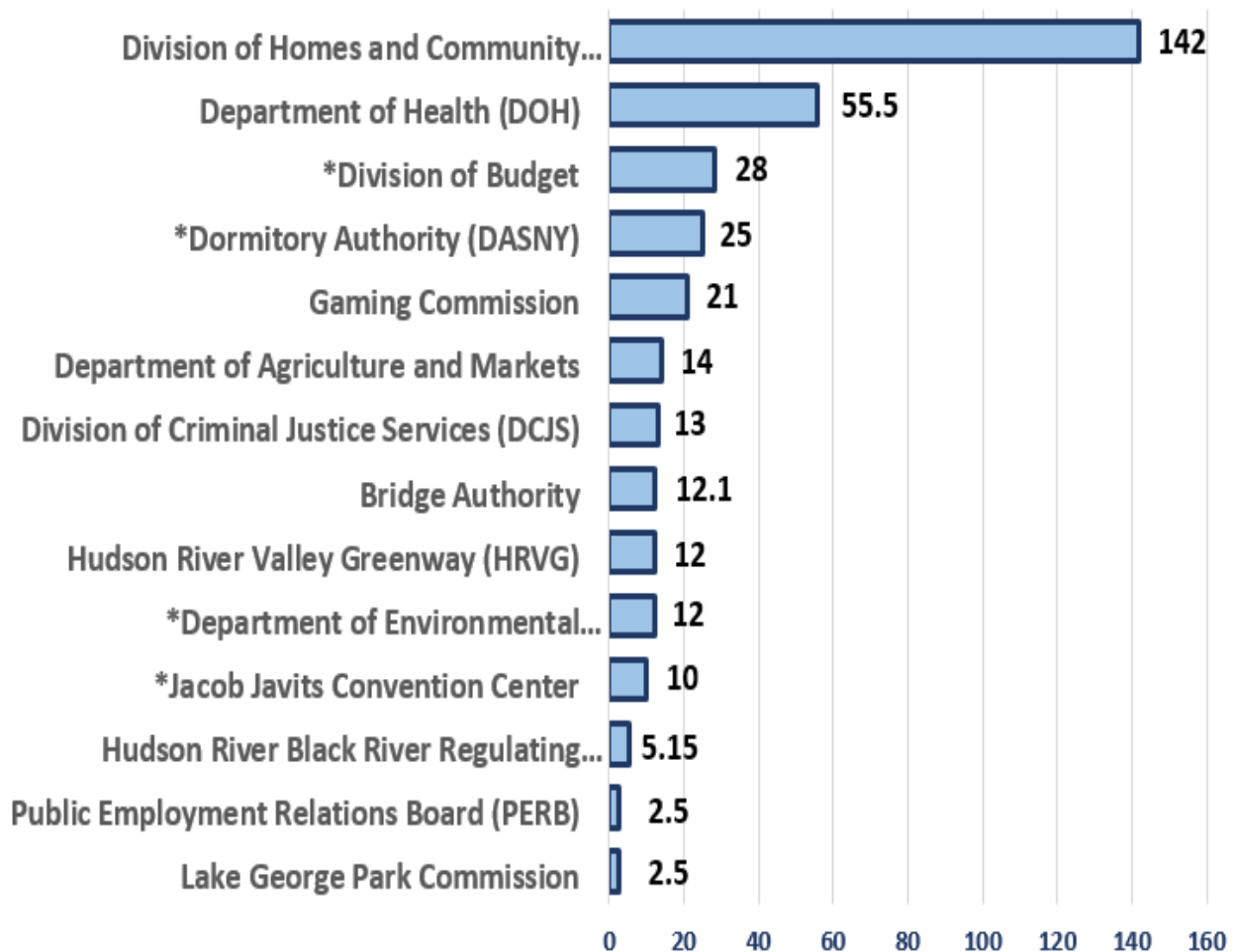
The number of FOIL requests received per agency are attached as **Exhibit E**.

What Is the Average Time to Complete a FOIL Request?

Of the sixty-three agencies that responded to our request, only fourteen were able to provide information regarding their average response time, as indicated in the chart below. The fact that forty-eight agencies do not track or have no idea as to the average length of time it takes to complete a FOIL request is amazing. A list of the forty-eight agencies that were unable to provide information regarding their average response time are attached as **Exhibit F**.

Average Time to Complete a FOIL Request in 2022

(business days)



*Data was estimated based on log.

How Many FOIL Requests Were Granted/Denied?

Only fourteen out of sixty-three state agencies were able to provide information regarding the number of FOIL requests they granted or denied as indicated in the chart below.

<u>State Agency</u>	<u>FOIL Requests Received in 2022</u>	<u>Granted In Full</u>	<u>Granted In Part</u>	<u>Granted In Full or In Part Unspecified</u>	<u>Denied</u>
Adirondack Park Agency	360			360	
Department of Veterans' Services	36	36			
*Dept. of Environmental Conservation	16,338				47
*Division of Budget	66	26		8	30
Environmental Facilities Corporation	57	57			
Hudson River Black River Reg. Dist.	13	10	3		
Hudson River Valley Greenway	5				5
*Jacob Javits Convention Center	30	16			9
Lake George Park Commission	8	8			
Long Island Power Authority	490			346	144
Office of Inspector General	78	71			
Office of Renewable Energy Siting	14	14			
Public Employment Relations Board	76	76			

*Data was estimated based on log.

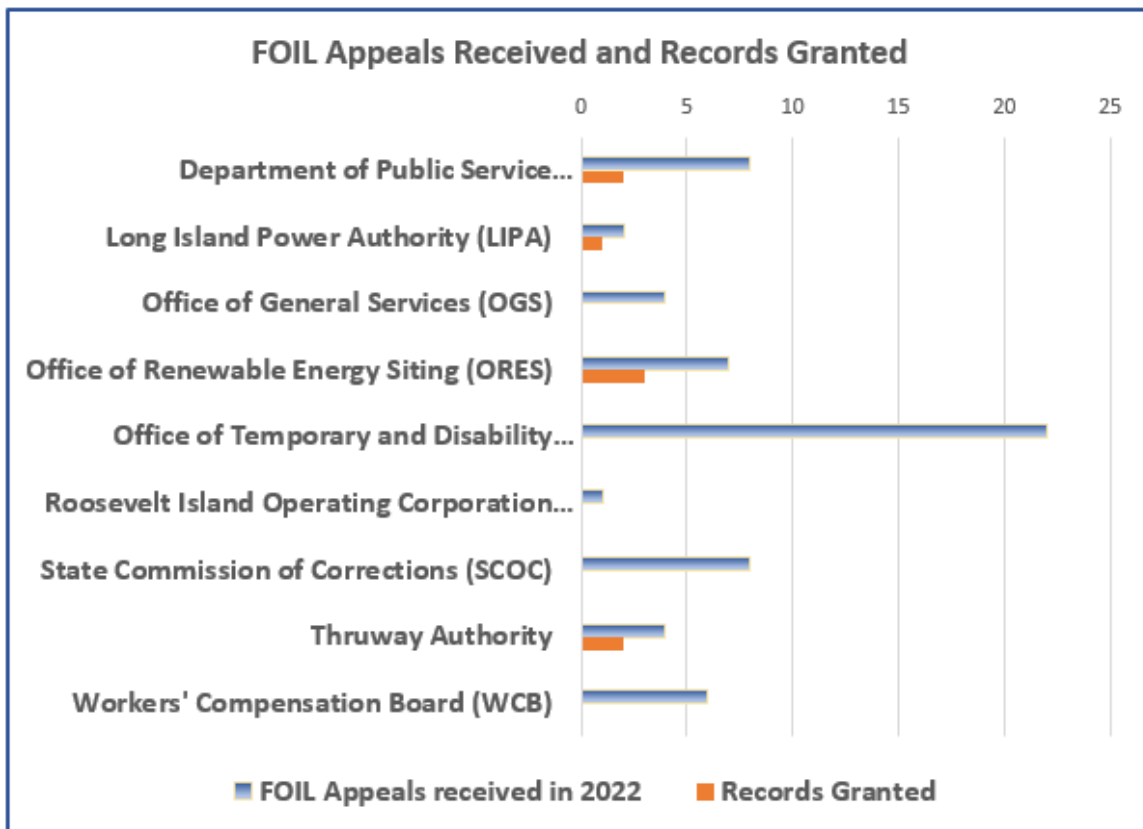
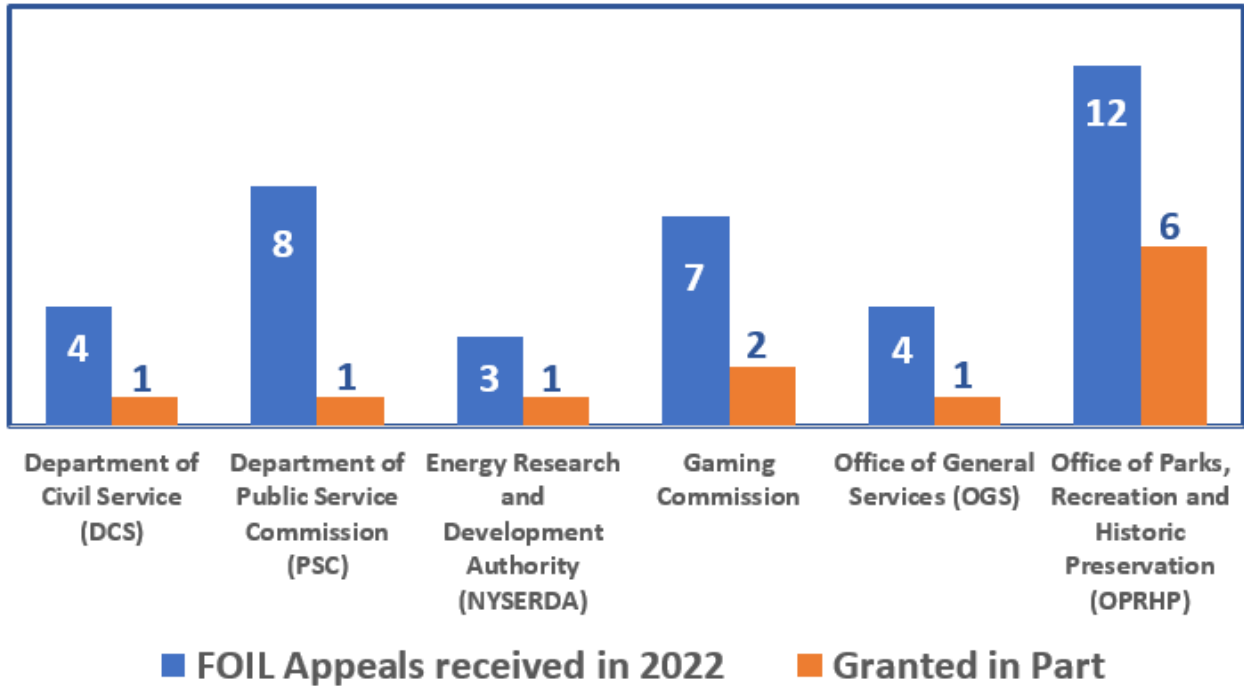
How Many FOIL Appeals Were Received and What Are the Appeal Results?

We received information from forty agencies regarding 1,403 appeals from their original FOIL decision. (See **Exhibit G**) Twelve State Agencies provided denial information.

State Agency	<u>FOIL Appeals received in 2022</u>	<u>Upheld Denial of FOIL Appeal</u>
Adirondack Park Agency	8	8
Battery Park City Authority	2	2
Bridge Authority	1	1
Department of Civil Service	4	3
Department of Public Service Commission	8	5
Energy Research and Development Authority	3	2
Gaming Commission	7	5
Long Island Power Authority	2	1
Office of General Services	4	1
Office of Parks, Recreation and Historic Preservation	12	6
Office of Renewable Energy Siting	7	4
Thruway Authority	4	2

The Public was Successful 35% and Unsuccessful 65% on FOIL Appeals

FOIL Appeals received in 2022 and Granted in Part



Exhibits H – K: Each exhibit provides a list of information received from State Agencies regarding FOIL Appeals as it relates to the prior four graphs.

State Agencies Who Did Not Provide the Results of FOIL Appeals They Received in 2022

Department of Taxation and Finance (DTF) – 28 Appeals
Office of Temporary and Disability Assistance (OTDA) – 22 Appeals
Roosevelt Island Operating Corporation (RIOC) – 1 Appeal
State Commission of Corrections (SCOC) – 8 Appeals
Workers’ Compensation Board (WCB) – 6 Appeals
Division of Homes and Community Renewal (HCR) / Governor's Office of Storm Recovery (GOSR) – 3 Appeals

State Agency That Did Not Respond to Our FOIL Request

Office for the Aging (NYSOFA)

State Agencies that were Combined

NYS Canal Corporation and NYS Power Authority
Division of Homes and Community Renewal (HCR) and Governor's Office of Storm Recovery (GOSR)

State Agencies that Provided a FOIL Log

Board of Elections (BOE) (1 log for each month)**
Department of Environmental Conservation (DEC)*
Division of Budget (DOB)*
Dormitory Authority (DASNY)*
Jacob Javits Convention Center*

*Data was estimated based on log.

**Only data reported from log was total FOIL requests.

Findings

- Of the sixty-three agencies that responded to our request, only fourteen (20% of 70 agencies) were able to provide information regarding their average response time. The fact that forty-seven agencies do not track or have no idea as to the average length of time it takes to complete a FOIL request is amazing.
- Only fourteen out of sixty-three state agencies were able to provide information regarding the number of FOIL requests they granted or denied. (20% out of 70 agencies)
- Only six State Agencies out of the sixty-three that responded were able to provide information regarding the number of FOIL requests that were denied. (12% out of 70 agencies)
- GOVQA is the new online form used by some of the state agencies. We found several issues with this system, such as creating multiple accounts, problems with access, no technical assistance, no response after receipt of FOIL Request.
- Some of the State websites did not provide accurate information on their FOIL process. Ex. Incorrect or inactive emails – which required a second FOIL Request via mail or GOVQA.
- The Department of Corrections and Community Supervision had the most Foil Requests - 18,741 or 71/bus. day and the most FOIL Appeals - 868 or 3/ bus. Day.
- Hudson River Valley Greenway had the least amount of FOIL Requests – 5.
- 54 agencies provided the same standard introductory response.

“It has long been established that FOIL does not require responses to specific questions, but instead governs release of government records. See Public Officers Law §89(3)(a) (indicating that an agency is not required to create a record in response to a request). Further, “there is nothing in the Freedom of Information Law or the Open Meetings Law that requires that government officers or employees respond to questions, supply information in response to questions or offer

explanations for their governmental activities.” New York State Committee on Open Government Advisory Opinion 16632a (June 18, 2007). However, as a courtesy, please see the information provided below in response to your questions:”

- The NYS Division of Budget provided a law that didn’t match the reason for denial but provided the documents after a FOIL Appeal.
- The NYS Police was the only State Agency that needed 118 business days to respond to the initial FOIL Request.
- The Division of Military and Naval Affairs failed to respond to a FOIL Appeal in 10 business days in August but did eventually respond in part by October.
- The NYS Department of Taxation and Finance provided their response 132 business days after the initial FOIL Request. They also requested multiple 20-day extensions.
- The NYS Department of Labor took the longest to approve with extensions, our initial FOIL Request - 184 business days, excluding holidays and weekends.
- The Division of Homes and Community Renewal (HCR) / Governor's Office of Storm Recovery (GOSR) provided their response 143 business days after the initial FOIL Request. They also requested multiple 20-day extensions.
- Only 5 State Agencies provided logs that confirmed they were tracking their FOIL Requests. Of the five logs provided the best one in our opinion was provided by the Board of Elections, due to the clarity of what transpired.

Recommendations

We Need Attorney Fee Reform

A5357A Sponsored by Assemblymember Steck

S5801A Sponsored by Senator Liu

In New York unlike many other states, the only recourse one has if a FOIL request has been ignored or improperly denied is to hire an attorney at your own expense to file an Article 78 lawsuit. If your lawsuit is successful, it is very hard under the current law to have a government agency ordered to pay for your attorney fees.

New York's current attorney fee statute is weaker than many other states, making it more challenging to obtain attorney fees when litigation is successful. In states like California, Colorado, Delaware, Florida, Illinois, Louisiana, Michigan, Montana, New Jersey, Rhode Island, and Washington, attorney fees are awarded if a party "prevails" in a lawsuit. In contrast, New York's statute requires that a party "substantially prevail" before attorney fees are awarded, which is a higher standard.

After a plaintiff is successful in an Article 78 action, a legal debate ensues as to whether the plaintiff "substantially prevailed" in order to receive attorney fees. New York's statute presents an additional hurdle in that the court must also find there was no reasonable basis for the agency to deny the Freedom of Information Law (FOIL) request. This additional finding is not required in the states listed above.

We Need an Independent Hearing Officer Process

A7933 Sponsored by Assemblymember Rosenthal

If your FOIL request is denied you can file an administrative appeal, which is decided by the same agency that denied your request in the first place. From the limited information that we received, the public is successful only 35% of the time in having a denial of their request fully overturned on appeal.

Unlike other states no entity has the power to enforce New York's Open Meetings Law or Freedom of Information Law. Other states also impose fines or criminal charges for violations of open government laws, such penalties are not available in New York. The only recourse available to the public in NY is retaining an attorney to file an Article 78 proceeding and hope that the court will award attorney fees.

Agencies Should Be Required to Keep A Log That Tracks the FOIL Requests Received and Response Time

A9621 Assemblymember John McDonald
S8671 Sponsored by Senator Hoylman-Sigal

Federal agencies under the federal Freedom of Information Act are required to submit an annual report to the Dept. of Justice. Federal agencies complete an annual report as to the number of FOIA requests received, number of appeals, average response time, reasons for denials, etc.

We currently have no idea how many FOIL requests are received by state agencies. This bill requires state agencies to maintain a log of the FOIL requests they receive, track their response times, etc. and to forward a copy of their logs annually to the NY Committee on Open Government for posting online.

There Should Be Specific Deadlines for Responding to FOIL Requests

A8586 Sponsored by Assemblymember Raga
S8128 Sponsored by Senator Skoufis

This bill will cap FOIL response times at 30 days, with the ability to extend for a maximum of 30 additional days if disclosing documents pursuant to challenging requests. The reality is that some agencies produce quick, efficient responses, while others delay months or even years before responding to a request. Therefore, a required timeframe for releasing agency records is essential to avoid obfuscation and delay of accountability.

If implemented, A.8586 and S.8128 would do the following:

- Require an agency to decide, within thirty days, whether to grant or deny a FOIL request.
- Cap the maximum time to disclose documents pursuant to any FOIL request at 60 days.
- Allow requestors to appeal on the basis of a constructive denial if these deadlines are not met.

FOIL is not fulfilling its purpose. The first step towards allowing the FOIL system to work is allowing it to proceed.

Conclusion

The New York Freedom of Information Law has been in effect for fifty years yet most state agencies do not track the FOIL requests they receive in any way. It should not be a mystery as to how many FOIL requests a state agency receives or how many requests are denied and the reasons why.

Agencies at the federal level are required to track the requests they receive and issue an annual report, where this information is shared with the public. Pennsylvania and Massachusetts require the keeping of a log to track Freedom of Information Law requests.

This report shows that the four legislative bills mentioned above are needed. We encourage the NY State Legislature to pass these bills and the Governor to sign them into law.