



In pursuit of open records

Posted August 18, 2015 By [Jie Jenny Zou](#) & [Shawn Musgrave](#)



Headquarters for New York City’s health and police departments are separated by the East River, but they might as well be worlds apart when it comes to transparency.

In December, identical public record requests for a list of employees were sent to the Department of Health and Mental Hygiene, and the New York City Police Department.

Within a month, the health department emailed an electronic list containing full names of its more than 5,200 employees, along with their titles, offices and salaries.

But it took three months for the NYPD to send its reply through the regular mail: a signed letter denying the request because an employee listing was not in the agency’s “possession, custody, or control.”

The requests were among 344 that The New York World filed in partnership with [MuckRock](#) to 86 local and state agencies subject to [New York state’s Freedom of Information Law \(FOIL\)](#) as part of an effort to assess how effectively different agencies deal with such requests. The results were decidedly mixed, as some agencies quickly provided the requested documents in an easy-to-use format and at no cost, while other requests remain outstanding to this day, eight months after they were filed.

“The public’s experience with FOIL is pretty damn bad,” said John Kaehny, executive director of Reinvent Albany, a nonprofit focused on FOIL reform and government transparency. “There’s a huge variation between the leaders and laggards.”

The New York World/MuckRock partnership requested copies of each agency’s subject matter list that details the records the agency maintains, FOIL-specific regulations and policies, a list of employees, and a log of all FOILs received.

The partnership then assessed each agency's response on a series of measures and assigned a letter grade to each. See [here](#) for a more detailed explanation of the methodology.

The city health department was among three city agencies to receive an 'A,' while the NYPD fell to the bottom of the pack with an 'F.' Calls and emails to both the NYPD and the health department for comment went unreturned.

In fact, only two of the nearly 20 agencies contacted for comment on their FOIL process agreed to speak on the record. The offices of Gov. Andrew Cuomo and New York City Mayor Bill de Blasio were among those that failed to respond to repeated requests for comment.

Under FOIL, any organization or individual can request access to government records, including businesses, advocacy groups, media, and concerned citizens. New York was among the first to enact state legislation modeled after the federal [Freedom of Information Act](#), or FOIA, which was retooled in the 1970s amid growing public distrust in the wake of the Watergate scandal.

"As government has grown and become more sophisticated and complex, so too has it become more remote from the people and more difficult to comprehend in all of its workings," then-Gov. [Malcolm Wilson](#) said in 1974. "These bills will provide, for the first time in New York state, a structure through which citizens may gain access to the records of government and thereby gain insight into its workings."

Tens of thousands of requests are filed across New York each year, with some agencies receiving just a few dozen, while others process thousands.

"We don't know exactly how much because no one's keeping track," Kaehny said.

And no mechanism exists to assess how well agencies are following the law, he added.

Whether agencies comply with FOIL matters, said Tim Hoefer, executive director of [Empire Center](#), an Albany-based conservative think tank. “We can’t ask the right question or even make the right implications or accusations, or be mad or angry if we don’t know what’s going on.”

Hoefer estimates that the Empire Center files roughly 1,000 requests annually to obtain payroll and pension data to maintain its [See Through NY website](#).

In addition to shedding light on the cost of government, public records can help journalists and others gain a better understanding of how government agencies or individual programs work without having to rely on government-issued reports or official statements.

For example, the use of military-style equipment by police responding to the protests in Ferguson, Missouri, that followed the 2014 death of Michael Brown surprised many observers and prompted reporters to file requests for records detailing the different types and amount of military grade equipment being distributed to local police through a federal program operated by the Department of Defense.

The data that were released showed that, in [New York state, for example](#), some rural police departments have access to equipment more suitable for war zones than sleepy towns along the Canadian border.

In recent years there have been cases from across the country that showed, again and again, the important role public records requests can play in shining a spotlight on problems that would have remained hidden without laws like FOIL.

Earlier this year, a Montana judge [forced](#) the city of Billings to turn over more than 1,000 pages of records to The Billings Gazette. The records ultimately showed [misuse of public funds](#) had gone unnoticed by city officials for years.

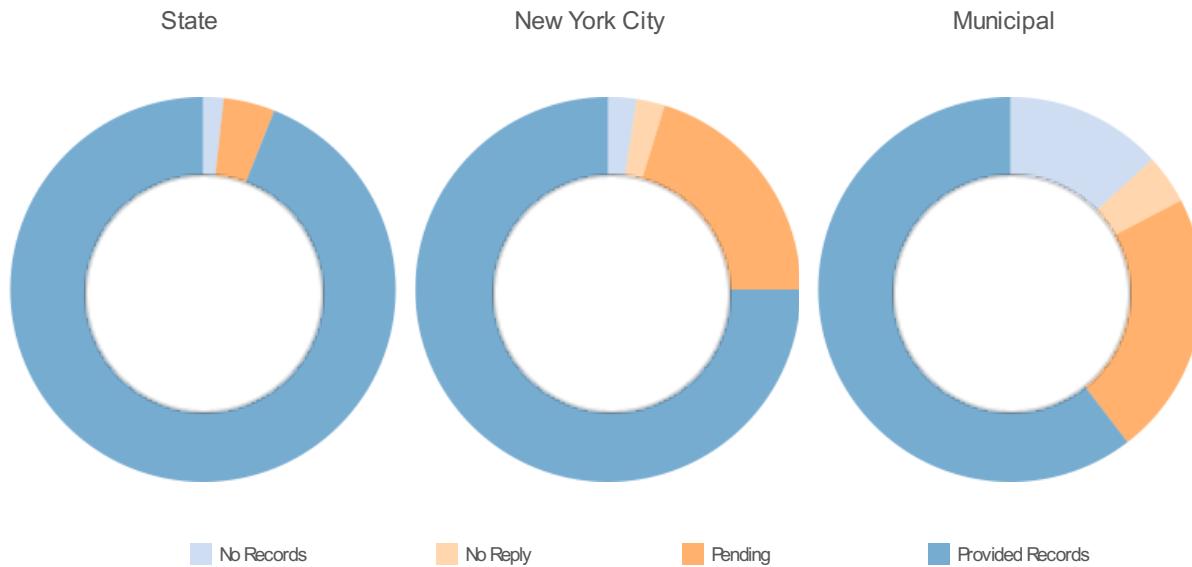
And in 2010, The Las Vegas Sun obtained [millions of records](#) for a series on substandard care at south Nevada hospitals that found high rates of hospital-acquired infections and other inpatient risks.

By comparison, the NYW/MuckRock requests sought more basic information.

Despite the simplicity of the requests—one records officer upstate said he was able to respond quickly because the requests were “easy”—nearly 50 of the 344 requests languish to this day, with some agencies missing their own deadlines by weeks or months. And in six requests, agencies have yet to respond at all, violating state requirements that agencies acknowledge requests within five business days.

Overall Response by Agency Level

Below are overall responses by level of government. "Provided records" refers to completed requests where records were provided. "No records" were completed requests where no records were available. "No reply" indicates agency did not acknowledge existence of request. "Pending" requests were those still being processed as of June 15, 2015.



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And, in one case, an agency sent a letter asking reporters to put a stop to efforts to obtain the requested records.

In late July, Auburn City Attorney John Rossi sent a letter requesting that reporters to “cease and desist” from sending out emails asking about what happened to our requests. In the letter, Rossi claimed that our “too broad” request had been “denied on several occasions” and that the denial was “still in full force and effect.”

The NYW/MuckRock team has no record of any denial.

In an earlier letter from January 15th referencing our request for a copy of the department’s FOIL rules and regulations, Auburn Police Chief Brian Neagle suggested we review the state FOIL law.

“You obviously have access to New York State Public Officers Law,” he wrote. “There are no other or additional policies beyond that which is required by State law.”

That very state law requires agencies, such as Neagle’s department, to have written rules and regulations dictating their FOIL process.

Following Neagle’s letter, a department records officer sent several emails asking for a reporter to contact her to discuss the requests but then told the reporter to contact the city’s legal division – which ignored repeated calls.

To date, the Auburn Police Department has failed to release a single document.

When agencies did provide records, a third were sent via regular mail or in formats not easily machine-readable, making it difficult to analyze records that sometimes ran to hundreds of pages.

The majority provided records at no charge, but some billed amounts as little as \$2.00 for copying fees. The Niagara Falls City School District sent an invoice of [\\$318.50](#) for what it described as a 14-hour search for a listing of all employees. Others charged for printouts from their own websites that were later mailed. In total, agencies assessed fees of \$750.57.

The FOIL statute allows agencies to charge requestors for access to records but the wording is broad and leads to wide differences in what different agencies charge for access to the same records.

In 23 requests, agencies claimed records didn't exist, or couldn't be found, providing insight into how some keep, or don't keep, records. The city of [Buffalo's Police Department](#) wrote in April that it didn't log the FOIL requests it receives but that it keeps them in "a file cabinet in alphabetical order." The files themselves "are purged every two years."

Although state FOIL is written to support disclosure, a lack of enforcement and wide discretion by agencies means that responses to requests vary dramatically.

"It's kind of a crapshoot when you put a FOIL in, you don't know what you're going to get," said Hoefer of Empire Center. "The law is pretty clear, but the way it's practiced is not clear."

Despite the predictability of Empire Center's requests for payroll data, which have been made consistently for the past seven years, agencies such as the Metropolitan Transportation Authority have made delays the "status quo," said Hoefer. "I know if I fight long enough and hard enough we're gonna get what we want, but the average person isn't going to do that."

Bureaucracy may be to blame for delayed requests, said Bob Freeman, who heads the state's Committee on Open Government, which acts as the state's legal FOIL resource. "There are too many layers that exist before a decision can be made," he said, adding that agencies should "enable staff to make independent judgments."

Many in government also fear releasing potentially damaging information and opt to release records in clumsy or hard-to-manage formats, Freeman noted. His two-person office alone received nearly 5,000 calls in 2014 from both requesters and agencies, mostly on FOIL matters, and conducted 85 presentations educating agencies and the public about FOIL and open meetings laws.



While Freeman's office strains under the huge number of calls for assistance in interpreting FOIL, employees at agencies across all levels of government tasked with processing FOIL requests face difficulties of their own. According to Freeman, it's typical for employees to handle FOILs on a part-time basis, or on top of primary job duties as a lawyer or clerk. For agencies that have dedicated FOIL officers, the office is often staffed by only a few people.

And those FOIL officers often have to wait to get records back from other parts of their agency in order to fulfill requests.

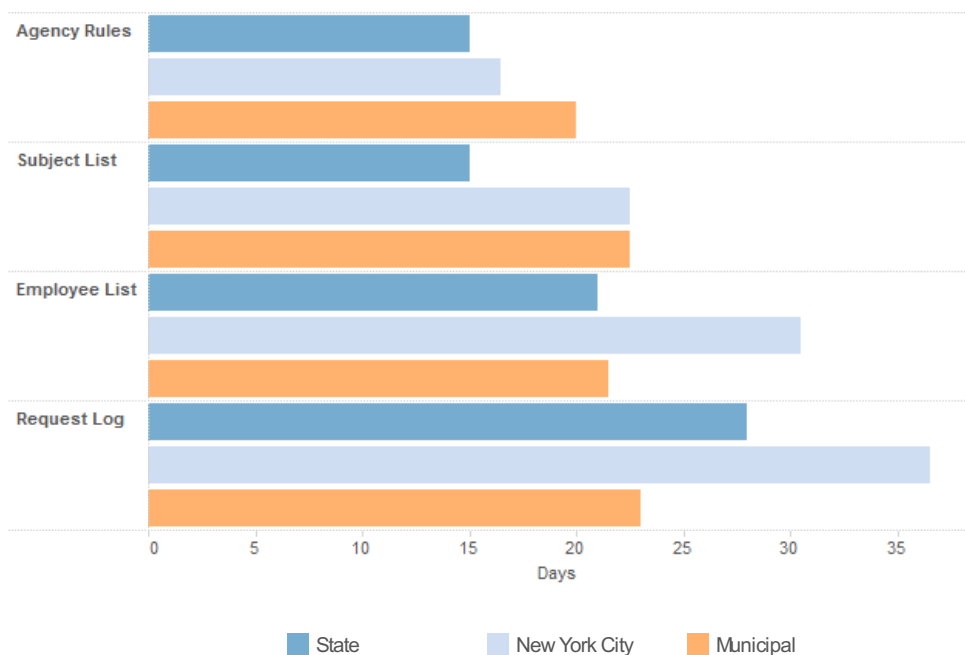
Albany City Clerk Nala Woodard, who oversees FOIL requests for the city, says it often feels like he has to "pull teeth to get records" from other city departments. "I have to be the thorn in people's side and constantly remind them we have these requests," Woodard said.

And the number of requests that come in varies widely by agency and of course depend on the size of the city. For example, Woodard's office received nearly 600 requests between 2012 and 2014, while the New York City Department of Consumer Affairs received more than 3,600 over the same time frame.

The time it takes for an agency to either provide the documents or issue a denial also varies. The requests filed as part of the NYW/MuckRock project that ultimately led to a final determination one way or another took about 22 business days to complete. However, it is not uncommon for months or even years to pass until the records are finally released.

How long did it take?

The chart below shows the median number of business days it took for agencies to process each of our four request types. The longer the bar, the more business days it generally took for that type of agency to complete the request. Shorter bars indicate faster processing time.



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Earlier this year the state Department of Corrections and Community Supervision took **seven months** to reply to a request from a New York World reporter for records related to the state's prison nursery program, which allows female inmates to spend time with their newborns while still serving their sentence.

To those who seek public records, these fights against agencies across all levels of government for access can sometimes seem like roadblocks erected to prevent public disclosure.

"Because there's no FOIL police and it's a giant pain to go to court, the agencies can stymie requests for information," Kaehny said of agencies that "give endless extensions" leaving some requests pending for more than a year. "The public has to pry it out of the agency."

New York City: Inviting Waste and Corruption

Before he became mayor of New York City, Bill de Blasio was the city's Public Advocate and in 2013 his office

issued a report that was highly critical of how city agencies handled [FOIL requests](#). The report assessed 18 city agencies and found that 10 percent of filed requests were ignored.

“The City is inviting waste and corruption by blocking information that belongs to the public. That’s the last thing New York City can afford right now. We have to start holding government accountable when it refuses to turn over public records to citizens and taxpayers,” said de Blasio.

As a mayoral candidate in 2013 de Blasio said that, if elected, he would [reform FOIL](#).



Mayor Bill de Blasio. AP Photo/Mark Lennihan

But as mayor, de Blasio’s hard-line stance has softened. None of the reforms he advocates for as a candidate have been enacted including measures mandating council oversight of requests or mechanisms to fine agencies that “regularly duck and delay FOIL requests.”

“As public advocate, he did the FOIL audit and was pretty tough on agencies,” said Freeman, who supported de Blasio’s audit. “My hope was that his desire for transparency would carry through as he became mayor, [but] it didn’t seem to happen.”

In addition to the lack of progress on any citywide reforms de Blasio’s own office has struggled with responding to open records requests. The mayor’s office squeaked by with a ‘C’ in the NYW/MuckRock partnership’s assessment after taking seven months to provide some of the requested documents (FOIL log, subject matter listing).

Another agency to get a ‘C’ grade was the Public Advocate Office, now under Letitia James, who has been less gung-ho about FOIL than her predecessor. After issuing his audit in 2013, de Blasio implemented a “real-time tracker” for FOILs filed to the Public Advocate’s office on the agency’s website. That functionality no longer exists on James’ new website.

James’ office declined to comment for the story.

While de Blasio’s former and current offices were firmly in the middle of the pack, one of the worst performing city agencies was the NYPD.

The department’s reluctance to release information of any kind has been a running complaint for years from the press and government transparency advocates. In fact, the department received a failing grade in de Blasio’s 2013 report as well.

The NYPD has continued to stonewall despite a spate of losing court rulings that forced the agency to turn over sensitive records relating to its controversial [stop-and-frisk policy](#), as well as a recent judicial order to disclose seemingly innocuous statistics on the [carriage horse industry](#).

The department also makes it more difficult than most agencies to even file a request. The department provides no email address or online form. Each request must be mailed to police headquarters.

Unsurprisingly, the NYPD did not respond to requests for comment.

New York State: A Change of Heart

De Blasio isn’t the only politician who made lofty promises on transparency only to later shift course. Cuomo

faced criticism when thousands of state employee emails were deleted as his administration began enforcing a controversial 2013 policy that automatically purged messages older than 90 days from most state employee accounts. Cuomo had earlier pledged to run his administration as [“the most transparent and accountable in history.”](#)

But by May, Cuomo reversed himself, undoing the policy entirely after months of criticism and deleting an unknown number of emails. Under the policy, deletions were automatic and employees had to refer to a [118-page state-issued manual](#) to decipher which messages to save in the event of a future FOIL request.

Cuomo’s office did not respond to calls for comment on the administration’s transparency efforts, including the email reversal.

Discussions on public records are usually laser-focused on FOIL, but until recently, less attention has been paid to records retention, even though “that directly affects how well FOIL is going to work,” Kaehny said. Greater interest has been shown in retention policies after Cuomo’s purge and Hillary Clinton’s [mass email deletions](#) as secretary of state made headlines.

The same day Cuomo announced the reversal, he also [pledged to reform state law](#) to make the legislature subject to FOIL. Unlike the governor’s office, the legislature is not fully subject to FOIL.

While state agencies were generally more responsive than local agencies (Cuomo’s office got an ‘A’), some still struggled with timeliness and fees. Among them were the State Police and the Office of the Inspector General.

The State Police provided records in all four requests, but it cost almost \$200 in fees and several months to receive mailed records. The agency charged \$158 for a [heavily redacted](#), 632-page, hard-copy list of its FOIL log and \$19.25 for a 77-page employee list that was difficult to decipher.



Gov. Andrew Cuomo. AP Photo/Richard Drew

The Office of the Inspector General also sent all records by mail and was generally slow to respond. Records relating to all four December requests to OIG were fulfilled in mid-February, compared with other state agencies that routinely processed requests in less than a month.

Both agencies received ‘F’s, and both declined to comment.

And then there’s the MTA. The authority doesn’t have a centralized office to process FOIL requests. Instead, each of the eight subdivisions, such as the New York City Transit Authority and the Long Island Railroad, maintains a separate FOIL office.

Each of those subdivisions received the same set of four requests from the NYW/MuckRock partnership, and those requests resulted in dramatically different responses.

For example, while both the police and Long Island Railroad divisions of the MTA were able to send employee listings via email within a month, other divisions of the state agency struggled to process the same request. The NYC Transit division, which operates the city’s subways and buses, took more than six months to send its employee listing.

Empire Center is currently suing the MTA to spur the release of payroll records under a FOIL provision that

allows requesters to take delayed or denied requests to court. "I'm not taking arms against the MTA, I'm trying to clarify this law," Hoefer said of his group's suit.

MTA spokesman Adam Lisberg declined to comment on the MTA's FOIL process or the lawsuit.

Beyond Automation

The city of Albany has been able to do what New York City has not: implement an automated system to coordinate response for all requests citywide.

The idea came to Albany City Clerk Nala Woodard four years ago and was sparked by a simple, personal desire. "I wanted to do it because I would like to take a vacation some day," the city clerk said, explaining how he came back to his desk after a week of job training and found it flooded with FOILs.

"When I came back, the FOILs were stacked up," he said. "This isn't possible for anybody to manage," he said of a process that involved printing, scanning and mailing letters and records.

After approval from officials and \$10,000 later, the city had a customized digital system that would "increase accuracy and efficacy, provide more transparency, and leave less room for human error," he said.

Each time a request is received, a designated city employee within a specific department flags it. By day 15, Woodard said, automated reminders are sent to employees and immediate supervisors, which act as timely incentives. Once compiled, records are uploaded to the portal where requesters can download information securely.

However, automation is not a cure-all for the agencies struggling to reply to requests in a timely fashion.

"The system can't do it all, you have to have staff behind the systems that understands it well," Woodard said, calling the portal a "finely tuned guitar" he is always looking to "retune."

Despite its digital system, Albany still ended up with a 'C' in the NYW/MuckRock assessment process. By comparison, Binghamton, a smaller city that doesn't have the bells and whistles of an automated system, still managed to outperform all other 11 upstate cities, receiving the lone 'A'.

Binghamton City Clerk Jeremy Pelletier boiled down the achievement to training, know-how and persistence. "I hound departments for the information," said Pelletier, who left the clerk's office in [July](#). "It's an effort on our part."

Pelletier kept a detailed log of all FOILs and referred to a database where he was able to search for digitized records or easily locate where a record might be.

He also said the NYW/MuckRock requests were fulfilled quickly because they were "easy" to comply with in that they involved records mandated by law, or ones he dealt with on a daily basis. "It wasn't very difficult for us to gather," he said.

"Automation is all in the eye of the beholder," said Hoefer, who agreed that automated FOIL systems would probably "solve" a big portion of problems and delays, but he noted that it's not a panacea. "My silver bullet is proactive disclosure."

Proactive Disclosure

By posting records online, transparency advocates hope to cut back on FOIL backlogs, while also reducing agency costs associated with handling requests. Freeman called open data initiatives that allow the public to quickly and easily download public information a situation where “everyone wins.”

Reinvent Albany estimated in 2014 that it [costs \\$400](#) for New York City to process a single FOIL, based on federal and UK figures. “FOIL is this absolutely creaky, archaic structure,” said Kaehny. “There’s a clear connection between open data and FOIL and a way for the government to save a lot of money.”

In 2012, then-Mayor Michael Bloomberg spearheaded the creation of an [open data portal](#). [The state](#), under Cuomo, followed suit in 2013.

Today, the city site boasts more than 1,300 data sets available for download that run the gamut from pothole complaints to Wi-Fi hot-spot locations. The state has more than 1,100 data sets on its site.

The open data movement has also spread to other municipalities such as the city of Albany, which built its own hub where members of the public can [“suggest a data set”](#) to be uploaded and prompted smaller cities like Binghamton to proactively increase the number of records it posts onto its city website.

The state’s Committee on Open Government voiced its support of [“proactive disclosure”](#) whenever possible as ways to boost overall “efficiency and transparency.” Among its long list of FOIL suggestions to the legislature in 2014 was to codify open data efforts. “When records and data are available, citizens need not submit FOIL requests, and the government does not have to engage in the time and effort needed to respond; the records are simply there for the taking.”

The committee closed its report celebrating the state’s 40th anniversary of FOIL with one line, “Much to celebrate, but more to be done.”

Clarification: An earlier version of this story misquoted John Kaehny, executive director of Reinvent Albany. The story quoted Kaehny saying that “there’s a huge variation between the leaders and laggards.” Kaehny actually said “laggards” rather than “laggers”. The quote has been updated.

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