



August 9, 2018

Mayor Patrick Madden  
Troy City Hall  
433 River Street  
Troy, New York 12180

Sent via Domestic Certified Mail

**RE: City of Troy's Failure to Respond to Freedom of Information Law Requests**

Dear Mayor Madden:

The Foundation for Individual Rights in Education (FIRE) is a nonpartisan, nonprofit organization dedicated to defending liberty, freedom of speech, due process, academic freedom, legal equality, and freedom of conscience on America's college campuses. FIRE has documented and criticized actions by Rensselaer Polytechnic Institute intended to chill student critics of RPI's administration. RPI's efforts have included the use of officers of the Troy Police Department to videotape student demonstrators, later providing that footage to RPI administrators.

This letter is an effort to procure the City of Troy's compliance with its obligations under New York's Freedom of Information Law concerning RPI's use of City of Troy police resources. Troy's predilection for opacity has led it to such absurdities as denying the existence of records *when provided with those records*, demanding copies of records requests in its own possession, and ignoring requests about records requests.

**I. The Demonstrations, the Police, and the Records**

**A. *RPI Students' Peaceful Demonstration Is Surveilled by Troy Police***

On October 13, 2017, students at Rensselaer Polytechnic Institute held a peaceful demonstration critical of RPI's administration. During that demonstration, 24 members of the Troy Police Department were present on RPI's campus. Officers were observed videotaping demonstrators. On October 26, this video was shown to an RPI administrator,

who used the footage to identify students present during the demonstration, even though no apparent crime had been committed.<sup>1</sup>

This relationship earned criticism from FIRE and local media. Writing on FIRE's website, I explained that "[i]t's one thing to have a camera on-hand and ready to begin taping violence or other criminal activity [and] another for uniformed law enforcement to, as here, continuously tape peaceful demonstrators doing nothing more than exercising their rights," particularly at the behest of a private institution.<sup>2</sup> The *Times Union* likewise opined that it would have been appropriate for officers to use the tape to facilitate prosecution of criminal acts, but "to supply it to the administration so it could charge students for violations not of laws but campus rules is a wholly inappropriate use of police work."<sup>3</sup> The *Times Union* called on the City of Troy to "set clear policy on this."<sup>4</sup>

### ***B. The First FOIL Seeks Communications Between Troy Police and RPI***

On November 8, 2017, I issued a request pursuant to the Freedom of Information Law, N.Y. Pub. Off. Law §87 *et seq.* ("FOIL"). The request sought, in relevant part, two categories of documents: (1) "records of communication or correspondence between" the Troy Police Department and RPI concerning the demonstration; and (2) photographs or video of that demonstration. After Deputy Director of Public Information John Salka denied the request on the basis that it would interfere with law enforcement, I appealed the denial to Corporation Counsel James Caruso, who conceded that the surveillance video would not reveal non-routine procedures or techniques. In connection with that appeal, I enclosed a copy of an invoice sent by the Troy Police Department to RPI, which had been acquired by students at RPI.

Mr. Caruso refused, however, to provide records relating to communication or correspondence between Troy police and RPI officials. Mr. Caruso averred that "Mr. Salka previously advised you that those records do not exist" and, accordingly, "the City of Troy has no obligation to provide documents that do not exist." This was, of course, incorrect: Mr. Salka

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<sup>1</sup> See Michael Arno, Incident Summary for Case 20170264, Nov. 1, 2017, *available at* <https://d28htnjz2elwuj.cloudfront.net/wp-content/uploads/2017/11/13153440/Redacted-Summary-of-Incident.pdf>.

<sup>2</sup> Adam Steinbaugh, *Troy Police Department videotaped student demonstrators at Rensselaer Polytechnic Institute, a private institution*, FOUND. FOR INDIV. RIGHTS IN EDUC., Mar. 27, 2018, <https://www.thefire.org/troy-police-department-videotaped-student-demonstrators-at-rensselaer-polytechnic-institute-a-private-institution>.

<sup>3</sup> *Editorial: Crossing a clear blue line*, TIMES UNION, Apr. 25, 2018, <https://www.timesunion.com/opinion/article/Editorial-Crossing-a-clear-blue-line-12865180.php>.

<sup>4</sup> *Id.*

had not advised me that records did not exist and it was clear that records *did* exist, as I had provided a copy of a billing invoice sent from the Troy Police Department to RPI.

On February 15, I sent another letter to Mr. Caruso, explaining that my possession of a copy of the invoice demonstrated that records exist and would have been found had a diligent search been conducted. My possession of one record was a canary in the coal mine. Mr. Caruso did not respond to this letter.

### **C.      *The Second FOIL Seeks Records About Searching for Records***

In December of 2017, I issued a second FOIL request, seeking records of “any public records request” after September 1, 2017, naming RPI or the City of Troy Police Department, together with any records produced in response to those requests. I also requested the “processing notes” — records pertaining to efforts to respond to the records request — for those requests. I specifically wanted to see what efforts the City of Troy took to respond to my first request.

What followed was a lengthy and tedious effort to procure copies of records in the possession of Troy’s public records staff. On December 26, 2017, the City of Troy indicated that “staffing limitations and the scope of records” sought by the request required the City of Troy to delay responding until February 19, 2018. Long after that self-imposed deadline lapsed, the City of Troy said it needed until March 20 to respond, again citing “staffing limitations.” On April 9, the self-imposed deadline again having long lapsed, the City of Troy granted itself until April 13 to respond.

On May 11, having received nothing further from the City of Troy, I filed the first appeal of this request (and the second overall) to Mr. Caruso, who requested that I provide him with a copy of the request itself — a request already in the possession of the City of Troy. After I informed Mr. Caruso that I did not have a copy of the request, as the City of Troy had taken its FOIL website offline, the City of Troy added my request to its *new* FOIL website on June 4. On that date, the City of Troy responded that my request “will be forwarded to the relevant department(s) to locate the information you seek” and that I would be contacted at some indeterminate date about their availability.

On July 3, I made a *second* appeal of this request (and *third* overall) to Mr. Caruso, as this response still failed to adhere to FOIL’s basic requirement that agencies provide a “statement of the approximate date” which is “reasonable under the circumstances of the request” when the request would be granted or denied. N.Y. Pub. Off. Law §89(3)(a). I further explained that records should be produced immediately, as there were no circumstances under which a future date of production could be reasonable: The records had been requested six months

earlier, are unlikely to be voluminous, and are almost certainly in the immediate possession of the person(s) responsible for the city's FOIL compliance.

Mr. Caruso did not respond to this appeal and no records or further response have been made.

## **II. The City of Troy's Refusal to Produce Records Is in Breach of FOIL**

The Freedom of Information Law's purpose is to "shed light on government decision-making" and provide for "[f]ull disclosure by public agencies," which is "a public right and in the public interest." *Farbman v. New York City Health and Hospitals Corporation*, 62 N.Y.2d 75, 80 (1984). This public oversight function depends on the willingness of public officials to expediently and thoroughly provide information in response to records requests.

The City of Troy stands in breach of the Freedom of Information Law for several reasons.

First, and foremost, it is abundantly clear that the City of Troy failed to conduct an adequate search — if any search was conducted at all — for records about its police officials' involvement in a student demonstration. Had a diligent search been conducted, the billing invoice should have been produced to me, but was not. This suggests either that a search was not conducted or that any search was not diligent, as required under FOIL. *See, e.g., Burton v. Slade*, 166 A.D.2d 352, 561 N.Y.S.2d 637 (1st Dep't 1990) (abuse of discretion for agency to deny access without reviewing documents and stating with particularity reasons for denial). Compounding this failure, the City of Troy now refuses to produce records that would establish what search — if any — it conducted in response to the first request.

Second, the failure to provide an adequate written response to the second FOIL is a procedural violation of FOIL. As discussed above, FOIL requires an agency to provide an approximate date, reasonable under the circumstances, upon which the agency will grant or deny access to the requested records. N.Y. Pub. Off. Law §89(3)(a). In the seven months after this request was first made, every approximate date set by the City of Troy has lapsed, and the City's most recent response failed to provide any approximate date at all.

Third, delay in producing responsive records runs contrary to the public oversight function of the Freedom of Information Law. In addition to requiring an expedient decision about whether the records are to be provided, FOIL also requires that agencies provide those records within twenty business days or, failing that, "state, in writing, both the reason for the inability [to provide the records] and a date certain within a reasonable period" when access would be granted. N.Y. Pub. Off. Law §89(3). The State of New York's Committee on Open

Government recently opined that it is only in a “rare instance” in which more than twenty business days are necessary to produce the responsive records.<sup>5</sup>

In comparison, nine months have now elapsed since the initial request for records was made, and nearly eight have passed since the second request. This does not approximate compliance with the letter or spirit of the Freedom of Information Law.

Finally, the City of Troy should remain cognizant that FOIL provides for mandatory awards of attorney’s fees where a litigant has “substantially prevailed and . . . the agency had no reasonable basis for denying access.” N.Y. Pub. Off. Law §89(4)(c)(ii).

### **III. Conclusion**

Accordingly, I ask that you direct the Troy Police Department, and any other employee of the City of Troy, to immediately search for and produce any records responsive to both the original request and the subsequent request.

As a show of the City’s good faith in resolving this matter, I request a response to this letter no later than the close of business on August 17, 2018.

Sincerely,



Adam B. Steinbaugh  
Director, Individual Rights Defense Program

Cc:

James Caruso, Corporation Counsel

John Salka, Deputy Director of Public Information

Kathy Manley, Vice President, New York Civil Liberties Union, Capital Region Chapter

Encl.

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<sup>5</sup> Robert J. Freeman, Executive Director, Committee on Open Government, FOIL Advisory Opinion No. 19671, June 13, 2018, *available at* <https://docs.dos.ny.gov/coog/ftext/fl9671.htm>.



**FIRE**  
Foundation for Individual  
Rights in Education

January 17, 2018

James Caruso  
Office of the Corporation Counsel  
Troy City Hall  
433 River Street  
Troy, New York 12180

Sent via Overnight Mail

**Re: Appeal of Denial of Freedom of Information Law Request No. 17-344**

Dear Mr. Caruso:

This letter is an appeal of a December 19, 2017, denial of certain categories of a Freedom of Information Law request, numbered 17-344. The request relates to the interaction between Rensselaer Polytechnic Institute and the Troy Police Department, particularly as it pertains to the use of police officers during students' peaceful demonstration on RPI's campus on October 13, 2017.

**I. The requests and denial**

On October 13, 2017, students at Rensselaer Polytechnic Institute held a peaceful demonstration. During that demonstration, 24 members of the Troy Police Department were present on RPI's campus.<sup>1</sup> Officers were observed videotaping demonstrators. On October 26, this video was shown to an RPI administrator, Michael Arno, who used the tape to identify students present during the demonstration.<sup>2</sup>

On November 8, 2017, I issued a request pursuant to FOIL, N.Y. Pub. Off. Law §87 et seq. ("FOIL"). The request seeks, in relevant part, two categories of documents: (1) "records of communication or correspondence between" the Troy Police Department and RPI concerning the demonstration; and (2) photographs or video of that demonstration.

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<sup>1</sup> See the attached invoice from Chief John F. Tedesco, produced to another individual in response to a FOIL request, and available at <https://savetheunion.xyz/assets/TroyPD.pdf>.

<sup>2</sup> See Michael Arno, Incident Summary for Case 20170264, Nov. 1, 2017, available at <https://d28htnjz2elwuj.cloudfront.net/wp-content/uploads/2017/11/13153440/Redacted-Summary-of-Incident.pdf>.



On December 19, Deputy Director of Public Information John Salka denied access to the foregoing categories of records. The denial cites, without elaboration, “NYS Public Officers Law Section 87 (2)(e)(iv) as it pertains to Troy Police Department security operations.”

This appeal is made on two grounds. First, the City of Troy’s recitation of a subsection of FOIL is inadequate to meet its burden of particularized and specific justification for nondisclosure of records requested under FOIL. Second, the statutory exception invoked by the City of Troy cannot justify denial of access to the full spectrum of responsive records, as not all of the responsive records were either “compiled for law enforcement purposes” and likely to “reveal criminal investigative techniques or procedures” which are not “routine.”

**II. The City of Troy’s denial does not meet the requirements of FOIL.**

**A. *FOIL requires particularized justification for denial of access to records notwithstanding FOIL’s liberal construction.***

A governmental body asserting that a specific statutory exception applies bears the burden of proving that a record falls “squarely within the ambit of one of [the] statutory exemptions.” *Russo v. Nassau Community College*, 81 N.Y.2d 690, 623 N.Y.S.2d 15, 603 N.E.2d 294 (1993) (quoting *Fink v. Lefkowitz*, 47 N.Y.2d 567, 571); see N.Y. Pub. Off. Law. § 89(4)(b). In applying these specific, limited exceptions, New York courts have repeatedly cautioned that “FOIL is to be liberally construed and its exemptions narrowly interpreted so that the public is granted maximum access to the records of government.” *Federation of New York State Rifle & Pistol Clubs*, 73 N.Y.2d at 95 (citing *In re Washington Post Co. v. New York State Ins. Dept.*, 61 N.Y.2d 557, 564 (1984), *Fink*, 47 N.Y.2d at 571, and *In re Capital Newspapers v. Whalen*, 69 N.Y.2d 246, 252 (1987)).

This burden is not met by mere recitation of a statutory exception. In *West Harlem Business Group v. Empire State Development Corp.*, the Court of Appeals stated that the agency’s response to a FOIL appeal which “merely parroted the [statutory language] in [its] appeal denial letter [...] without more, constituted a failure [...] to fully explain in writing” the reasons for the denial. 13 N.Y. 3d 882, 884–85 (2009). In order to establish the applicability of an exception, an agency must do more than simply recite “sections, subdivisions and subparagraphs of the applicable statute and conclusory characterizations of the records sought to be withheld.” *Church of Scientology v. State*, 46 N.Y.2d 906, 907-908 (1979).

The City of Troy’s denial does not meet this burden. As with the respondent agencies in *West Harlem Business Group* and *Church of Scientology*, Troy’s response consists only

of a bare recitation of the names of statutory exceptions. There are no facts to explain what types of documents are responsive, but subject to an exception, or what law enforcement interest merits withholding the records.

***B. Troy has already produced responsive records it now claims are subject to the inapplicable “law enforcement purpose” exception.***

Even assuming *some* records could be withheld pursuant to the cited exception, it is abundantly clear that not *all* responsive records may be withheld on this basis. To the contrary, records disclosed to at least one other requester indicate that at least some responsive records are subject to disclosure, and *have* been disclosed. This inconsistent approach to disclosure raises questions about the extent of Troy’s search for and review of records and the propriety of its blanket assertion that the “law enforcement purpose” exception entitles it to withhold all responsive records.

FOIL Section 87(2)(e)(iv) provides, in relevant part, that a public agency “may deny access to records or portions thereof that [ . . . ] are compiled for law enforcement purposes and which, if disclosed, would [ . . . ] reveal criminal investigative techniques or procedures, except routine techniques and procedures[.]” This exception cannot justify Troy’s refusal to produce any records whatsoever for at least three reasons.

***First***, the records may not serve a “law enforcement purpose” at all, and the requirement that FOIL exceptions be narrowly construed cannot be reconciled with Troy’s indiscriminate refusal to produce any record responsive to the request. “Only where the material requested falls squarely within the ambit of one of [the] statutory exemptions may disclosure be withheld” *Fink v. Lefkowitz*, 47 N.Y.2d 567, 571 (1979).

Not all records of communication between RPI and the Troy Police Department serve a law enforcement purpose, but may instead serve alternative purposes. For example, an invoice already disclosed in a separate FOIL request, and enclosed with this appeal, was not made for the purpose of law enforcement, but for the purpose of accounting for and collecting money for services rendered to a private institution. Other records may serve similar purposes unrelated to non-routine investigative techniques and procedures, including records of the communication(s) that initiated or arranged for the presence of the Troy Police Department in advance of the demonstration.

***Second***, even if some of the records could serve *some* law enforcement purpose, it is not likely that their disclosure would meet the statute’s requirement that documents only be withheld if they would “reveal criminal investigative techniques or procedures” which are not “routine.” FOIL Section 87(2)(e)(iv).



Courts interpret the “law enforcement purpose” exception quite narrowly,<sup>3</sup> and the exception cannot be read to encompass all (if any) of the records responsive to this request. The records pertain to the conduct of some two dozen members of the Troy Police Department acting, in uniform, in the full view of thousands of members of the public. Video taken by the officers, and subject to the instant request, was shared with administrators of a private college not for the purpose of law enforcement, but for that private institution’s enforcement of its contractual agreements with its students. If there is some aspect of crowd control during a peaceful demonstration that is not “routine,” it is not readily apparent.

**Third**, the inconsistency in applying this exception across requests suggests that Troy has not reviewed the responsive records to determine whether the exception applies at all. *See, e.g., Burton v. Slade*, 166 A.D.2d 352, 561 N.Y.S.2d 637 (1st Dep’t 1990) (abuse of discretion for agency to deny access without reviewing documents and stating with particularity reasons for denial). The City of Troy presumably did not review the responsive records, including the attached invoice, and then reach the conclusion that these records serve a non-routine law enforcement purpose. Accordingly, we ask that a review be conducted and an inventory of responsive (but withheld) records be shared in order to facilitate review of the propriety of the City of Troy’s withholdings.

**C.      *If an exemption applies to portions of a record, a redacted version should be provided.***

Finally, even if *some* aspect of a responsive record might serve a non-routine law enforcement purpose, the narrow construction of FOIL exemptions requires the production of redacted records. *See, e.g., The New York Times Co. v. City of New York Fire Department*, 4 N.Y. 3d 477, 487 (2005) (records should be disclosed but redacted to remove material subject to an exception).

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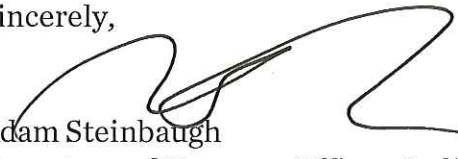
<sup>3</sup> *See, e.g., Ragusa v. New York State Dept. of Law*, 152 Misc.2d 602, 578 N.Y.S.2d 959 (Sup. Ct. 1991) (granting access to Attorney General’s investigative records where allegation of interference with law enforcement is wholly speculative); *Spencer v. New York State Police*, 187 A.D.2d 919, 591 N.Y.S.2d 207 (3d Dept. 1992) (denying access to non-routine, highly detailed step-by-step depictions of the investigatory process and to portions of the file describing autopsies performed on victims, but granting access to files regarding surveillance, establishment of roadblocks and lists of evidence seized); *Mitchell v. Slade*, 173 A.D.2d 226, 569 N.Y.S.2d 437 (1st Dep’t 1991) (arrest follow-up report was not exempt under law enforcement or intra-agency exemptions); *Grune v. Alexanderson*, 168 A.D.2d 496, 562 N.Y.S.2d 739 (2d Dep’t 1990) (portions of arson control plan which reveal routine criminal investigative techniques or procedures are subject to disclosure); *Cornell University v. City of New York Police Dep’t*, 153 A.D.2d 515, 544 N.Y.S.2d 356 (1st Dep’t 1989), leave denied, 75 N.Y.2d 707 (1990) (granting disclosure of police investigative file where witnesses were not promised anonymity).

**III. The City of Troy must decide this appeal within ten days.**

For the foregoing reasons, I appeal both the sufficiency and merits of the City of Troy's refusal to produce records responsive to my November 8, 2017, request. Under New York law, the City of Troy has ten business days to decide this appeal. N.Y. Pub. Off. Law § 89(4)(a).

Should you have any questions, please don't hesitate to call or email me.

Sincerely,



Adam Steinbaugh  
Reporter and Program Officer, Individual Rights Defense Program  
Foundation for Individual Rights in Education  
510 Walnut Street  
Suite 1250  
Philadelphia, Pennsylvania 19106  
[adam@thefire.org](mailto:adam@thefire.org)  
(215) 717-3473



JOHN F. TEDESCO  
Chief of Police  
Ph: 518-270-4442  
Fax: 518-270-4452

George G. VanBramer  
Assistant Chief  
Ph: 518-270-4780

In regards to: RPI Student Demonstration 2017  
Attention: Jerry Matthews  
Director of Public Safety  
Rensselaer Polytechnic Institute  
110 8<sup>th</sup> Street  
Troy, New York 12180-3590

For professional services rendered.  
Troy Police Department  
Federal ID 14-6002472

Service: 21 Police officers  
2 Police Sergeants  
1 Police Captain

Date of service: 10/13/2017

Salary: \$ 8171.19  
Administrative Fee: \$2042.79

**Total for the above-referenced detail is: \$ 10,213.98**

Please send payment to City of Troy, City Hall, 433 River Street, Troy, NY 12180  
Attn: Selena Skiba, Thank you.

Sincerely,

A handwritten signature in cursive script, appearing to read "J. Tedesco", written over a horizontal line.

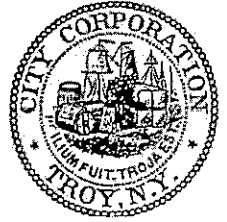
John F. Tedesco  
Police Chief



*James A. Caruso*  
*Corporation Counsel*



Office of the Corporation Counsel  
Phone (518) 279-7157  
Fax (518) 270-4609



January 24, 2018

Adam Steinbaugh  
c/o FIRE  
510 Walnut Street  
Suite 1250  
Philadelphia, Pennsylvania 19106

**RE: FOIL APPEAL**

Dear Sir:

On January 22, 2018, the City of Troy Law Department received your recent FOIL appeal.

In reviewing said Appeal, it was noted that you did not include a copy of your original FOIL request nor a copy of the response from the City of Troy's Deputy Director of Public Information.

Would you be so kind as to forward a copy of each to the Law Department at your earliest convenience?

Thank you in advance for your cooperation.

Sincerely,

JAMES A. CARUSO  
City of Troy Corporation Counsel



# **FIRE**

Foundation for Individual  
Rights in Education

January 29, 2018

James Caruso  
Office of the Corporation Counsel  
Troy City Hall  
433 River Street  
Troy, New York 12180

Sent via Overnight Mail

**Re: Appeal of Denial of Freedom of Information Law Request No. 17-344**

Dear Mr. Caruso:

In conformity with the request in your letter of January 24, 2018, please find enclosed a copy of the original FOIL request and a copy of the response from the City of Troy's Deputy Director of Public Information.

Please don't hesitate to contact me if I can be of further assistance.

Sincerely,

Adam Steinbaugh

Reporter and Program Officer, Individual Rights Defense Program  
Foundation for Individual Rights in Education  
510 Walnut Street  
Suite 1250  
Philadelphia, Pennsylvania 19106  
[adam@thefire.org](mailto:adam@thefire.org)  
(215) 717-3473

Encl.



# Request #17-344

 OPEN

As of January 29, 2018, 10:09am

Request Visibility: Unpublished

## Details

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For the period of September 1, 2017 to the present date, any records of communication or correspondence between the Troy Police and Rensselaer Polytechnic Institute, or representatives or employees thereof, concerning a demonstration during October 12 or 13, 2017.

Please also include a copy of any photographs or video taken or possessed by the Troy police which depicts a demonstration at Rensselaer on or about October 12 or 13, 2017.

Please se also include any records of police reports or complaints concerning a demonstration at Rensselaer on or about October 12 or 13, 2017.

I request a fee fee waiver and expedited processing. I am an investigative journalist affiliated with a nonprofit organization. The instant request is not made for a commercial purpose, but to inform the public about the activities of law enforcement as they pertain to First Amendment activities.

*Update: November 15, 2017*

1. A copy of any contract, agreement, memorandum of understanding, request, or other document which identifies the relationship between Rensselaer Polytechnic Institute, including its agents and affiliated entities, and the Troy Police Department, including its individual officers. (To put it in plain English, I'm requesting documents showing whether RPI hired officers of the Troy Police Department, as well as the terms of that relationship.)

2. Any memorandum of understanding, contract, or agreement between the Troy Police Department and Rensselaer Polytechnic Institute

(including its agents and affiliated entities) which is now in force or was

— [Read less](#)

 [2018.01.17 - Appeal re City of Troy FOIL 17-344.pdf](#)

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*Received*

**November 8, 2017** via web

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*Departments*

**Police Department**


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*Requester*

**Adam Steinbaugh**

 adam@thefire.org

 510 Walnut St Suite 1250, Philadelphia , PA 19106

 5626866990

 Foundation for Individual Rights in Education

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*Requester email status list*



## Documents

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*Public (pending)*

(none)

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*Requester*

*Only*

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## Staff

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*Point of Contact*

**John Salka**

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## Timeline

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**External Message**

Requester + Staff

Regarding the portion of your request for "Please se also include any records of police reports or complaints concerning a demonstration at Rensselaer on or about October 12 or 13, 2017" - a search of Troy Police Department records returned no results relative to this portion of your request.

*January 22, 2018, 3:55pm by John Salka, Deputy Director of Public Information (Staff)*

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## **Department Assignment**

Public

Added: Police Department.

*December 19, 2017, 2:05pm*

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## **External Message**

Requester + Staff

Regarding the portion of your request "*for the period of September 1, 2017 to the present date, any records of communication or correspondence between the Troy Police and Rensselaer Polytechnic Institute, or representatives or employees thereof, concerning a demonstration during October 12 or 13, 2017,*" and "*[a] copy of any photographs or video taken or possessed by the Troy police which depicts a demonstration at Rensselaer on or about October 12 or 13, 2017,*" - your request is denied pursuant to NYS Public Officers Law Section 87 (2)(e)(iv) as it pertains to Troy Police Department security operations.

Any persons denied access to requested records may appeal the decision in writing within thirty days. Appeals should be sent to: James Caruso, Office of the Corporation Counsel, Troy City Hall, 433 River Street, Troy, NY 12180.

Pertaining to the portion of your request for "any records of police reports or complaints concerning a demonstration at Rensselaer on or about October 12 or 13, 2017" - we anticipate having a response to your request on or around December 29, 2017.

Thank you.

*December 19, 2017, 2:04pm by John Salka, Deputy Director of Public Information (Staff)*

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## **External Message**

Requester + Staff

Pertaining to the portion of your request for:

"1. A copy of any contract, agreement, memorandum of understanding, request, or other document which identifies the relationship between Rensselaer Polytechnic Institute, including its agents and affiliated entities, and the Troy Police Department, including its individual officers. (To put it in plain English, I'm requesting documents showing whether RPI hired officers of the Troy Police Department, as well as the terms of that relationship.)

"2. Any memorandum of understanding, contract, or agreement between the Troy Police Department and Rensselaer Polytechnic Institute (including its agents and affiliated entities) which is now in force or was in force on October 13, 2017."

A search of city records returned no documents relative to your request.

*December 13, 2017, 4:08pm by John Salka, Deputy Director of Public Information (Staff)*

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**External Message**

Requester + Staff

Hello Mr. Salka --

I'd like to amend my FOIL to add the following requests:

1. A copy of any contract, agreement, memorandum of understanding, request, or other document which identifies the relationship between Rensselaer Polytechnic Institute, including its agents and affiliated entities, and the Troy Police Department, including its individual officers. (To put it in plain English, I'm requesting documents showing whether RPI hired officers of the Troy Police Department, as well as the terms of that relationship.)
2. Any memorandum of understanding, contract, or agreement between the Troy Police Department and Rensselaer Polytechnic Institute (including its agents and affiliated entities) which is now in force or was in force on October 13, 2017.

Thank you!

*November 15, 2017, 9:29pm by the requester*

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**External Message**

Requester + Staff

Due to staffing limitations additional time is needed to process this request. We anticipate having a response to your request on or around December 8, 2017.

*November 13, 2017, 12:12pm by John Salka, Deputy Director of Public Information (Staff)*

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**Request Opened**

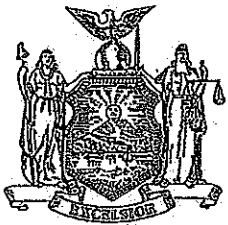
Public

Request received via web

*November 8, 2017, 11:02pm*

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*James A. Caruso*  
*Corporation Counsel*



Office of the Corporation Counsel  
Phone (518) 279-7157  
Fax (518) 270-4609



February 8, 2018

Adam Steinbaugh  
c/o Foundation for Individual Rights in Education  
510 Walnut Street  
Suite 1250  
Philadelphia, Pennsylvania 19106

**RE: FOIL APPEAL**

Dear Mr. Steinbaugh:

The Law Department of the City of Troy is in receipt of your Appeal, dated January 17, 2018, of the FOIL request denial by John Salka, the City of Troy's Deputy Director of Public Information. As the Freedom of Information Law ("FOIL") Appeals Officer for the City of Troy, New York, I am hereby providing you with the City of Troy's response to your FOIL Appeal.

By FOIL request dated November 8, 2017, you made a written request to the City of Troy's Records Access Officer seeking records "For the period of September 1, 2017 to the present date, any records of communication or correspondence between the Troy Police and Rensselaer Polytechnic Institute, or representatives or employees thereof, concerning a demonstration during October 12 or 13, 2017." You also requested "... a copy of any photographs or videos taken or possessed by the Troy police which depicts a demonstration at Rensselaer or about October 12 or 13, 2017." Finally, you requested "...any records of police reports or complaints concerning a demonstration at Rensselaer on or about October 12 or 13, 2017."

Subsequent to that date, you made an additional request for "A copy of any contract, agreement, memorandum of understanding, request, or other document which identifies the relationship between Rensselaer Polytechnic Institute, including its agents and affiliated entities, and the Troy Police Department, including its individual officers", as well as "Any memorandum of understanding, contract, or agreement between the Troy Police Department and Rensselaer Polytechnic Institute (including its agents and affiliated entities) which is now in force or was in force on October 13, 2017."

By response dated December 13, 2017, Mr. Salka responded and advised you that a search of the Troy Police Department records returned no results relative to your request for "a copy of any contract, agreement, memorandum of understanding, request, or other document which identifies the relationship between Rensselaer Polytechnic Institute, including its agents and affiliated entities, and the Troy Police Department, including its individual officers," as well as "Any memorandum of understanding, contract, or



agreement between the Troy Police Department and Rensselaer Polytechnic Institute (including its agents and affiliated entities) which is now in force or was in force on October 13, 2017.”

By response dated December 19, 2017, Mr. Salka advised you that your requests “for the period of September 1, 2017 to the present date, any records of communication or correspondence between the Troy Police and Rensselaer Polytechnic Institute, or representatives or employees thereof, concerning a demonstration during October 12 or 13, 2017,” and “... a copy of any photographs or videos taken or possessed by the Troy police which depicts a demonstration at Rensselaer or about October 12 or 13, 2017,” were denied pursuant to New York Public Officers Law Section 87 (2) (e) (iv) as it pertains to Troy Police Department security operations.

The instant Appeal followed.

For the following reasons, your Appeal is granted, in part, and denied, in part.

Pursuant to New York Public Officers Law Section 87 (2) an “... agency may deny access to records or portions thereof that... (e) are compiled for law enforcement purposes and which, if disclosed, would :...(iv) reveal criminal investigative techniques or procedures, except routine techniques and procedures...”

In the instant matter, in light of the fact that the Troy Police Department already revealed its video of the October 13, 2017 demonstration at RPI to Michael Arno, Director of Student Rights, Responsibilities, and Judicial Affairs at RPI, there is no reasonable or legitimate basis upon which to claim that the provision of same at this point in time would reveal criminal investigative techniques or procedures.


Thus, that portion of the FOIL request denial is reversed.

Turning to the balance of the records that you sought, Mr. Salka previously advised you that those records do not exist. Clearly, the City of Troy has no obligation to provide documents that do not exist. Moreover, you have acknowledged that you are already in possession of a billing statement from the Troy Police Department to RPI.

Thus, that portion of Mr. Salka’s FOIL request denial is hereby affirmed.

Accordingly, as discussed above, your FOIL Appeal is hereby granted, in part, and denied, in part.

**DATED:** Troy, New York  
February 8, 2018



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**JAMES A. CARUSO, ESQ.**  
City of Troy Corporation Counsel  
and FOIL Appeals Officer



**FIRE**  
Foundation for Individual  
Rights in Education

February 15, 2018

James Caruso  
Office of the Corporation Counsel  
Troy City Hall  
433 River Street  
Troy, New York 12180

Sent via U.S. Mail

**Re: Appeal of Denial of FOIL Request No. 17-344**

Dear Mr. Caruso:

I write in response to the City of Troy's February 8, 2018, response to my appeal concerning the above-referenced FOIL request. For ease of reference, that response is enclosed.

First, thank you for agreeing to reverse the portion of the FOIL request relating to the video of the October 13, 2017, demonstration.

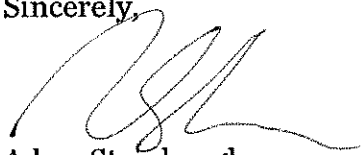
However, I write to request that you reconsider the affirmation of the request denial as it pertains to records of communications between the Troy Police Department and Rensselaer Polytechnic Institute. While I wholeheartedly agree that the City of Troy cannot provide records that do not exist, my concern – which I write today to clarify – is that the Troy Police Department has not conducted an adequate search for records.

My purpose in enclosing the Troy Police Department billing statement was not to establish that I already have the records I seek, but to offer evidence that responsive records exist, contradicting the claim that records do not exist. Had a diligent search been conducted, this billing invoice should have been produced to me, but was not. This suggests either that a search was not conducted or that any search was not diligent, as required under FOIL. *See, e.g., Burton v. Slade*, 166 A.D.2d 352, 561 N.Y.S.2d 637 (1st Dep't 1990) (abuse of discretion for agency to deny access without reviewing documents and stating with particularity reasons for denial)

The remedy I seek on appeal is simple: the Troy Police Department should be directed to conduct an adequate search for records, produce any non-exempt records, and provide a privilege log for any responsive records withheld.

I appreciate your prompt review and look forward to your response.

Sincerely,

A handwritten signature in black ink, appearing to read 'AS', with a long horizontal flourish extending to the right.

Adam Steinbaugh

Encl.



May 11, 2018

James Caruso  
Office of the Corporation Counsel  
Troy City Hall  
433 River Street  
Troy, New York 12180

Sent via U.S. Mail

**Re: Appeal of Constructive Denial of Freedom of Information  
Law Request No. 17-415**

Dear Mr. Caruso:

This letter is an appeal from the constructive denial of a pending Freedom of Information Law request, numbered 17-415. This request relates the search for records responsive to Request No. 17-344. As you may recall, Request No. 17-344 sought, in relevant part, records pertaining to communications between the Troy Police Department and Rensselaer Polytechnic Institute. The City has taken the position that no such records exist even after being provided with an example of one such record.

The City of Troy has now failed to produce records demonstrating that the city undertook a diligent search for responsive records, or whether a search took place at all.

**I. The request and constructive denial**

On October 13, 2017, students at Rensselaer Polytechnic Institute held a peaceful demonstration. During that demonstration, 24 members of the Troy Police Department were present on RPI's campus,<sup>1</sup> and were observed videotaping demonstrators. On October 26, this video was shown to an RPI administrator, Michael Arno, who used the tape to identify students present during the demonstration.<sup>2</sup>

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<sup>1</sup> See the attached invoice from Chief John F. Tedesco, produced to another individual in response to a FOIL request, and available at <https://savetheunion.xyz/assets/TroyPD.pdf>.

<sup>2</sup> See Michael Arno, Incident Summary for Case 20170264, Nov. 1, 2017, available at <https://d28htnjz2elwuj.cloudfront.net/wp-content/uploads/2017/11/13153440/Redacted-Summary-of-Incident.pdf>.

In December of 2017, I issued a request pursuant to FOIL, N.Y. Pub. Off. Law §87 *et seq.* (“FOIL”). That request sought records pertaining to the City of Troy’s efforts to respond to FOIL Request No. 17-344, which sought “records of communication or correspondence between” the Troy Police Department and RPI concerning the demonstration. The City asserted that no such records exist even after being provided with an example of such a record in connection with the FOIL appeal of Request No. 17-344. The request at issue in this letter, No. 17-415, was submitted through the City of Troy’s NextRequest system, an online platform utilized by the City of Troy to manage its public records requests.

On December 26, 2017, I received a message through the NextRequest system indicating that the City of Troy anticipated providing a response by February 19, 2018, due to “staffing limitations and the scope of records associated with this submission.”

On March 12, 2018, I received a second message through NextRequest, asserting that a response would be forthcoming by March 30, 2018, due to “staffing limitations.”

On April 9, 2018, I received a third message through NextRequest, asserting that a response would be forthcoming by April 13, 2018.

No response has been received. The NextRequest system is no longer publicly available. As a result, I am unable to locate records of Request No. 17-415. NextRequest appears to have been replaced by a second online platform, the “FOIL Records Center,” based on software provided by GovQA. Attempts to locate Request No. 17-415 on this secondary system have proved unfruitful.

## **II. The City of Troy has constructively denied access to the requested records**

Under FOIL, a government agency is required to, “within five business days of the receipt of a written request for” records, “make such record available . . . , deny such request in writing or furnish a written acknowledgment of the receipt of such request and a statement of the approximate date, which shall be reasonable under the circumstances of the request, when such request will be granted or denied[.]” N.Y. Pub. Off. Law §89(3)(a).

In turn, FOIL provides that where access to a record has been denied, the requestor “may within thirty days appeal in writing such denial to the head, chief executive or governing body of the entity, or the person therefor designated by such head, chief executive, or governing body, who shall within ten business days of the receipt of such appeal fully explain in writing to the person requesting the record the reasons for further denial, or provide access to the record sought.” N.Y. Pub. Off. Law §89(4)(a).

The City of Troy’s failure to produce responsive records on or before April 13, 2018, is a constructive denial of access in violation of N.Y. Pub. Off. Law §89(3)(a) for two reasons.

***First***, the City of Troy repeatedly granted itself extensions to provide access to the requested records, but the extensions were not reasonable. The approximate date furnished by a government agency as to when it will respond to the request must be “reasonable under the



circumstances of the request.” N.Y. Pub. Off. Law §89(3)(a). “The determination of whether a period is reasonable must be made on a case by case basis taking into account the volume of documents requested, the time involved in locating the material, and the complexity of the issues involved in determining whether the materials fall within one of the exceptions to disclosure.” *Linz v. City of N.Y. Police Dep’t*, N.Y.L.J., Dec. 17, 2001 (Sup. Ct. N.Y. Co.).

Considering the effort required to locate the materials here and the likely volume of records requested, the City of Troy’s delay is manifestly unreasonable. The total period of the City of Troy’s extensions—between the first extension on December 26, 2017 and the date of this appeal—amounts to 135 days’ delay. The requested records are unlikely to be voluminous, and the request seeks records immediately accessible to the City of Troy’s FOIL designee.<sup>3</sup>

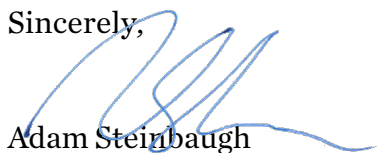
***Second***, and moreover, the City of Troy has failed to provide any further response to the requested records, notwithstanding having furnished a date certain by which a response would be forthcoming. That date, April 13, 2018, has lapsed without further response from the City of Troy.<sup>4</sup>

### **III. The City of Troy must decide this appeal within ten days**

For the foregoing reasons, I appeal the City of Troy’s constructive denial of access to records responsive to my December 2017 request. Under New York law, the City of Troy has ten business days to decide this appeal. N.Y. Pub. Off. Law § 89(4)(a).

Should you have any questions, please don’t hesitate to call or email me.

Sincerely,



Adam Steinbaugh  
Senior Program Officer and Investigative Reporter  
Foundation for Individual Rights in Education  
Phone: (215) 717-3473  
Fax: (215) 717-3440  
[adam@thefire.org](mailto:adam@thefire.org)

Encl.

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<sup>3</sup> Or, perhaps, records accessible to persons asked by the city’s FOIL staff to search for records on their behalf.

<sup>4</sup> The instant appeal is timely. Under FOIL, an appeal may be undertaken within thirty days of a denial of access. N.Y. Pub. Off. Law §89(4)(a).



James A. Caruso  
Corporation Counsel



Office of the Corporation Counsel  
Phone (518) 279-7157  
Fax (518) 270-4609



May 14, 2018

Adam Steinbaugh  
c/o FIRE  
510 Walnut Street  
Suite 1250  
Philadelphia, Pennsylvania 19106

**RE: FOIL APPEAL**

Dear Sir:

The City of Troy is in receipt of your most recent FOIL Appeal, dated May 11, 2018. As the Freedom of Information Law ("FOIL") Appeals Officer for the City of Troy, New York, your FOIL Appeal has been forwarded to me

In reviewing said Appeal, it was immediately noted that you did not include a copy of your FOIL request (Request # 17-415). By your own admission, Request # 17-415 cannot be located on the City's on-line platform.

Would you be so kind as to forward a copy of Request # 17-415 to me at the Law Department at your earliest convenience?

Thank you in advance for your cooperation.

Sincerely,

  
JAMES A. CARUSO  
City of Troy Corporation Counsel



May 18, 2018

James Caruso  
Office of the Corporation Counsel  
Troy City Hall  
433 River Street  
Troy, New York 12180

Sent via U.S. Mail

**Re: Appeal of FOIL Request No. 17-415**

Dear Mr. Caruso:

I am in receipt of your May 14, 2018, letter in response to my May 11 appeal concerning FOIL Request No. 17-415. Your letter cites the lack of a copy of my FOIL request and that by my "own admission," the request "cannot be located on the City's on-line platform." Accordingly, you ask that I provide a copy of that request.

I would be pleased to provide you with such a copy. However, the request is accessible only to the City of Troy, as the online platform through which public records requests are submitted and stored has been disabled. The only way that I could obtain a copy of the request is to issue a request under the Freedom of Information Law. That would, if we're keeping track, be a request for records about a request for records about a request for records.<sup>1</sup>

Sincerely,



Adam Steinbaugh  
Senior Program Officer and Investigative Reporter  
Foundation for Individual Rights in Education  
Phone: (215) 717-3473  
Fax: (215) 717-3440  
[adam@thefire.org](mailto:adam@thefire.org)

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<sup>1</sup> See generally, INCEPTION (Legendary Pictures 2010).



July 3, 2018

James Caruso  
Office of the Corporation Counsel  
Troy City Hall  
433 River Street  
Troy, New York 12180

Sent via U.S. Mail

**Second Appeal of FOIL Request No. 17-415 / C000236-060418**

Dear Mr. Caruso:

This letter is an appeal from the constructive denial of a pending Freedom of Information Law request, numbered 17-415. This appeal is the second undertaken with respect to this request. As you may recall, the request seeks records pertaining to the City of Troy's search for records concerning communications between the Troy Police Department and Rensselaer Polytechnic Institute. The City has taken the position that no such records exist even after being provided with an exemplar of one such record.

The instant request was first received by the City of Troy on December 19, 2017. Following an appeal concerning its failure to provide a response compliant with N.Y. Pub. Off. Law §89(3)(a), the City of Troy provided a purported response on June 4, 2018, nearly six months after the request was first received.

The June 4 response was again non-compliant with N.Y. Pub. Off. Law §89(3)(a) because it failed to provide a statement of the approximate date when the request will be granted or denied. On June 27, I sent a message to the City of Troy's FOIL officer requesting a compliant response. I have not received a response.

Because an appeal from a denial of access must be made within thirty days of the denial, and because the June 4 operates as a constructive denial of access, I now appeal from that denial. I further write to remind the City of Troy that N.Y. Pub. Off. Law § 89(3) also requires that any approximated date be "reasonable under the circumstances of the request." Some 196 days have lapsed since the request was first received, and the request pertains to records concerning a search for records under FOIL. No future date could be reasonable.

Copies of the underlying request, the June 4 response, and my June 27 request for clarification are enclosed for your reference.

**I. The City of Troy has constructively denied access to the requested records**

Under FOIL, a government agency is required to, “within five business days of the receipt of a written request for” records, “make such record available . . . , deny such request in writing or furnish a written acknowledgment of the receipt of such request and a statement of the approximate date, which shall be reasonable under the circumstances of the request, when such request will be granted or denied[.]” N.Y. Pub. Off. Law §89(3)(a).

In turn, FOIL provides that where access to a record has been denied, the requestor “may within thirty days appeal in writing such denial to the head, chief executive or governing body of the entity, or the person therefor designated by such head, chief executive, or governing body, who shall within ten business days of the receipt of such appeal fully explain in writing to the person requesting the record the reasons for further denial, or provide access to the record sought.” N.Y. Pub. Off. Law §89(4)(a).

The City of Troy’s June 4 response fails to comply with FOIL because it lacks a “statement of the approximate date, which shall be reasonable under the circumstances of the request, when such request will be granted or denied.” N.Y. Pub. Off. Law §89(3)(a). Thus, the failure to provide a response compliant with §89(3)(a) operates as a constructive denial of access in violation of N.Y. Pub. Off. Law §89(3)(a).

The City of Troy must therefore provide a response compliant with that section by providing a statement of the approximate date when the request will be granted or denied. Yet no future date could possibly be reasonable under the circumstances of the request. “The determination of whether a period is reasonable must be made on a case by case basis taking into account the volume of documents requested, the time involved in locating the material, and the complexity of the issues involved in determining whether the materials fall within one of the exceptions to disclosure.” *Linz v. City of N.Y. Police Dep’t*, N.Y.L.J., Dec. 17, 2001 (Sup. Ct. N.Y. Co.).

As our *previous* appeal noted:

[T]he City of Troy repeatedly granted itself extensions to provide access to the requested records, but the extensions were not reasonable. The approximate date furnished by a government agency as to when it will respond to the request must be “reasonable under the circumstances of the request.” N.Y. Pub. Off. Law §89(3)(a).

Considering the effort required to locate the materials here and the likely volume of records requested, the City of Troy’s delay is manifestly unreasonable. The total period of the City of Troy’s extensions—between the first extension on December 26, 2017 and



the date of this appeal—amounts to 135 days’ delay. The requested records are unlikely to be voluminous, and the request seeks records immediately accessible to the City of Troy’s FOIL designee [or, perhaps, records accessible to persons asked by the city’s FOIL staff to search for records on their behalf.]

It is difficult to imagine any circumstances under which six months’ time would be a reasonable period to complete this request. The request seeks records concerning a narrow set of requests for records, and is made of the same office that conducted that response. The responsive records are not likely to be voluminous, privileged, or difficult to locate.

Moreover, the underlying request seeks to explore whether the City of Troy made any search for records before asserting that responsive records do not exist — a conclusion it inexplicably reached even after being presented with proof that responsive records actually exist. The denial of the existence of records *provided to it*, coupled with the repeated failure to provide records that would substantiate that it conducted a search at all, is contrary to the Freedom of Information Law’s purpose: to “shed light on government decision-making” and provide for “[f]ull disclosure by public agencies,” which is “a public right and in the public interest.” *Farbman v. New York City Health and Hospitals Corporation*, 62 NY2d 75, 80 (1984).

In lieu of providing an approximate date that would necessarily be unreasonable under the circumstances, the City of Troy must immediately provide the responsive records, or concede that *these* records do not exist and that no search was conducted. In that event, I renew my request for records concerning communications between the Troy Police Department and RPI, and request that a thorough search for records be conducted.

## **II. The City of Troy must decide this appeal within ten days**

For the foregoing reasons, I again appeal the City of Troy’s constructive denial of access to records responsive to my December 2017 request. Under New York law, the City of Troy has ten business days to decide this appeal. N.Y. Pub. Off. Law § 89(4)(a).

Should you have any questions, please don’t hesitate to call or email me.

Sincerely,



Adam Steinbaugh  
Senior Program Officer and Investigative Reporter  
Foundation for Individual Rights in Education  
Phone: (215) 717-3473  
Fax: (215) 717-3440  
[adam@thefire.org](mailto:adam@thefire.org)

Encl.

## Message History (3)

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 On 6/27/2018 4:21:14 PM, adam@thefire.org wrote:


Hello,

I'm seeking clarification with respect to this request. The June 4, 2018 response to my December 19, 2017, request does not provide a statement of the approximate date when the request will be granted or denied, as required by N.Y. Pub. Off. Law § 89(3). That section further requires that any provided date be reasonable under the circumstances.

As the date for a response compliant with § 89(3) has lapsed, the failure to provide an approximate date for response operates as a denial.

However, as I'd like to avoid a second appeal over a constructive denial of access, I'm writing to solicit a date certain by which the relevant records will be provided. However, in determining whether the approximate date is reasonable under the circumstances, please keep in mind that the instant request was first made in December of last year and that the request includes records within the immediate control of this office.

Thank you!

 On 6/4/2018 1:13:47 PM, City of Troy FOIL Request Center wrote:

Dear Adam Steinbaugh:

Thank you for your interest in public records of the City of Troy, NY. Your request has been received and is being processed. Your request was received in this office on 12/19/2017 and given the reference number C000236-060418 for tracking purposes.

Records Requested: "I request the following documents:

1. A copy of any public records request received by the City of Troy on or after September 1, 2017, which names Rensselaer Polytechnic Institute, RPI, or the City of Troy Police Department.
2. A copy of any document produced in response to a records request referenced in foregoing category 1.
3. The processing notes (i.e., any records pertaining to efforts to respond to the records request) generated in response to a records request referenced in foregoing category 1, including specifically request number 17-344.


If I can be of service in narrowing or interpreting these requests, please don't hesitate to ask.

Thank you!"

Your request will be forwarded to the relevant department(s) to locate the information you seek and to determine the volume and any costs associated with satisfying your request. You will be contacted about the availability and/or provided with copies of the records in question.

You can monitor the progress of your request at the link below and you'll receive an email when your request has been completed.

[City of Troy FOIL Records Center](#)

 On 6/4/2018 1:13:47 PM, City of Troy FOIL Request Center wrote:

Request was created by staff