

SHINING A LIGHT ON RATTLEY: THE TROUBLESOME DILIGENT SEARCH STANDARD UNDERCUTTING NEW YORK'S FREEDOM OF INFORMATION LAW

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*New York's Freedom of Information Law (FOIL) provides citizens with access to the documents, statistics, and information relied on by New York State government agencies. Modeled after the federal Freedom of Information Act (FOIA), New York legislators designed the state's "sunshine law" to promote transparency and accountability through a presumption of disclosure by requiring agencies to make all records available to the public except those specifically exempted by statute. But state agencies often rely on a separate, unceremonious reason to deny FOIL requests—they cannot find the documents. FOIL requires an agency to certify that it performed a diligent records search to justify such a denial, but a 2001 holding by the New York Court of Appeals in *Rattley v. New York City Police Department* permits agencies to properly deny a request in this manner without describing the search or offering a statement from the individual who personally performed the search. Despite FOIL's promise of transparency and disclosure, an agency's ability to deny a records request under *Rattley* without explaining its search efforts leaves requesters without their requested records and without meaningful recourse to challenge the agency's alleged search in court. This Note argues that the *Rattley* standard used in New York state courts renders FOIL's diligent search requirement entirely toothless, creates an inequitable burden-shifting framework for the agency and the requester, and contradicts FOIL's original legislative intent to promote disclosure. This Note further argues that the New York Court of Appeals should replace *Rattley* with the federal courts' reasonableness test and suggests a legislative fix to resolve FOIL's statutory ambiguity regarding the diligent search certification requirement.*

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INTRODUCTION

An incarcerated individual sits behind bars. Their trial results in a conviction and their appeal is unsuccessful—yet the incarcerated individual maintains their innocence. They submit a records request to the New York City Police Department (NYPD) for specific documents related to their conviction.¹ The NYPD acknowledges receipt of the request and provides a deadline for its response but never responds to either the initial request or the incarcerated individual’s subsequent administrative appeal.² Frustrated with the NYPD’s lack of response, the incarcerated individual commences a court proceeding to challenge the NYPD’s constructive denial of the request.³ Only then does the NYPD respond: after several weeks, the NYPD informs the incarcerated individual that while it did find some of the documents, it could not find other requested records.⁴

The NYPD then moves to dismiss the proceeding altogether.⁵ To support its denial, the NYPD’s legal counsel states that the agency could not find the documents despite a “thorough and diligent search.”⁶ The incarcerated individual nevertheless persists in challenging the agency’s inability to find documents relating to their conviction, especially since the affirmation contained no description of the search performed and because the NYPD’s

1. *See Rattley v. N.Y.C. Police Dep’t*, 756 N.E.2d 56, 57 (N.Y. 2001).

2. *See id.*

3. *See id.*

4. *See id.* at 57–58.

5. *See id.*

6. *Id.* at 57.

counsel did not personally conduct the search.⁷ Fortunately, the case comes before New York's highest court, the Court of Appeals.⁸ Unfortunately, the court holds that the denial was proper—the NYPD need not provide the incarcerated individual with a detailed description of the search or a statement from the person who actually conducted the search.⁹

In another case nineteen years later, a New York public policy center files a request with the state's Department of Health (DOH) to get the count of nursing home residents who died from COVID-19.¹⁰ The DOH stalls for months, even though their emergency response system requires a daily report from nursing homes totaling all resident deaths from COVID-19.¹¹ The DOH provides a reason for the delay: the agency is still conducting a diligent search for the records.¹² After a delay lasting seven months, the policy center secures a legal win when a New York state supreme court holds that the DOH's reasons for delay are inadequate and orders the DOH to turn over the requested records.¹³ The policy center files further separate requests for COVID-19 statistics with the DOH several months later.¹⁴ Again, the DOH responds that the statistics will be delayed.¹⁵ The reason? The DOH needs more time to complete a diligent search.¹⁶

In New York, incarcerated individuals requesting records related to their convictions,¹⁷ public policy centers investigating the COVID-19 pandemic

7. *See id.*

8. *See id.* at 56–58.

9. *See id.* at 58.

10. *See* Empire Ctr. for Pub. Pol'y v. N.Y. State Dep't of Health, 150 N.Y.S.3d 497, 497 (Sup. Ct. 2021); Bill Hammond, *The Health Department Stalls a FOIL Request for the Full COVID Death Toll in Nursing Homes*, EMPIRE CTR. (Sept. 1, 2020), <https://www.empirecenter.org/publications/the-health-department-stalls-a-foil/> [https://perma.cc/97F6-DKBE].

11. *See* Empire Ctr. for Pub. Pol'y, 150 N.Y.S.3d at 501.

12. *See* Letter from Rosemarie Hewig, Recs. Access Officer, N.Y.S. Dep't of Health, to Bill Hammond, Senior Fellow for Health Pol'y, Empire Ctr. for Pub. Pol'y (Aug. 31, 2020), <https://www.empirecenter.org/wp-content/uploads/2020/09/FOIL-response.pdf> [https://perma.cc/HF9P-RSJ6].

13. *See* Empire Ctr. for Pub. Pol'y, 150 N.Y.S.3d at 505–07; *see also* Press Release, Empire Ctr. for Pub. Pol'y, NY Supreme Court Rules in Favor of Empire Center Petition for Complete Nursing Home Information (Feb. 3, 2021), <https://www.empirecenter.org/publications/court-rules-in-favor-of-empire-center-for-nursing-home-info/> [https://perma.cc/7QAM-NAJS].

14. *See* Press Release, Empire Ctr. for Pub. Pol'y, Empire Center Demands Dozens of Coronavirus Data Sets from the NYS DOH (June 22, 2021), <https://www.empirecenter.org/publications/empire-center-demands-dozens-of-coronavirus-data-sets/> [https://perma.cc/P8J6-VR6A].

15. *See* Bill Hammond, *The Health Department's FOIL Responses Signal an Indefinite Wait for Pandemic Data*, EMPIRE CTR. (July 23, 2021), <https://www.empirecenter.org/publications/the-health-departments-foil-responses/> [https://perma.cc/8D8Q-UQW3].

16. *See id.*

17. *See* Stan Johnson, Brianna Lorenzana, Cristyn Mingo, Arlenis Pena, Rickie Quansah, Kayla Ray, Adaury Rodriguez & Nickie Uwoghiren, *Inmates Want Files to Prove Innocence. DA Can't Find Them.*, CITY LIMITS (Jan. 21, 2016), <https://citylimits.org/2016/01/21/inmates-want-files-to-prove-innocence-da-cant-find-them/> [https://perma.cc/5F6K-MC3M]; Jarrett Murphy, *Delays, Denials, Documents That Disappear?: Survey Reveals Range of Concerns About FOIL in NYC*, CITY LIMITS (Jan. 21, 2016), <https://citylimits.org/2019/03/26/delays->

in the state,¹⁸ and everyday citizens curious about what their government is up to all utilize the same legislative sunshine law¹⁹: the New York State Freedom of Information Law²⁰ (FOIL). Modeled after the federal Freedom of Information Act²¹ (FOIA), FOIL was passed by the New York legislature in 1974²² to grant citizens the right to request documents and access information held by government agencies.²³ FOIL's original legislative intent section declared that "government is the public's business and that the public . . . should have unimpaired access to the records of government."²⁴ To this end, a presumption of disclosure from state agencies to citizens underlies FOIL—agencies subject to FOIL must make all records available to the public except those specifically exempted by statute.²⁵ Yet despite FOIL's promise of broad public access,²⁶ citizens requesting information using FOIL often face inordinate delays and receive inadequate responses from government agencies.²⁷ And, as evidenced by the two examples above and numerous other cases, government agencies often supply an abrupt response to explain their FOIL request denials: they cannot find the

denials-documents-that-disappear-survey-reveals-range-of-concerns-about-foil-in-nyc/ [https://perma.cc/8X2Z-ASXT].

18. See Hammond, *supra* note 10; see also Jeanmarie Evelly, *Access to Public Information in the Age of COVID-19*, CITY LIMITS (Mar. 26, 2021), <https://citylimits.org/2021/03/26/access-to-public-information-in-the-age-of-covid-19/> [https://perma.cc/MHL2-YX27] (highlighting that government agencies have cited COVID-19 as the reason for delays in FOIL and FOIA requests at the New York and federal levels, respectively).

19. A "sunshine law" is a common term used to describe a state's freedom of information law, and different states use different terminology for their state law granting citizens the right to request documents from government agencies. See Justin Cox, *Maximizing Information's Freedom: The Nuts, Bolts, and Levers of FOIA*, 13 CUNY L. REV. 387, 412–13 & n.117 (2010); see also LOUIS D. BRANDEIS, *OTHER PEOPLE'S MONEY AND HOW THE BANKERS USE IT* 92 (Frederick A. Stokes Co. 2d prtg. 1914) (1913) ("Sunlight is said to be the best of disinfectants . . .").

20. N.Y. PUB. OFF. LAW §§ 84–90 (McKinney 2022).

21. 5 U.S.C. § 552; see also Ralph J. Marino, *The New York Freedom of Information Law*, 43 FORDHAM L. REV. 83, 83 (1974) (noting that New York's FOIL is modeled after the federal FOIA).

22. See Freedom of Information Law, ch. 578, 1974 N.Y. Laws 1538 (codified at N.Y. PUB. OFF. LAW §§ 85–89 (McKinney 1974) (current version at N.Y. PUB. OFF. LAW §§ 84–90 (McKinney 2022))).

23. See *id.* at 1538.

24. *Id.* The language of the diligent search standard from the 1977 FOIL, which this Note analyzes, has not been amended since 1977. Compare Freedom of Information Law, ch. 933, 1977 N.Y. Laws 1, 4 (codified at N.Y. PUB. OFF. LAW § 89(3) (McKinney 1977) (current version at N.Y. PUB. OFF. LAW § 89(3) (McKinney 2022))), with PUB. OFF. § 89(3).

25. See PUB. OFF. §§ 84, 87(2); *Hepps v. N.Y. State Dep't of Health*, 122 N.Y.S.3d 446, 450–51 (App. Div. 3d Dep't 2020); *Goyer v. N.Y. State Dep't of Env't Conservation*, 813 N.Y.S.2d 628, 633–34 (Sup. Ct. 2005).

26. See PUB. OFF. § 84.

27. See, e.g., Murphy, *supra* note 17; Evelly, *supra* note 18; see also Nate Jones, *Public Records Requests Fall Victim to the Coronavirus Pandemic*, WASH. POST (Oct. 1, 2020, 9:01 AM), https://www.washingtonpost.com/investigations/public-records-requests-fall-victim-to-the-coronavirus-pandemic/2020/10/01/cba2500c-b7a5-11ea-a8da-693df3d7674a_story.html [https://perma.cc/FMD2-YEEJ] (providing numerous examples of COVID-19 delaying state and federal agency responses to freedom of information requests).

documents.²⁸ Agencies can lawfully deny records requests for several reasons,²⁹ but this Note focuses on one particular reason: when an agency “certif[ies] . . . that such record cannot be found after diligent search.”³⁰

FOIL does not specify how an agency must certify that it performed a diligent search.³¹ In light of FOIL’s statutory ambiguity, in 2001, the New York Court of Appeals³² held in *Rattley v. New York City Police Department*³³ that an agency does not need to provide a “detailed description of the search” or a “personal statement from the person who actually conducted the search” to certify that it performed a diligent search.³⁴ In practice, the *Rattley* standard allows agencies to meet their FOIL burden by simply stating that a diligent search turned up empty, without having to describe the search or include statements from those who actually performed the search.³⁵

By contrast, federal courts interpreting FOIL’s precursor and analogue, FOIA, impose a different burden on agencies to initially demonstrate that they have conducted an adequate search for documents. In 1983, the U.S. Court of Appeals for the District of Columbia established a reasonableness test: the agency must show that it has “conducted a search reasonably calculated to uncover all relevant documents.”³⁶ A federal agency can meet this burden by producing a “reasonably detailed affidavit, setting forth the search terms and the type of search performed.”³⁷ An affidavit lacking any detail will not satisfy the federal agency’s burden.³⁸ Although FOIL’s drafters directly modeled the New York statute after FOIA,³⁹ the New York Court of Appeals’s *Rattley* standard carves a significantly easier path for agencies to deny records requests in New York.⁴⁰ As a result, FOIL requesters—including incarcerated individuals, public policy organizations,

28. See, e.g., *Rattley v. N.Y.C. Police Dep’t*, 756 N.E.2d 56, 57–58 (N.Y. 2001); *McGee v. Bishop*, 145 N.Y.S.3d 627, 631 (App. Div. 3d Dep’t 2021); see also *Johnson et al.*, *supra* note 17.

29. See *infra* text accompanying note 73.

30. PUB. OFF. § 89(3)(a).

31. See *id.*; *Rattley*, 756 N.E.2d at 58.

32. The New York Court of Appeals is New York State’s highest court. This Note refers to New York’s highest court as both the “New York Court of Appeals” and the “Court of Appeals.”

33. 756 N.E.2d 56 (N.Y. 2001).

34. *Id.* at 58.

35. See *id.* See generally *Jackson v. Albany Cnty. Dist. Att’y’s Off.*, 113 N.Y.S.3d 313 (App. Div. 3d Dep’t 2019); *McFadden v. Fonda*, 50 N.Y.S.3d 605 (App. Div. 3d Dep’t 2017); *Oddone v. Suffolk Cnty. Police Dep’t*, 946 N.Y.S.2d 580 (App. Div. 2d Dep’t 2012); *Leibowicz v. N.Y. State Dep’t of Tax’n & Fin.*, 919 N.Y.S.2d 917 (App. Div. 3d Dep’t 2011); *Curry v. Nassau Cnty. Sheriff’s Dep’t*, 893 N.Y.S.2d 148 (App. Div. 2d Dep’t 2010); see also *infra* Parts II.B.1, II.B.3.

36. *Weisberg v. U.S. Dep’t of Just.*, 705 F.2d 1344, 1351 (D.C. Cir. 1983).

37. *Oglesby v. U.S. Dep’t of the Army*, 920 F.2d 57, 68 (D.C. Cir. 1990); see also *Goland v. CIA*, 607 F.2d 339, 352 (D.C. Cir. 1978) (“The agency’s affidavits, naturally, must be ‘relatively detailed’ and nonconclusory and must be submitted in good faith.” (quoting *Vaughn v. Rosen*, 484 F.2d 820, 826 (D.C. Cir. 1973))).

38. See *infra* notes 282–83 and accompanying text.

39. See *Marino*, *supra* note 21, at 83.

40. Compare *Rattley*, 756 N.E.2d at 58, with *Weisberg*, 705 F.2d at 1351.

and everyday New Yorkers—are often left without their requested documents, without an explanation of the agency’s search, and without meaningful legal recourse to challenge the agency’s contention through a review of the denial.⁴¹

This Note contends that the New York Court of Appeals misconstrued FOIL’s certification requirement in *Rattley* by tipping the scales too far in favor of the agency and against the citizen. This construction renders FOIL’s presumption of disclosure toothless and robs FOIL requesters of meaningful judicial review of agency denials. Part I of this Note provides an overview of New York’s FOIL and the federal FOIA, FOIL’s legislative history, and how New York state courts, federal courts, and other state courts interpret an agency’s burden to demonstrate that it performed an adequate records search. Part II outlines the basic arguments surrounding the *Rattley* standard and compares New York state and federal cases to demonstrate the way in which *Rattley* lessens the burden for agencies and places a heavier burden on requesters challenging a denial in New York state court. Finally, Part III proposes that New York state courts replace the twenty-year-old *Rattley* standard with the federal reasonableness standard, and otherwise urges the New York state legislature to adopt a statutory fix that resolves FOIL’s ambiguity regarding the diligent search certification requirement.

I. AN OVERVIEW OF FOIL, THE *RATTLEY* STANDARD, AND FOIA’S INFLUENCE ON NEW YORK AND OTHER STATE SUNSHINE LAWS

The New York FOIL and the federal FOIA share analogous legislative purposes and statutory constructions, yet their divergence in how much scrutiny is cast on an agency’s diligent search certification illuminates the *Rattley* decision’s impact on freedom of information in New York. To this end, Part I.A outlines FOIL’s legislative history, how FOIL works—describing both administrative and constructive denials, as well as subsequent administrative and judicial appeals—and summarizes the diligent search jurisprudence leading up to *Rattley*. Part I.B then describes how the federal FOIA functions and lays out the federal courts’ reasonableness test to evaluate the adequacy of an agency’s search. Finally, Part I.C discusses the instructive nature of FOIA case law in New York state courts and how other states have adopted the federal courts’ reasonableness test to assess an agency’s search in their own state court systems.

A. *An Overview of New York State’s Freedom of Information Law*

FOIL’s legislative history highlights the statute’s underlying presumption of disclosure and FOIL’s structure mirroring the federal FOIA.

41. See *infra* Part II.B.2; see also *infra* note 291.

1. FOIL's Enactment and Subsequent Amendment: An Attempt to More Closely Align FOIL with FOIA

New York governor Malcolm Wilson signed FOIL into law in 1974.⁴² FOIL's original legislative declaration emphasized that the public's knowledge of both government actions and the information underlying those actions is essential for any free democratic society, and it affirmed that government secrecy should not overshadow the people's right to know.⁴³ New York state courts have also emphasized the statute's purpose of promoting public access to information, increasing the citizenry's knowledge and understanding of official state activity, and preventing governmental secrecy.⁴⁴ FOIL's sponsor in the senate, Ralph J. Marino, noted that the New York FOIL was derived from the federal FOIA and received widespread support by the state legislature and the media at the time of passage.⁴⁵

In 1977, the New York legislature amended FOIL.⁴⁶ The 1974 version of FOIL recognized only eight categories of records that agencies were obligated to release for public inspection, creating the presumption that all documents outside of these eight categories were unavailable to the public.⁴⁷ The primary thrust of the 1977 amendment was reversal of this basic premise.⁴⁸ The amended statute instead specified the categories of records that an agency⁴⁹ could withhold, creating a presumption of disclosing "all records" to the public unless a record falls within an enumerated exemption.⁵⁰ In addition to codifying a presumption of disclosure, the

42. See Freedom of Information Law, ch. 578, 1974 N.Y. Laws 1538 (codified at N.Y. PUB. OFF. LAW §§ 85–89 (McKinney 1974) (current version at N.Y. PUB. OFF. LAW §§ 84–90 (McKinney 2022))).

43. See *id.* at 1538 (“[A] free society is maintained . . . when the public is aware of government actions The people’s right to know the process of governmental decision-making and the documents and statistics leading to determinations is basic to our society. Access to such information should not be thwarted by shrouding it with the cloak of secrecy or confidentiality.”).

44. See, e.g., *Beechwood Restorative Care Ctr. v. Signor*, 842 N.E.2d 466, 469 (N.Y. 2005).

45. See Marino, *supra* note 21, at 83 (noting that FOIL was “[p]atterned after the Federal Freedom of Information Act”); Memorandum from Ralph J. Marino, Sen. (1977), reprinted in *NEW YORK STATE LEGISLATIVE ANNUAL—1977*, at 330–31 (1977) (“Basically, this legislation will conform New York State’s version of Freedom of Information to the Federal law [FOIA.]”); see also *Fink v. Lefkowitz*, 393 N.E.2d 463, 466 n.1 (N.Y. 1979) (“The legislative history of the Freedom of Information Law indicates that many of its provisions . . . were patterned after the Federal analogue.”).

46. See Freedom of Information Law, ch. 933, 1977 N.Y. Laws 1 (codified as amended at N.Y. PUB. OFF. LAW §§ 84–90 (McKinney 2022)).

47. See ch. 578, 1974 N.Y. Laws at 1539–40.

48. Compare *id.*, with ch. 933, 1977 N.Y. Laws at 2 (mandating that agencies make “all records” available except for those specifically exempted).

49. See N.Y. PUB. OFF. LAW § 86 (McKinney 2022) (defining “[a]gency” as “any state or municipal department, board, bureau, division, commission, committee, public authority, public corporation, council, office or other governmental entity performing a governmental or proprietary function for the state or any one or more municipalities thereof, except the judiciary or the state legislature”).

50. See *id.* § 87(2); see also Memorandum from Ralph J. Marino, *supra* note 45 (“All records are now closed but for nine exceptions and this legislation literally reverses that basic

amendment placed the burden of proof on the agency denying a FOIL request to justify its nondisclosure in a judicial proceeding challenging the denial.⁵¹ Supporters of the amendment contended that placing the burden on the agency to justify nondisclosure was consistent with FOIL's legislative intent⁵² and was equitable given that the everyday citizen requesting records is inherently less familiar with the records than the government agency maintaining them.⁵³ Although FOIL has undergone several amendments since 1977,⁵⁴ the 1977 FOIL remains substantially intact.⁵⁵

Additionally, FOIL establishes the Committee on Open Government⁵⁶ (COOG), a committee that oversees the administration of FOIL and advises both the public and state government officials on the intricacies of FOIL.⁵⁷ FOIL enables the COOG to provide advisory opinions to agencies⁵⁸ and the

premise.”). FOIL also dictates that agencies proactively disclose certain information without the need for anyone to file a FOIL request, including rules and regulations regarding the availability of records and how to obtain them, voting records at agency proceedings, and a reasonably detailed list of all records in the agency's possession that must be posted on the agency's website. *See* PUB. OFF. § 87.

51. *See* Press Release, Mario M. Cuomo, Sec'y of State, N.Y. Dep't of State (Jul. 27, 1977), *reprinted in* N.Y. Bill Jacket 1977, ch. 933, at 4 (urging the governor to sign the FOIL amendment and noting that the amendments place the burden of proof on the agency that denied access to records to demonstrate FOIL compliance in a judicial proceeding); *see also* Budget Report on Bills, No. S. 16-A, at 2 (N.Y. 1977), *reprinted in* N.Y. Bill Jacket 1977, ch. 933, at 15, 16 (“By placing the burden of proof on public agencies to demonstrate that access to records has been legally denied, this bill strengthens the case of private citizens in Article 78 proceedings and may encourage increased agency compliance with the FOIL.”).

52. *See* Memorandum from John C. Esposito, Couns., N.Y. State Consumer Prot. Bd., to Judah Gribetz, Couns., Off. of the Governor (Jul. 22, 1977), *reprinted in* N.Y. Bill Jacket 1977, ch. 933, at 106 (arguing that placing the burden of proof on the requester is inconsistent with FOIL's legislative intent and that the presumption should be for access and against denial).

53. *See, e.g.*, Letter from Robert J. Dryfoos, Couns., Off. of the Lieutenant Governor, to Judah Gribetz, Couns., Off. of the Governor, at 3 (Jul. 25, 1977), *reprinted in* N.Y. Bill Jacket 1977, ch. 933, at 65, 67 (indicating the lieutenant governor's support for the 1977 FOIL amendment reversing a presumption of denial to a presumption of disclosure and noting that the current procedure “dramatically favors the responding agency” because the requester is “generally ill-equipped” to submit an adequate FOIL request, while the agency can base its arguments on “intimate knowledge of the document[s]”).

54. *See* Act of May 3, 1982, ch. 73, 1982 N.Y. Laws 1383 (codified as amended at PUB. OFF. §§ 87(1), 89(2) (McKinney 2022)) (granting attorneys' fees in certain situations to FOIL requesters); Act of July 24, 1989, ch. 705, 1989 N.Y. Laws 3160 (codified as amended at PUB. OFF. § 89(2) (McKinney 2022)) (banning the willful concealment or destruction of records to prevent public inspection); Act of Aug. 16, 2006, ch. 492, 2006 N.Y. Laws 3375 (codified as amended at PUB. OFF. § 89(1) (McKinney 2022)) (requiring agencies to respond to FOIL requests over email and granting courts discretion to award attorneys' fees to the substantially prevailing party).

55. *See* Michael J. Grygiel, *New York Open Government Guide: Foreword*, REPS. COMM. FOR FREEDOM OF THE PRESS, <https://www.rcfp.org/open-government-guide/new-york/#open-government-guide> [<https://perma.cc/EHL4-W8PZ>] (last visited Oct. 7, 2022).

56. *See* PUB. OFF. §§ 87(1)(a)–(b), 89(1)–(2). The New York State administrative code contains rules and regulations promulgated by COOG. *See* N.Y. COMP. CODES R. & REGS. tit. 21, § 1401 (2021).

57. *See* PUB. OFF. § 89(1)(b); *Committee on Open Government: Overview*, N.Y. STATE, <https://opengovernment.ny.gov> [<https://perma.cc/8AG7-P4CD>] (last visited Oct. 7, 2022).

58. *See* PUB. OFF. § 89(1)(b)(i).

public⁵⁹ regarding FOIL, to promulgate rules and regulations regarding procedures for making records available,⁶⁰ to develop a records request form for citizens,⁶¹ and to report annually to the legislature with findings regarding FOIL's administration and suggested amendments to the statute.⁶² While COOG advisory opinions can clarify FOIL discrepancies for agencies or members of the public,⁶³ they are not binding and do not warrant greater deference than an agency's own interpretation in a court proceeding.⁶⁴

The COOG promulgates rules and regulations with the force of law,⁶⁵ and FOIL requires agencies to conform their record-availability procedures with COOG rules,⁶⁶ but the COOG has not clarified how an agency must certify a diligent search beyond what is required under New York State case law.⁶⁷ Under COOG regulations, an agency must designate one or more individuals as records access officers (RAOs) responsible for coordinating the agency's response to a FOIL request.⁶⁸ Therefore, when an agency cannot locate requested documents, the RAO is responsible for certifying that the agency does not keep the requested records⁶⁹ or that a diligent search failed to uncover the records.⁷⁰ Nevertheless, the courts, and not COOG, have the final say on how agencies must certify a diligent search.⁷¹

2. Administrative and Constructive Denials Under FOIL

In addition to promoting broad access to agency documents, FOIL outlines the proper procedures for an agency to deny a FOIL request through either administrative or constructive denial.⁷² An agency's response to a FOIL request falls into one of three general buckets. The agency can (1) disclose the requested record, (2) administratively deny the request pursuant to a

59. *See id.* § 89(1)(b)(ii).

60. *See id.* § 89(1)(b)(iii).

61. *See id.* § 89(1)(b)(v).

62. *See id.* § 89(1)(b)(vi).

63. *See id.* § 89(1)(b)(i)–(ii).

64. *See Buffalo News, Inc. v. Buffalo Enter. Dev. Corp.*, 644 N.E.2d 277, 279–80 (N.Y. 1994) (citing *In re John P. v. Whalen*, 429 N.E.2d 117, 121 (N.Y. 1981)); *see also* Comm. on Open Gov't, N.Y. State Dep't of State, Advisory Opinion 17434 (Nov. 18, 2008), <https://docsopengovernment.dos.ny.gov/coog/ftext/fl17434.html> [<https://perma.cc/D6XQ-MXGJ>] (“[T]he Committee on Open Government . . . is not empowered to issue a binding decision.”).

65. *See* Comm. on Open Gov't, *supra* note 64.

66. *See* PUB. OFF. § 87(1)(a)–(b).

67. *See* Comm. on Open Gov't, *supra* note 64 (directing the requester to New York state court holdings for an explanation of FOIL's requirement that an agency certify a diligent search).

68. *See* N.Y. COMP. CODES R. & REGS. tit. 21, § 1401.2(a) (2021).

69. *See id.* § 1401.2(b)(7)(i).

70. *See id.* § 1401.2(b)(7)(ii).

71. *See* Comm. on Open Gov't, *supra* note 64.

72. *See* N.Y. PUB. OFF. LAW §§ 87, 89 (McKinney 2022). This Note's Introduction provides examples of administrative denial (the NYPD informing the incarcerated individual that it could not locate documents after diligent search) and constructive denial (the DOH failing to respond to the public policy center's request in a reasonable amount of time). *See supra* notes 4, 13 and accompanying text.

specific exemption, or (3) administratively deny the request because the document either does not exist or cannot be located.⁷³ Under the second response, New York Public Officers Law section 87(2) enumerates nine categories of agency records that are exempt from disclosure for various compelling privacy, safety, and confidentiality interests.⁷⁴ If a citizen requests a record within one of these nine categories of documents, the agency can properly deny the FOIL request even if it possesses the document.⁷⁵

If a document is not exempted from disclosure under section 87(2), under the third type of response—that the document does not exist or cannot be located—the agency has several remaining options for properly denying the request. New York Public Officers Law section 89 provides the agency with the remaining procedurally proper grounds for denial: (1) that the request was not reasonably described,⁷⁶ (2) that the agency does not possess the requested record,⁷⁷ or (3) that the requested record could not be located after a diligent search.⁷⁸ This Note focuses on the third ground for denial: that an agency could not locate the document following a diligent search.

In addition to the “administrative” denials outlined above, an agency’s failure to meet the response deadlines outlined in section 89(3) will also constitute a “constructive” denial of a records request.⁷⁹ Section 89(3)

73. See PUB. OFF. §§ 87(2), 89(3); see also *Goyer v. N.Y. State Dep’t of Env’t Conservation*, 813 N.Y.S.2d 628, 634 (Sup. Ct. 2005).

74. See PUB. OFF. § 87(2)(a)–(i). FOIL exempts from disclosure records that (1) are exempted by another state or federal statute, (2) would constitute an unjustified invasion of privacy, (3) would impede contract or collective bargaining negotiations, (4) constitute trade secrets, (5) would interfere with law enforcement, (6) could imperil a person’s life or safety, (7) are interagency or intra-agency materials, (8) are examination questions or answers prior to final determination of questions, or (9) would hinder ability to protect information technology assets. See *id.*

75. See *id.* § 87(2).

76. See PUB. OFF. § 89(3)(a) (“Each entity subject to the provisions of this article, within five business days of the receipt of a written request for a record reasonably described, shall make such record available to the person requesting it”); *Konigsberg v. Coughlin*, 501 N.E.2d 1, 3 (N.Y. 1986) (recognizing that FOIL requirement that request “reasonably describe” record sought enables agency to locate document in question (quoting PUB. OFF. § 89(3)(a))).

77. See PUB. OFF. § 89(3)(a) (“[T]he entity shall provide a copy of such record . . . or . . . shall certify that it does not have possession of such record”).

78. See *id.* (“[T]he entity shall provide a copy of such record . . . or . . . shall certify . . . that such record cannot be found after diligent search.”).

79. See *id.* § 89(4)(a) (“Failure by an agency to conform to the provisions of subdivision three of this section shall constitute a denial.”); see also *Legal Aid Soc’y v. N.Y. State Dep’t of Corr. & Cmty. Supervision*, 962 N.Y.S.2d 773, 775 (App. Div. 3d Dep’t 2013) (classifying an agency’s failure to respond to a FOIL request or appeal within the statute’s specified timeline as a “constructive denial”); *Comm. on Open Gov’t, N.Y. State Dep’t of State, Advisory Opinion 14913* (Sep. 24, 2004), <https://docs.opengovernment.dos.ny.gov/coog/ftext/f14913.htm> [<https://perma.cc/XZR4-M4VQ>] (“If neither a response to a request nor an acknowledgement of the receipt of a request is given within five business days, if . . . an agency delays responding for an unreasonable time after it acknowledges that a request has been received, or if the acknowledgement of the receipt of a request fails to include an estimated date for granting or denying access, a request may . . . be considered to have been constructively denied.”).

imposes deadlines on agencies to respond to FOIL requests.⁸⁰ When an agency receives a “reasonably described”⁸¹ records request, the agency must respond within five days of receipt.⁸² In this initial response, the agency must either make the requested record available, deny the request in writing, or acknowledge the request and provide a reasonable approximate date for when the agency will grant or deny the request.⁸³ If an agency decides to grant a request, but circumstances prevent disclosure within twenty days from acknowledgment, the agency shall inform the requester of the reason why it cannot complete the request within twenty days and provide a reasonable date for when the agency will grant the request.⁸⁴ In the final response, the agency must either provide the requested document, or certify that it does not possess the record or that “such record cannot be found after diligent search.”⁸⁵

The COOG regulations on FOIL responses crystallize that an agency’s failure to comply with section 89(3)’s time limitations constitutes a constructive denial, and they outline seven examples.⁸⁶ The COOG regulations mirror section 89(4)(a)’s language explicitly stating that an agency’s failure to follow the section 89(3) timeline will constitute a denial.⁸⁷ Thus, not only can an agency administratively deny a FOIL request because the document is exempted⁸⁸ or because the document cannot be located after a diligent search,⁸⁹ but an agency can also constructively deny a FOIL request by failing to make timely or reasonable responses.⁹⁰

80. See PUB. OFF. § 89(3)(a), (4)(a).

81. *Id.* § 89(3)(a).

82. *See id.*

83. *See id.* An agency cannot deny a FOIL request because the request is “voluminous” or because “locating or reviewing the requested records or providing the requested copies is burdensome.” *Id.*

84. *See* PUB. OFF. § 89(3)(a); *see also* *Data Tree v. Romaine*, 880 N.E.2d 10, 17 (N.Y. 2007) (establishing that there is “no specific time period in which the agency must grant access to the records” and that a reasonable amount of time needed to respond depends on several factors including the size of the request and the necessary methods for retrieving documents).

85. *Id.*

86. *See* N.Y. COMP. CODES R. & REGS. tit. 21, § 1401.5(e)(1)–(7) (2021). The COOG provides the following examples of constructive denials that warrant appeal: (1) failure to either grant or deny access in writing, or to acknowledge receipt of the FOIL request within five business days; (2) failure to provide an approximate response date; (3) giving an unreasonable approximate response date; (4) failure to respond within a reasonable time after the approximate response date or within twenty business days after acknowledging receipt; (5) communicating that a request will be granted within twenty business days but then failing to grant the request, unless the agency provides a new response and explains the delay; (6) failure to explain why the request was not granted or provide new response date within twenty business days; or (7) responding that more time is needed to respond but providing an unreasonable response date. *See id.*

87. *See* PUB. OFF. § 89(4)(a).

88. *See id.* § 87(2).

89. *See id.* § 89(3)(a).

90. *See id.* § 89(4)(a); *see also* tit. 21, § 1401.5(e)(1)–(7).

3. Challenging a FOIL Denial Through an Article 78 Proceeding

FOIL provides a mechanism for requesters to file an administrative appeal of either an administrative or constructive denial, and also to challenge that denial in court following the administrative appeal.⁹¹ A citizen whose FOIL request is denied may file their administrative appeal in writing to the agency within thirty days of the denial.⁹² In response to the administrative appeal, the agency must, within ten days, either provide access to the requested records or “fully explain” the reason for sustaining the denial.⁹³ If the agency denies the administrative appeal or does not make a timely response, the requester can then bring a proceeding under article 78 of the New York Civil Practice Law and Rules (CPLR) (“Article 78”) for court review of the agency’s final action.⁹⁴ A requester can only bring an Article 78 proceeding if the agency’s denial is final, and only after bringing an administrative appeal.⁹⁵

An Article 78 proceeding challenging an agency’s FOIL denial takes the form of a petition for a writ of mandamus to compel disclosure⁹⁶ and acts as an official command to an officer or agency to perform a duty enjoined on them by law.⁹⁷ In the context of FOIL, the petitioner in an Article 78 proceeding seeks a writ of mandamus to compel the agency to comply with

91. See PUB. OFF. § 89(4)(b).

92. See *id.* § 89(4)(a).

93. See *id.* FOIL does not define the phrase “fully explain,” and an agency’s failure to provide reasons for the denial at the administrative appeal level does not bar the agency from raising different reasons for denial. See William Tesler, Gould *Debunked: The Prohibition Against Using New York’s Freedom of Information Law as a Criminal Discovery Tool*, 44 N.Y.L. SCH. L. REV. 71, 82–85 (2000) (explaining that FOIL’s language prompting agencies to “fully explain” the denial is “merely directory”).

94. See PUB. OFF. § 89(4)(b). The date of either the letter denying the administrative appeal or the constructive denial of the appeal (if the agency does not respond within ten days) triggers a four-month statute of limitations period for the requester to bring an Article 78 proceeding. See Tesler, *supra* note 93, at 81.

95. See N.Y. C.P.L.R. 7801 (McKinney 2022); see also PUB. OFF. § 89(4)(b) (“[A] person denied access to a record in an appeal determination . . . may bring a proceeding for review of such denial pursuant to article seventy-eight.”).

96. See C.P.L.R. 7801; see, e.g., Scott, Sardano & Pomeranz v. Recs. Access Officer of Syracuse, 480 N.E.2d 1071, 1072 (N.Y. 1985) (“[P]etitioner brought an article 78 proceeding in the nature of mandamus to compel access to the reports pursuant to the Freedom of Information Law.”); Rattley v. N.Y.C. Police Dep’t, 756 N.E.2d 56, 58 (N.Y. 2001) (“[T]his CPLR article 78 proceeding to compel disclosure was properly dismissed as moot.”).

97. See C.P.L.R. 7801, 7801 cmt. 3, 7803; Hamptons Hosp. & Med. Ctr., Inc. v. Moore, 417 N.E.2d 533, 537 (N.Y. 1981) (“An article 78 proceeding may lie . . . by way of mandamus to compel performance by an administrative agency of a duty enjoined by law.”). CPLR. 7803 outlines the only four questions that can be raised in an Article 78 proceeding: (1) whether the agency failed to perform a statutory duty; (2) whether the agency acted outside its jurisdiction; (3) whether a final determination violated “lawful procedure, was affected by an error of law or was arbitrary and capricious or an abuse of discretion”; or (4) whether a final determination following a hearing is supported by substantial evidence on the record. C.P.L.R. 7803. Commentary notes that the first question in CPLR 7803 “corresponds with the writ of mandamus to compel,” and that courts rarely mention the error-of-law standard specifically. See *id.* 7803 cmt. 1. Instead, the error-of-law question is implicit in the allegation that the agency improperly interpreted or incorrectly applied a statute. See *id.*

FOIL, and to produce the requested documents that were improperly denied⁹⁸ or to certify that it performed a diligent search yielding no documents.⁹⁹ An Article 78 proceeding can also determine whether an agency action resulted from an error of law, was arbitrary and capricious, or constituted an abuse of discretion.¹⁰⁰ Courts apply the error-of-law standard in FOIL cases,¹⁰¹ as the analysis rests on whether a document properly falls within a specific exemption¹⁰² or whether an agency properly interpreted and performed their statutory obligation to diligently search for documents.¹⁰³ Article 78 FOIL cases seldom mention the error-of-law standard directly, but New York state courts use the error-of-law standard to determine whether an agency correctly interpreted their statutory duty under FOIL, and therefore whether it correctly denied a FOIL request.¹⁰⁴

4. New York State Jurisprudence Evaluating Diligent Search Certifications in Article 78 Proceedings

Under FOIL, requesters can bring an Article 78 proceeding to challenge any final denial of their records request, including a denial based on a specified exemption under section 87(2) or a denial based on a diligent search failing to uncover the requested records under section 89(3).¹⁰⁵ When an agency denies a FOIL request under section 87(2), the agency bears the burden of proof to demonstrate that an enumerated exception applies.¹⁰⁶ In such proceedings, the New York Court of Appeals “narrowly construe[s]” section 87(2) exemptions.¹⁰⁷ The agency must “articulate ‘particularized and specific justification’ for not disclosing requested documents.”¹⁰⁸ By narrowly construing section 87(2) exemptions, the Court of Appeals emphasizes that blanket exemptions protecting documents from disclosure

98. *See, e.g.,* Goyer v. N.Y. State Dep’t of Env’t Conservation, 813 N.Y.S.2d 628, 630 (Sup. Ct. 2005) (“In this CPLR article 78 proceeding, petitioner Jacqueline Goyer seeks a judgment compelling respondents . . . to comply with her Freedom of Information Law (FOIL) request . . . by providing her with the public information she sought . . .”).

99. *See, e.g.,* Jackson v. Albany Cnty. Dist. Att’y’s Off., 113 N.Y.S.3d 313, 314 (App. Div. 3d Dep’t 2019) (“[P]etitioner eventually commenced this CPLR article 78 proceeding seeking to compel respondent to produce the photographs.”).

100. *See* C.P.L.R. 7803; *supra* note 97.

101. *See, e.g.,* Surveillance Tech. Oversight Project v. N.Y.C. Police Dep’t, No. 156442/2021, 2021 N.Y. Misc. LEXIS 6780, at *7 (Sup. Ct. Dec. 28, 2021).

102. *See, e.g.,* Hanig v. N.Y. State Dep’t of Motor Vehicles, 588 N.E.2d 750, 753 (N.Y. 1992) (clarifying that the question in Article 78 proceeding to challenge whether document was exempted from disclosure under section 87(2) was “solely one of statutory interpretation”).

103. *See supra* note 97.

104. *See supra* notes 97–98, 102.

105. *See* N.Y. PUB. OFF. LAW § 89(4).

106. *See id.* § 89(4)(b) (“In the event that access to any record is denied pursuant to the provisions of subdivision two of section eighty-seven of this article, the agency involved shall have the burden of proving that such record falls within the provisions of such subdivision two.”); *see also* Hanig, 588 N.E.2d at 752–53.

107. Hanig, 588 N.E.2d at 752–53.

108. Gould v. N.Y.C. Police Dep’t, 675 N.E.2d 808, 811 (N.Y. 1996) (quoting Fink v. Lefkowitz, 393 N.E.2d 463, 465 (N.Y. 1979)).

are contrary to FOIL's purpose of open government.¹⁰⁹ While FOIL does not expand on its command for agencies to "fully explain" the reasons for denial at the administrative appeal level,¹¹⁰ the Court of Appeals clarifies that an agency denying a FOIL request pursuant to a section 87(2) exemption must explicitly justify why a certain record falls within that exemption to meet their burden of proof in an Article 78 proceeding.¹¹¹

While an agency must demonstrate a "particularized and specific justification" that a requested document falls within a section 87(2) exemption to meet its burden of proof,¹¹² New York state courts do not require the agency to show the same explicit justification to certify that it performed a diligent search justifying its section 89(3) denial.¹¹³ FOIL does not specify how any agency must "certify" that a "diligent" search was performed to properly deny a FOIL request because the agency could not locate the document.¹¹⁴ The New York Court of Appeals weighed in on this ambiguity in *Rattley*, holding that an agency can meet its burden of proof with a simple statement that it performed a diligent search, and without describing the search or providing a statement from the person who conducted the search.¹¹⁵

In *Rattley*, the court heard an appeal of a decision from the Supreme Court of the State of New York, Appellate Division, First Judicial Department. The First Department held that in responding to a FOIL request, a letter from NYPD's counsel stating that a "thorough and diligent" search had been performed was insufficient to certify a diligent search because the letter lacked detail or personal knowledge of the alleged search.¹¹⁶ The First Department relied on *Key v. Hynes*,¹¹⁷ a case from the Supreme Court of the State of New York, Appellate Division, Second Judicial Department, holding that a conclusory statement averring that a diligent search produced no documents was insufficient for an agency to satisfy their FOIL obligation, especially when the person who made the statement lacked direct knowledge of the search.¹¹⁸ The First Department emphasized that conclusory statements lacking any evidentiary proof cannot justify a denial by diligent

109. *See id.*

110. *See* PUB. OFF. § 89(4)(a).

111. *See id.* § 89(4)(b); *Fink v. Lefkowitz*, 393 N.E.2d 463, 465 (N.Y. 1979).

112. *See Fink*, 393 N.E.2d at 465.

113. *See, e.g., Rattley v. N.Y.C. Police Dep't*, 756 N.E.2d 56, 58 (N.Y. 2001).

114. *See* PUB. OFF. § 89(3); *Rattley*, 756 N.E.2d at 58.

115. 756 N.E.2d at 58.

116. *See Rattley v. N.Y.C. Police Dep't*, 706 N.Y.S.2d 26, 27 (App. Div. 1st Dep't 2000), *rev'd*, 756 N.E.2d 56 (N.Y. 2001).

117. 613 N.Y.S.2d 926 (App. Div. 2d Dep't 1994), *invalidated by Rattley v. N.Y.C. Police Dep't*, 756 N.E.2d 56 (N.Y. 2001).

118. *See id.* at 928; *see also Thomas v. Recs. Access Officer*, 613 N.Y.S.2d 929, 929 (App. Div. 2d Dep't 1994) (holding that agency satisfied FOIL certification requirement with affidavit from employee who performed the search for documents and subsequent evidence demonstrating diligent search at hearing), *invalidated by Rattley v. N.Y.C. Police Dep't*, 756 N.E.2d 56 (N.Y. 2001).

search under section 89(3), just as similar conclusory statements cannot support a denial by specified exemption under section 87(2).¹¹⁹

The New York Court of Appeals in *Rattley* reversed the First Department's decision and overturned *Hynes*,¹²⁰ holding that an agency can meet its burden of proof—that it complied with section 89(3) and performed a diligent search—with a conclusory statement lacking detail or personal knowledge of the search.¹²¹ In this case, the NYPD satisfied its burden of proof with an affirmation that “despite a ‘thorough and diligent search,’ certain documents could not be found.”¹²²

When an agency meets its burden to certify that a diligent search failed to uncover the requested documents, the requester can nevertheless secure a hearing on the issue of whether the documents exist if they can “articulate a demonstrable factual basis to support [the] contention that the requested documents existed and were within the [agency's] control.”¹²³ Under this high standard,¹²⁴ a petitioner armed only with conclusory speculation and lacking factual support for the existence of the requested records or proof that the agency failed to search for the documents will not be able to overcome the agency's certification and will face final denial of their appeal.¹²⁵

B. FOIL's Precursor: The Federal Freedom of Information Act

New York's Freedom of Information Law is modeled directly after the federal Freedom of Information Act.¹²⁶ This section provides an overview of how the federal FOIA works, how federal courts assess the adequacy of a federal agency's search for records when a requester challenges a FOIA denial, and how federal agencies can meet their burden of proof in court to demonstrate that they performed a sufficient search for documents.

119. See *Rattley*, 706 N.Y.S.2d at 27; *Hynes*, 613 N.Y.S.2d at 928 (arguing that there is no basis in law or reason to accept conclusory statements to meet the agency's burden of proof to certify a diligent search under section 89(3), but not to justify an exemption under section 87(2) in an Article 78 proceeding).

120. See *Rattley*, 756 N.E.2d at 58.

121. See *id.* (“Neither a detailed description of the search nor a personal statement from the person who actually conducted the search is required. Here, the Department satisfied the certification requirement by averring that all responsive documents had been disclosed and that it had conducted a diligent search for the documents it could not locate.”).

122. *Id.* at 57 (quoting affirmation submitted by the NYPD).

123. *Gould v. N.Y.C. Police Dep't*, 675 N.E.2d 808, 814 (N.Y. 1996).

124. See *Tesler*, *supra* note 93, at 88 n.74 (citing *Gould v. N.Y.C. Police Dep't*, 675 N.E.2d 808, 814 (N.Y. 1996)) (noting that the demonstrable-factual-basis standard is “formidable” and providing several examples of proffered evidence that failed to meet the standard, including when newspaper articles referred to the requested documents and agency's own documents referred to the requested records).

125. See *Gould*, 675 N.E.2d at 814 (finding that petitioner's “conjecture” that documents existed years beforehand is “insufficient to warrant a hearing”); *Jackson v. Albany Cnty. Dist. Att'y's Off.*, 113 N.Y.S.3d 313, 314–15 (App. Div. 3d Dep't 2019) (finding that police property report listing roll of film did not establish “demonstrable factual basis” that police possessed negatives of crime scene photographs requested by petitioner); *DeFreitas v. N.Y. State Police Crime Lab*, 35 N.Y.S.3d 598, 600 (App. Div. 3d Dep't 2016) (finding that petitioner “failed to support his speculation that such documentation exists” to earn a hearing).

126. See *supra* note 45.

1. An Overview of FOIA and Federal Agencies' Search Obligations

The federal government established a statutory right of public access to federal agency documents with the enactment of FOIA in 1966.¹²⁷ The U.S. Supreme Court recognizes FOIA's significance as a tool for citizens to know "what their Government is up to"¹²⁸ and as a necessary check on any potential corruption.¹²⁹ Like with FOIL, FOIA's mandate that federal agencies subject to the act make all records available to the public—unless the requested records fall within a specific exemption—creates a presumption of broad disclosure.¹³⁰ FOIA has undergone numerous amendments since its enactment, including amendments first narrowing and then broadening the scope of law enforcement and national security exemptions, amendments addressing proactive disclosure of electronic records, and amendments preventing foreign governments or international organizations from submitting FOIA requests.¹³¹

Like New York's FOIL, the federal FOIA contains requirements for proactive disclosure of certain documents to the public without the need for a formal FOIA request.¹³² Furthermore, FOIA outlines nine categories of documents that are exempt from disclosure in 5 U.S.C. § 552(b).¹³³ Section 552(c) clarifies that certain law enforcement records—those concerning ongoing criminal investigations,¹³⁴ identification of informants,¹³⁵ and foreign intelligence or counterterrorism efforts¹³⁶—are not subject to FOIA's

127. *See* Freedom of Information Act, Pub. L. No. 89-554, 80 Stat. 383 (codified at 5 U.S.C. § 552).

128. *See, e.g.*, *Nat'l Archives & Recs. Admin. v. Favish*, 541 U.S. 157, 171–72 (2004) (quoting *U.S. Dep't of Just. v. Repts. Comm. for Freedom of the Press*, 489 U.S. 749, 773 (1989)).

129. *See, e.g.*, *NLRB v. Robbins Tire & Rubber Co.*, 437 U.S. 214, 242 (1978).

130. *See* 5 U.S.C. § 552(a)(3), (4)(B), (b), (c); *John Doe Agency v. John Doe Corp.*, 493 U.S. 146, 153 (1989); *Dep't of the Air Force v. Rose*, 425 U.S. 352, 361 (1976).

131. *See* U.S. DEP'T OF JUST., DEPARTMENT OF JUSTICE GUIDE TO THE FREEDOM OF INFORMATION ACT: INTRODUCTION 7–9 (2020), <https://www.justice.gov/oip/page/file/1248371/download> [<https://perma.cc/72AJ-J33A>]; *see also* Jennifer Shkabatur, *Transparency With(out) Accountability: Open Government in the United States*, 31 *YALE L. & POL'Y REV.* 79, 80–91 (2012) (providing further exploration of FOIA's history and amendments).

132. *See* 5 U.S.C. § 552(a)(1)–(2). FOIA requires agencies to proactively publish certain materials in the Federal Register—including descriptions of agency organization and methods of obtaining information from agencies—in addition to publishing certain materials online—including final opinions and orders from adjudications, agency policy statements, and certain administrative staff manuals. *See id.*

133. *See id.* § 552(b)(1)–(9). The nine categories of documents exempt from disclosure are (1) documents classified as secret by executive order to protect national defense or foreign policy interests, (2) documents only related to an agency's internal rules and practices, (3) documents specifically exempted from disclosure by another statute, (4) documents containing trade secrets and privileged or confidential commercial or financial information, (5) interagency or intra-agency memoranda, (6) personnel and medical files that would constitute an invasion of privacy if disclosed, (7) certain law enforcement records, (8) documents regarding an agency's examination of a financial institution, and (9) geological and geophysical information regarding wells. *See id.*

134. *See id.* § 552(c)(1)(A)–(B).

135. *See id.* § 552(c)(2).

136. *See id.* § 552(c)(3).

disclosure requirements.¹³⁷ FOIA also establishes the Office of Government Information Services within the U.S. National Archives and Records Administration.¹³⁸

FOIA grants the public the right to request documents that are not specifically exempted.¹³⁹ If a request is reasonably described,¹⁴⁰ the agency must provide the requested records unless they are exempt from disclosure pursuant to the nine specified exemptions in § 552(b)¹⁴¹ or are otherwise excluded from FOIA disclosure under § 552(c).¹⁴² Like FOIL exemptions, FOIA exemptions are “narrowly construe[d]”¹⁴³ by federal courts and are mostly discretionary.¹⁴⁴ Unlike FOIL, FOIA does not contain language directing the agency to conduct a “diligent” search, but the statute provides a definition of “search”—“to review, manually or by automated means, agency records for the purpose of locating those records which are responsive to a request.”¹⁴⁵ Finally, FOIA provides an avenue for an administrative appeal of a denial,¹⁴⁶ and a requester who has exhausted the administrative appeals process may seek judicial review of the agency’s denial in federal district court.¹⁴⁷

2. A Reasonableness Test: Federal Jurisprudence Evaluating the Adequacy of Agency Searches Under FOIA

While federal courts require agencies subject to FOIA to narrowly construe FOIA exemptions, federal courts examine the adequacy of an agency’s search for records, and agency certifications of the search performed, under a different standard than do New York state courts. Since 1983, the D.C. Circuit has held that agencies must conduct a search that is

137. *See id.* § 552(c).

138. *See id.* § 552(h)(1). The Office of Government Information Services reviews FOIA agency policies and procedures, monitors agencies’ compliance with FOIA, offers mediation services as an alternative to litigation, and reports annually any legislative recommendations for FOIA. *See id.* § 552(h)(2)–(4).

139. *See id.* § 552(a)(3).

140. *See id.* § 552(a)(3)(A).

141. *See id.* § 552(b).

142. *See id.* § 552(c).

143. *Dep’t of Interior v. Klamath Water Users Protective Ass’n*, 532 U.S. 1, 8 (2001) (quoting *FBI v. Abramson*, 456 U.S. 615, 630 (1982)). Furthermore, if a federal agency withholds a record under an exemption, it can only withhold the information to which the exemption applies and must provide all “reasonably segregable” portions of the record. *See* 5 U.S.C. § 552(b).

144. *See Bartholdi Cable Co. v. FCC*, 114 F.3d 274, 282 (D.C. Cir. 1997) (“FOIA’s exemptions simply permit, but do not require, an agency to withhold exempted information.”).

145. 5 U.S.C. § 552(a)(3)(D); *see also* U.S. DEP’T OF JUST., DEPARTMENT OF JUSTICE GUIDE TO THE FREEDOM OF INFORMATION ACT: PROCEDURAL REQUIREMENTS 42–43 (2020), <https://www.justice.gov/oip/page/file/1199421/download> [<https://perma.cc/X6KF-2BEV>].

146. *See* 5 U.S.C. § 552(a)(6)(A)(i).

147. *See id.* § 552(a)(4)(B). Most FOIA case law comes from the D.C. Circuit because, under FOIA, the D.C. Circuit is a proper venue for all FOIA litigation. *See id.* (venue for judicial review of FOIA denial is proper in district where requester resides, where records are, or in D.C. Circuit); Cox, *supra* note 19, at 392 n.24 (noting that, in 2008, 40 percent of all FOIA cases were filed in the D.C. Circuit).

“reasonably calculated to uncover all relevant documents” to fulfill their FOIA search obligation.¹⁴⁸ When a FOIA requester challenges the adequacy of the agency’s search for documents after receiving a denial, the agency must demonstrate that it made a “good faith effort to conduct a search for the requested records, using methods which can be reasonably expected to produce the information requested.”¹⁴⁹ The agency bears the burden at summary judgment to show that it complied with FOIA’s search requirement¹⁵⁰ and can rely on a “reasonably detailed affidavit”—including at least the search terms used and the type of search performed—to certify the adequacy of its search.¹⁵¹ Federal courts maintain that an agency’s affidavit averring to the search’s adequacy must be “relatively detailed and nonconclusory and submitted in good faith.”¹⁵² A declaration that outlines all the files reasonably believed to contain the requested records, the actual files searched, and the search terms used can satisfy this requirement.¹⁵³ Finally, federal courts do not require an affidavit from the person who actually performed the search and accept an affidavit from the person responsible for coordinating the search.¹⁵⁴

148. *Valencia-Lucena v. U.S. Coast Guard*, 180 F.3d 321, 325–26 (D.C. Cir. 1999) (quoting *Weisberg v. U.S. Dep’t of Just.*, 705 F.2d 1344, 1351 (D.C. Cir. 1983)). Because the D.C. Circuit hears most FOIA litigation, this Note refers to the standard articulated in the D.C. Circuit as “the federal standard.” *See supra* note 147. Notably, most circuits have adopted the reasonableness test articulated by the D.C. Circuit. *See, e.g.*, *Thomas v. Soc. Sec. Admin.*, 551 F. App’x 24, 24–25 (2d Cir. 2014); *Campbell v. Soc. Sec. Admin.*, 46 F. App’x 477, 480 (3d Cir. 2011); *Trentadue v. FBI*, 572 F.3d 794, 797–98 (10th Cir. 2009); *Urban v. United States*, 72 F.3d 94, 95 (8th Cir. 1995); *Maynard v. CIA*, 986 F.2d 547, 559–60 (1st Cir. 1993).

149. *Valencia-Lucena*, 180 F.3d at 325–26 (quoting *Oglesby v. U.S. Dep’t of the Army*, 920 F.2d 57, 68 (D.C. Cir. 1990)). Courts examine the search itself—as opposed to the results of the search or the remote possibility of responsive documents existing—to measure the adequacy of the search. *See Jud. Watch, Inc. v. U.S. Dep’t of State*, No. CV 15-687, 2021 WL 3363423, at *3 (D.D.C. Aug. 3, 2021); *Weisberg v. U.S. Dep’t of Just.*, 745 F.2d 1476, 1485 (D.C. Cir. 1984).

150. *See* 5 U.S.C. § 552(a)(4)(B) (“In such a case [where documents are improperly withheld] the court shall determine the matter de novo . . . and the burden is on the agency to sustain its action.”).

151. *See Valencia-Lucena*, 180 F.3d at 326 (quoting *Oglesby v. U.S. Dep’t of the Army*, 920 F.2d 57, 68 (D.C. Cir. 1990)); *see also Kowalczyk v. Dep’t of Just.*, 73 F.3d 386, 388 (D.C. Cir. 1996); *Weisberg v. U.S. Dep’t of Just.*, 705 F.2d 1344, 1351 (D.C. Cir. 1983).

152. *Ground Saucer Watch, Inc. v. CIA*, 692 F.2d 770, 771 (D.C. Cir. 1981) (quoting *Goland v. CIA*, 607 F.2d 339, 352 (D.C. Cir. 1978)).

153. *See Mobley v. CIA*, 806 F.3d 568, 581 (D.C. Cir. 2015) (stating that courts may rely on reasonably detailed affidavits asserting that “all files likely to contain responsive materials (if such records exist) were searched” to find that an agency has met their burden of proof for an adequate search (quoting *Oglesby v. U.S. Dep’t of the Army*, 920 F.2d 57, 68 (D.C. Cir. 1990)); *Iturralde v. Comptroller of the Currency*, 315 F.3d 311, 313–14 (D.C. Cir. 2003) (explaining that an affidavit containing the search terms, type of search performed, and averment that all files likely to contain responsive records were searched is adequate); *see also* U.S. DEP’T OF JUST., DEPARTMENT OF JUSTICE GUIDE TO THE FREEDOM OF INFORMATION ACT: LITIGATION CONSIDERATIONS 53–57 (2020), <https://www.justice.gov/oip/page/file/1205066/download> [<https://perma.cc/N3DC-QAXU>].

154. *See Carney v. U.S. Dep’t of Just.*, 19 F.3d 807, 814 (2d Cir. 1994) (“An affidavit from an agency employee responsible for supervising a FOIA search is all that is needed . . . there is no need for the agency to supply affidavits from each individual who participated in the actual search.”); *DiBacco v. Dep’t of Army*, 926 F.3d 827, 833 (D.C. Cir. 2019) (accepting

When evaluating the adequacy of an agency's search, federal courts maintain a standard of reasonableness that balances FOIA's broad presumption of disclosure with realistic expectations for federal agencies' search efforts.¹⁵⁵ Under this standard, an agency need not show that it located every single document a person requested under FOIA to meet its burden, and the adequacy of the search is determined "not by the fruits of the search, but by the appropriateness of [its] methods."¹⁵⁶ The federal standard underscores that adequacy—not perfection—is the standard to measure an agency's search,¹⁵⁷ and once the agency has met its initial burden of demonstrating the search's adequacy,¹⁵⁸ the requester can only overcome the agency's assertion with a showing of bad faith.¹⁵⁹ Although federal courts measure an agency's efforts under a standard of reasonableness,¹⁶⁰ they still require agencies to provide a reasonably detailed affidavit on appeal¹⁶¹ to meet the burden at summary judgment and to maintain FOIA's presumption of disclosure.¹⁶²

C. FOIA's Influence on FOIL and Sunshine Laws in Other States

Given the similarities between FOIL and FOIA, New York state courts treat FOIA case law as instructive in FOIL litigation.¹⁶³ Additionally, FOIA case law not only informs New York's sunshine law jurisprudence; various other states also adopt the federal reasonableness test to determine whether

declaration of supervisor who described search efforts based in part on information she received from employees); *SafeCard Servs., Inc. v. SEC*, 926 F.2d 1197, 1201 (D.C. Cir. 1991) (finding that person coordinating the U.S. Securities and Exchange Commission's search efforts was appropriate person to provide comprehensive affidavit even though some information was secondhand).

155. See, e.g., *Weisberg v. U.S. Dep't of Just.*, 745 F.2d 1476, 1485 (D.C. Cir. 1984).

156. *Iturralde*, 315 F.3d at 315; see also *Mobley*, 806 F.3d at 581 (finding that an agency search that does not find all relevant material is not necessarily inadequate); *Amnesty Int'l USA v. CIA*, 728 F. Supp. 2d 479, 498 (S.D.N.Y. 2010) (finding that the discovery of two additional documents did not render the search inadequate because the documents were located in a place that the CIA determined would likely not contain documents).

157. See *DiBacco v. U.S. Army*, 795 F.3d 178, 191 (D.C. Cir. 2015).

158. See 5 U.S.C. § 552(a)(4)(B); *Kean v. NASA*, 480 F. Supp. 2d 150, 156 (D.C. Cir. 2007) ("The burden of proof is on the government to show that its search was reasonably calculated to uncover all relevant documents.").

159. See *Maynard v. CIA*, 986 F.2d 547, 560 (1st Cir. 1993). Once the agency has supplied a proper affidavit outlining the search, that agency affidavit is afforded a presumption of good faith. See *Carney*, 19 F.3d at 812 ("Affidavits submitted by an agency are 'accorded a presumption of good faith' . . .") (quoting *SafeCard Servs., Inc. v. SEC*, 926 F.2d 1197, 1200 (D.C. Cir. 1991)). But see *Am. Oversight v. Off. of Mgmt. & Budget*, No. 18-cv-2424, 2020 WL 1536186, at *5 (D.D.C. Mar. 31, 2020) (noting that while requester cannot dictate search terms to the agency, if requester suggests demonstrably reasonable search terms, then the agency must still explain why the search terms were not used).

160. See *Weisberg*, 745 F.2d at 1485.

161. See *Iturralde*, 315 F.3d at 313–14.

162. See *Campbell v. U.S. Dep't of Just.*, 164 F.3d 20, 27 (D.C. Cir. 1998) ("The court applies a 'reasonableness' test to determine the 'adequacy' of a search methodology, consistent with congressional intent tilting the scale in favor of disclosure." (quoting *Weisberg v. U.S. Dep't of Just.*, 705 F.2d 1344, 1351 (D.C. Cir. 1983))).

163. See *infra* notes 167–68 and accompanying text; Part I.C.1.

their agencies have performed an adequate search for requested records.¹⁶⁴ This section highlights the instructive nature of FOIA case law in FOIL litigation, and points to several states that have mirrored their adequate search analysis after the federal standard.

1. Federal FOIA Case Law Is Instructive in New York FOIL Cases

New York legislators specifically patterned the 1977 FOIL after the federal FOIA,¹⁶⁵ and New York courts consider federal FOIA case law when interpreting FOIL's language.¹⁶⁶ In 1979, the New York Court of Appeals found that "[f]ederal case law and legislative history . . . are instructive" when analyzing the scope of a FOIL exemption.¹⁶⁷ As recently as 2018, the Court of Appeals continues to recognize the instructive nature of federal FOIA case law when interpreting FOIL.¹⁶⁸ The Court of Appeals's adoption of FOIA case law tracks New York statutory law directing courts to borrow from federal decisions when construing similar state statutes that are ambiguous.¹⁶⁹

2. Other States Have Adopted the Federal Reasonableness Test to Determine the Adequacy of an Agency's Search for Documents

New York is not the only state to adopt a sunshine law modeled after FOIA. Every state legislature has enacted its own freedom of information law "in some form or another."¹⁷⁰ In addition, several states joined New York in patterning their sunshine laws directly after the federal statute,

164. *See infra* Part I.C.2.

165. *See supra* note 45 and accompanying text.

166. *See Fink v. Lefkowitz*, 393 N.E.2d 463, 466 (N.Y. 1979) (citing federal courts' interpretations of FOIA); *see also Tesler*, *supra* note 93, at 98 (proposing that any comprehensive FOIL analysis requires a FOIA analysis because FOIL and FOIA maintain an undisputed parallel relationship).

167. *Fink*, 393 N.E.2d at 466 n.1.

168. *See Abdur-Rashid v. N.Y.C. Police Dep't*, 100 N.E.3d 799, 807, 833 (N.Y. 2018) (emphasizing that because FOIL is modeled after FOIA, the Court of Appeals looks to federal precedent when interpreting FOIL). In *Abdur-Rashid*, the court allowed the NYPD to adopt the federal practice known as the Glomar doctrine—under which an agency can deny a records request by failing to confirm or deny the existence of the records sought—because the very fact that the agency possessed the records would reveal information protected by exemption. *See id.* at 800, 813; *see also Hunt v. CIA*, 981 F.2d 1116, 1118 (9th Cir. 1992) (noting that the Glomar doctrine's namesake stems from the D.C. Circuit's decision upholding the CIA's refusal to confirm or deny the existence of documents related to the activities of the U.S.N.S. Hughes Glomar Explorer ship (citing *Phillippi v. CIA*, 546 F.2d 1109, 1011 (D.C. Cir. 1976))).

169. *See N.Y. STAT. LAW § 262 cmts.* (McKinney 2021) ("In determining the construction to be placed on an ambiguous statute, the [New York state] courts will seek light from practically any source which may help in arriving at the meaning of the act [W]hile federal decisions construing a federal statute are not binding on a New York state court construing a similar state statute, they are highly persuasive, and uniformity in interpretation is desirable.").

170. *Herald Publ'g Co. v. Barnwell*, 351 S.E.2d 878, 881 (S.C. 1986).

including California, Connecticut, Maryland, Michigan, Oregon, as well as the District of Columbia.¹⁷¹

Several states also adopt the federal standard for establishing an agency's burden to demonstrate that it performed an adequate search for documents.¹⁷² The Washington Supreme Court, in evaluating the adequacy of a Public Records Act¹⁷³ search, explicitly adopted the D.C. Circuit's reasonableness test and accepts "reasonably detailed, nonconclusory affidavits submitted in good faith" by an agency to meet their summary judgment burden.¹⁷⁴ The Court of Appeals of Maryland also utilizes the federal reasonableness test to analyze a response to a Public Information Act¹⁷⁵ request, emphasizing that the requester is at a disadvantage because they do not know what records the agency keeps or how the agency keeps them.¹⁷⁶ The Vermont Supreme Court held that an agency will meet its burden in responding to a Public Records Act¹⁷⁷ request if it provides reasonable assurance of an adequate search, which can include evidence of a "specified word search" for responsive documents.¹⁷⁸ Finally, in New Jersey, agency personnel responding to an Open Public Records Act¹⁷⁹ request must produce a statement setting forth "in detail" the search undertaken to fulfill the request, the responsive documents found, whether the documents or any part of the documents are confidential, and information regarding the agency's document destruction policy.¹⁸⁰

II. CERTIFYING A DILIGENT SEARCH IN PRACTICE: COMPARING ACCEPTABLE SEARCH CERTIFICATIONS UNDER FOIL AND FOIA

FOIL's legislative history demonstrates an intent to increase transparency and access for citizens seeking records from state agencies,¹⁸¹ and the statute's plain language calls for agencies to certify that they performed a

171. See generally Joe Regalia, *The Common Law Right to Information*, 18 RICH. J.L. & PUB. INT. 89, 113–14, 113 n.158 (2015).

172. Because this Note focuses on FOIL and its relation to FOIA, it only comments on several states for comparison and does not undertake a fifty-state survey on how each state evaluates the adequacy of an agency's search. For more information on search obligations in response to records requests under various state sunshine laws, see *Open Government Guide: Search Obligations*, REPS. COMM. FOR FREEDOM OF THE PRESS, <https://www.rcfp.org/open-government-sections/1-search-obligations/> [<https://perma.cc/G2Y5-SQFQ>] (last visited Oct. 7, 2022).

173. WASH. REV. CODE §§ 42.56.001–42.56.904 (2022).

174. See *Neighborhood All. of Spokane Cnty. v. Spokane Cnty.*, 261 P.3d 119, 127 (Wash. 2011).

175. 1970 Md. Laws 1970.

176. See *Glass v. Anne Arundel Cnty.*, 160 A.3d 658, 676 (Md. 2017) (stressing that a public records request should not be a game of "hide and seek").

177. VT. STAT. ANN. tit. 1, §§ 315–320 (2022).

178. See *Toensing v. Att'y Gen. of Vt.*, 178 A.3d 1000, 1012–13 (Vt. 2017).

179. N.J. REV. STAT. §§ 47:1A-1 to 47:4-6 (2022).

180. See *Paff v. N.J. Dep't of Lab.*, 920 A.2d 731, 736 (N.J. Super. Ct. App. Div. 2007).

181. See *supra* Parts I.A.1, I.B.1.

diligent search to that end.¹⁸² While requesters argue that an agency's certification should provide either detail or personal knowledge about the search, the New York Court of Appeals's decision in *Rattley* set a lower burden for agencies to confirm that they performed a diligent search justifying a FOIL denial.¹⁸³ FOIL requesters, unsatisfied with the court paving the way for agencies' denial and nondisclosure, argue that the *Rattley* standard dissolves the statutory distinction between a search and a "diligent search," allows an agency to meet its burden by regurgitating FOIL's language, and obstructs meaningful judicial review of agency decisions.¹⁸⁴

Part II.A analyzes the briefs filed by each party in the *Rattley* case to illuminate the key arguments for what the certification standard should be. Part II.B surveys examples of sufficient and insufficient diligent search certifications, before and after the *Rattley* decision, to demonstrate how the decision practically altered agencies' burden of proof in FOIL litigation. Finally, Part II.C outlines examples of sufficient and insufficient search certifications under the federal reasonableness test to demonstrate the different burdens placed on federal versus state agencies.

A. *The Rattley Briefs: Evaluating the Certification of a Diligent Search*

Section 89(3)(a) requires that an agency certify that a diligent search was performed to justify its inability to locate the requested documents, and thus properly deny a FOIL request.¹⁸⁵ Despite the fact that FOIL's requirement that the search be "diligent" goes further than FOIA's explicit search requirements,¹⁸⁶ the New York Court of Appeals notes in *Rattley* that FOIL does not specify how an agency must certify that it performed a diligent search.¹⁸⁷ The *Rattley* opinion spans only two short pages, but the briefs from the NYPD¹⁸⁸ and the Office of the Appellate Defender¹⁸⁹ (OAD) flesh out the main arguments for whether courts should require a specific description of the search or a statement from someone with personal

182. See N.Y. PUB. OFF. LAW § 89(3)(a) (McKinney 2022) ("[The agency] shall certify that it does not have possession of such record or that such record cannot be found after diligent search.").

183. See *Rattley v. N.Y.C. Police Dep't*, 756 N.E.2d 56, 58 (N.Y. 2001); *infra* Part II.B.

184. See *infra* Part II.B.

185. See PUB. OFF. § 89(3)(a). FOIL does not define "certify" or "diligent." See *id.* § 86. *But see generally Certify*, BLACK'S LAW DICTIONARY (11th ed. 2019) (defining "certify" as "[t]o authenticate or verify in writing" or "[t]o attest as being true or meeting certain criteria"); *Diligent*, BLACK'S LAW DICTIONARY (11th ed. 2019) (defining "diligent" as "[c]arried out with care and steady effort").

186. Compare 5 U.S.C. § 552(a)(3)(D), with PUB. OFF. § 89(3)(a); see *supra* Part I.B.1; *supra* note 145 and accompanying text.

187. See *Rattley*, 756 N.E.2d at 58 ("The statute does not specify the manner in which an agency must certify that documents cannot be located.").

188. See Appellant's Brief, *Rattley v. N.Y.C. Police Dep't*, 756 N.E.2d 56 (N.Y. 2001) (No. 401325/98), 2000 WL 34030595.

189. See Brief for Off. of the App. Def. as Amicus Curiae Supporting Petitioner, *Rattley v. N.Y.C. Police Dep't*, 756 N.E.2d 56 (N.Y. 2001) (No. 401325/98), 2001 WL 34151431. The Office of the Appellate Defender submitted an amicus curiae brief on behalf of Peter Rattley, who appeared pro se. See *id.* at *iii.

knowledge of the search for an agency to meet their section 89(3) certification obligation under FOIL.¹⁹⁰

The NYPD argued that an agency should not be required to give a detailed description of the search or an affirmation from the individual who carried out the search, and it cited several previous New York State cases allowing an agency to meet its burden under section 89(3) with similarly nondescript certifications.¹⁹¹ The NYPD argued that *Hynes*, relied on by the OAD, was distinguishable given its “unusual set of facts”: the certification that documents could not be found after a diligent search proved to be incorrect when the documents were later uncovered.¹⁹² The NYPD contended that a court should presume that government officials under oath will not act contrary to their official duties, therefore rendering the NYPD’s affirmation sufficient unless the requester could prove otherwise.¹⁹³ Finally, the NYPD insisted that requiring a detailed description of the search or a statement from individuals who performed the search would impose an “enormous burden” on agencies, and especially on the NYPD, given the agency’s size and the amount of FOIL requests that the agency receives.¹⁹⁴

In opposition, the OAD argued that the court’s acceptance of conclusory statements, lacking detail and made by persons without personal knowledge of the search, would render section 89(3)’s certification requirement “meaningless.”¹⁹⁵ The OAD argued for an interpretation of “certify,” as used in section 89(3), that requires the individual averring to the search performed have personal knowledge of the search.¹⁹⁶ Further, the OAD argued that a certification lacking any detailed description of the search frustrates both the chance for meaningful judicial review of the search¹⁹⁷ and the ability of the requester to then meet their burden and articulate a factual basis that the

190. See PUB. OFF. § 89(3)(a).

191. See Appellant’s Brief, *supra* note 188, at *7–9 (first citing *Gould v. N.Y.C. Police Dep’t*, 675 N.E.2d 808, 814 (N.Y. 1996); then *Vandenburg v. Wagner*, 704 N.Y.S.2d 739, 741 (App. Div. 3d Dep’t 2000); and then *Qayyam v. N.Y.C. Police Dep’t*, 642 N.Y.S.2d 28, 29 (App. Div. 1st Dep’t 1996)).

192. See *id.* at *10 (arguing that such a holding should be limited to similar circumstances when a diligent search certification proves incorrect (citing *Key v. Hynes*, 613 N.Y.S.2d 926, 927–28 (App. Div. 2d Dep’t 1994), *invalidated by Rattley v. N.Y.C. Police Dep’t*, 756 N.E.2d 56 (N.Y. 2001))).

193. See *id.* at *10–11 (citing *In re Marcellus’ Est.*, 58 N.E. 796, 798 (N.Y. 1900) (“The general presumption is that no official or person acting under an oath of office will do anything contrary to his official duty, or omit anything which his official duty requires to be done.”)); see also *Tesler*, *supra* note 93, at 88–89 (arguing that the language of FOIL does not suspend the “presumption of regularity” principle, which dictates that an agency’s representation that they could not locate documents implies that a diligent search was performed absent a showing to the contrary).

194. See Appellant’s Brief, *supra* note 188, at *11–12.

195. See Brief for Off. of the App. Def. as Amicus Curiae Supporting Petitioner, *supra* note 189, at *6.

196. See *id.* at *6–8 (citing *Key v. Hynes*, 613 N.Y.S.2d 926, 928 (App. Div. 2d Dep’t 1994) (finding the conclusory statement that a diligent search was performed was insufficient to permit the court to determine whether the agency had indeed conducted the search, and therefore requiring the agency to submit a more detailed affidavit), *invalidated by Rattley v. N.Y.C. Police Dep’t*, 756 N.E.2d 56 (N.Y. 2001)).

197. See *id.* at *8–10.

documents exist to secure a hearing on the issue.¹⁹⁸ Finally, the OAD emphasized that FOIL mandates broad public access to government records despite the inherent burden posed to government agencies, and contended that allowing an agency to deny requests with vague, conclusory statements is antithetical to this purpose.¹⁹⁹

Faced with two opposing interpretations of an agency's FOIL obligation to certify a diligent search, the New York Court of Appeals adopted the lower standard more favorable to agencies²⁰⁰ and explicitly abrogated previous appellate decisions to the contrary.²⁰¹ In addition to shifting the certification standard in New York state courts, the *Rattley* decision altered COOG advisory opinions regarding FOIL's certification requirements.²⁰² The Court of Appeals's holding lowered the bar for agencies to demonstrate compliance with FOIL, invalidated previous New York case law requiring more detail from agencies,²⁰³ and created a foundation for future dismissals of requesters' challenges to FOIL denials.²⁰⁴

B. Comparing Sufficient Certifications Pre-Rattley and Post-Rattley

Part II.B explains how the *Rattley* decision relaxed an agency's burden to certify that a diligent search was performed—and thus satisfy its statutory obligation under FOIL—when informing a requester that it could not find the requested documents. The disparity between search certifications found to be insufficient pre-*Rattley* and those found to be sufficiently diligent post-*Rattley* illuminates *Rattley*'s practical effect on FOIL searches and certifications. Part II.B.1 evaluates how the *Rattley* standard works in practice to evaluate search certifications. Part II.B.2 examines how the *Rattley* standard shifted the balance of burdens facing the agency and requester in FOIL litigation. Finally, Part II.B.3 emphasizes the discrepancy under *Rattley* between the justifications required to deny a request after a

198. *See id.* at *11–12.

199. *See id.* at *13 (“FOIL ‘imposes a broad duty to make certain records publicly available irrespective of the private interests and the attendant burdens involved.’” (alteration in original) (quoting *Gould v. N.Y.C. Police Dep’t*, 675 N.E.2d 808, 814 (N.Y. 1996))); *see also* N.Y. PUB. OFF. LAW § 89(3) (McKinney 2022) (“An agency shall not deny a request on the basis that the request is voluminous or that locating or reviewing the requested records or providing the requested copies is burdensome . . .”).

200. *See Rattley v. N.Y.C. Police Dep’t*, 756 N.E.2d 56, 58 (N.Y. 2001). The *Rattley* opinion did not expand on its interpretation of FOIL's certification requirement, only noting the statute's failure to specify how any agency must certify the search performed. *See id.* at 58.

201. *See id.* (“To the extent that some courts have held to the contrary, those decisions are not to be followed.” (first citing *Key v. Hynes*, 613 N.Y.S.2d 926 (App. Div. 2d Dep’t 1994), *invalidated by Rattley v. N.Y.C. Police Dep’t*, 756 N.E.2d 56 (N.Y. 2001); then *Bellamy v. N.Y.C. Police Dep’t*, 708 N.Y.S.2d 5 (App. Div. 1st Dep’t 2000); and then *Sanders v. Bratton*, 718 N.Y.S.2d 19 (App. Div. 1st Dep’t 2000))).

202. *See, e.g.*, Comm. on Open Gov’t, *supra* note 64 (directing FOIL requester to *Rattley* holding for agency's requirement to certify diligent search in New York state court, and noting that *Hynes* was the previous standard before *Rattley* held to the contrary).

203. *See Rattley*, 756 N.E.2d at 58.

204. *See infra* Part II.B.

diligent search under section 89(3) and those required to deny a request under a specific section 87(2) exemption.

1. *Rattley's* Lower Standard Changes New York State Courts' Ability to Weed Out Diligent Searches from Ineffective Searches

Rattley's standard allowing an agency to meet its certification burden with conclusory statements affects the ability of New York state courts to determine whether the search was diligent and also threatens the capacity to preserve the issue of the search's diligence for subsequent review.²⁰⁵ Before *Rattley*, in *Hynes*, the Second Department held that an assistant district attorney's affirmation that "[a]fter a diligent search, this office does not have petitioner's file"²⁰⁶ did not satisfy FOIL's diligent search certification requirement.²⁰⁷ The *Hynes* court found that the response containing "entirely conclusory terms" did not permit the court to make a meaningful determination as to whether the agency had actually performed a diligent search as mandated by section 89(3).²⁰⁸ The Second Department's holding in *Hynes* emphasizes the utility of more-than-conclusory statements to guarantee agency compliance with FOIL's diligent search requirement and to facilitate meaningful judicial review of an agency's response to a FOIL request in an Article 78 hearing.²⁰⁹ Before *Rattley*, New York courts consistently applied the *Hynes* standard.²¹⁰

The facts of the *Hynes* case highlight the practical implications of FOIL's requirement that agencies diligently search for documents. After an assistant district attorney affirmed that the district attorney's office did not have the petitioner's file, the requested file was subsequently found.²¹¹ Yet the situation of an agency denying a request because its diligent search failed to locate the documents, then subsequently finding the very same documents, is

205. See, e.g., *Thomas v. Recs. Access Officer*, 613 N.Y.S.2d 929, 929 (App. Div. 2d Dep't 1994) ("[I]t is error to accept wholly conclusory allegations as a substitute for proof that an agency governed by the Freedom of Information Law has been unable to locate a document after having conducted a 'diligent search.'" (quoting N.Y. PUB. OFF. LAW § 89(3) (McKinney 2022))), *invalidated by Rattley v. N.Y.C. Police Dep't*, 756 N.E.2d 56 (N.Y. 2001).

206. *Key v. Hynes*, 613 N.Y.S.2d 926, 927–28 (App. Div. 2d Dep't 1994), *invalidated by Rattley v. N.Y.C. Police Dep't*, 756 N.E.2d 56 (N.Y. 2001).

207. See *id.* at 928 (emphasizing that, in the FOIL context, conclusory allegations are "legally valueless," especially when made by an individual without direct knowledge of the search at issue).

208. See *id.*

209. See *id.*; *supra* notes 205–07 and accompanying text.

210. See *Hynes*, 613 N.Y.S.2d at 928; see also *Bellamy v. N.Y.C. Police Dep't*, 708 N.Y.S.2d 5, 8 (App. Div. 1st Dep't 2000), *invalidated by Rattley v. N.Y.C. Police Dep't*, 756 N.E.2d 56 (N.Y. 2001); *Sanders v. Bratton*, 718 N.Y.S.2d 19, 22 (App. Div. 1st Dep't 2000), *invalidated by Rattley v. N.Y.C. Police Dep't*, 756 N.E.2d 56 (N.Y. 2001); *Cuadrado v. Morgenthau*, 699 N.Y.S.2d 367, 368 (App. Div. 1st Dep't 1999) (holding that a district attorney did not sustain his burden of demonstrating that he diligently searched for files related to a petitioner's conviction, and ordering the district attorney to not only perform a diligent search, but also to describe how his office stores videotapes); *Thomas*, 613 N.Y.S.2d at 929.

211. See *Hynes*, 613 N.Y.S.2d at 927–28.

not an anomaly unique to the *Hynes* case. In *Davis v. Scott*,²¹² an incarcerated individual in New York brought an Article 78 proceeding challenging the denial of his FOIL request by the New York City Department of Correction (DOC). The Supreme Court of the State of New York, New York County, found the agency's conclusory memoranda—which stated that a diligent search did not turn up any documents—to be insufficient to fulfill its statutory burden.²¹³ Subsequently, the court discovered that the DOC employee who had written the memo that a diligent search had been performed in fact did not search for the records at all because they were kept at another DOC facility.²¹⁴ When the court ordered the employee to call the other facility about the requested records following a hearing, the records were located “within minutes.”²¹⁵

The realistic possibility that an agency's search fails to uncover documents requested by citizens under FOIL—even by honest mistake—highlights the importance of the burden on an agency to demonstrate that they in fact performed a diligent search, as well as the statutory mechanisms that allow the court to review the search.²¹⁶ Federal courts contemplating this possibility hold that requested documents uncovered after the certification do not necessarily render the certification insufficient, as long as the agency has effectively demonstrated that the initial search was adequate.²¹⁷ Yet *Rattley*'s shift from requiring an agency to provide some detailed specificity or personal knowledge about the search²¹⁸ to requiring neither details about the search nor personal knowledge²¹⁹ hinders a court's ability to evaluate the search performed and to discern whether failure to find the requested documents stems from honest mistake or lack of diligence.²²⁰

In *Leibowicz v. New York State Department of Taxation & Finance*,²²¹ the Supreme Court of the State of New York, Appellate Division, Third Judicial Department, applied *Rattley* and held that the agency's affidavits stating that a diligent search did not uncover requested documents satisfied its section 89(3) obligations.²²² After the respondent's certification, an additional document that was “specifically identified” in the petitioner's request was

212. N.Y. L.J., Nov. 23, 1999, at 32, <https://opengovernment.ny.gov/system/files/documents/2021/01/davis-v.-scott.pdf> [<https://perma.cc/3NVU-S9J2>].

213. *See id.*

214. *See id.*

215. *See id.* The New York County Supreme Court imposed sanctions on the DOC and stated that further sanctions would be imposed if the records were not delivered in two days. *See id.*

216. *See, e.g., Hynes*, 613 N.Y.S.2d at 927–28; *Leibowicz v. N.Y. State Dep't of Tax'n & Fin.*, 919 N.Y.S.2d 917, 917 (App. Div. 3d Dep't 2011).

217. *See supra* notes 156–59 and accompanying text.

218. *See, e.g., Hynes*, 613 N.Y.S.2d at 928.

219. *See Rattley v. N.Y.C. Police Dep't*, 756 N.E.2d 56, 58 (N.Y. 2001).

220. *See, e.g., Davis*, N.Y. L.J., at 32 (finding bad faith and ordering sanctions when agency personnel certified that a diligent search uncovered no documents, but the documents were later located within minutes after one phone call).

221. 919 N.Y.S.2d 917 (App. Div. 3d Dep't 2011).

222. *See id.*

found and provided to the petitioner.²²³ However, the Third Department held that the additional document's discovery did not invalidate the respondent's certification because the agency satisfied its initial burden under *Rattley*.²²⁴ Since *Rattley* requires neither a detailed description of the search nor a statement from an official with personal knowledge of the search,²²⁵ the court must take the agency at its word that the search was diligent despite the mistake, rather than assessing whether the agency's efforts were diligent in the first place.

2. How *Rattley*'s Burden-Shifting Framework Places the Burden on the Requester to Justify Disclosure

New York cases in which courts have found that agency certifications do not meet the *Rattley* standard and specified how an agency can cure the deficiency demonstrate the ease with which agencies meet their burden to certify a diligent search under *Rattley*. In *Oddone v. Suffolk County Police Department*,²²⁶ the Second Department held that an officer's assertion that a diligent search did not produce requested documents was insufficient under *Rattley* because the officer stated that "he had 'been informed' that a diligent search had been conducted by an unidentified source."²²⁷ The court noted that because the assertion was not based on any evidence on the record, the police department could not demonstrate that the determination was not arbitrary and capricious.²²⁸ But following the appellate court's decision, a lower court found on remand that a subsequent affidavit from the police department cured the initial deficiency.²²⁹ Although the two subsequent police affidavits did not provide any additional details about the search, the court held that they cured the initial deficiency because the officer submitting them stated that she supervised the search.²³⁰

Additional rare cases in which an agency fails to meet its certification burden under *Rattley* reveal that this standard effectively filters out cases in which the agency indicates that no search was made at all and cases in which the certification's language does not match the language in section 89(3). In *Kairis v. Fischer*,²³¹ an incarcerated individual submitted a FOIL request for documents relating to his lost property claim.²³² He received no response

223. *See id.*

224. *See id.*

225. *See Rattley v. N.Y.C. Police Dep't*, 756 N.E.2d 56, 58 (N.Y. 2001).

226. 946 N.Y.S.2d 580 (App. Div. 2d Dep't 2012).

227. *Id.* at 583 (quoting assertion by an officer).

228. *See id.*

229. *See Oddone v. Suffolk Cnty. Police Dep't*, No. 002036/2011, 2013 WL 361143 (N.Y. Sup. Ct. Jan. 11, 2013) (citing *Rattley v. N.Y.C. Police Dep't*, 756 N.E.2d 56, 58 (N.Y. 2001)). An employee of the Suffolk County Police Department submitted two affidavits. *See id.* The first affidavit stated that an additional diligent search was conducted, producing no documents. *See id.* The second affidavit added that the employee supervised the search, but did not add details regarding the steps taken in the search for documents. *See id.*

230. *See id.*

231. 973 N.Y.S.2d 887 (App. Div. 3d Dep't 2013).

232. *See id.* at 888.

because the records coordinator mistakenly believed that the request had been withdrawn, and the court remitted the matter because the agency certification revealed that no search was performed at all.²³³ In *Baez v. Brown*,²³⁴ the Second Department held that an agency's statement did not meet the certification requirement under *Rattley* because the statement read that "nothing in the case file met [the petitioner's] description of these items."²³⁵ Here, the Second Department remanded the matter to the lower court because the certification did not state that the search was "diligent."²³⁶ These cases indicate that the *Rattley* standard filters out certifications that fail to produce evidence of any search at all,²³⁷ as well as statements that fail to include the language in section 89(3),²³⁸ and that an agency can easily cure a deficiency to meet its *Rattley* burden.²³⁹

After an agency meets the low bar for certifying compliance with FOIL's diligent search requirement under *Rattley*, the burden then shifts back to the requester, who faces a high bar in rebutting the agency's certification to earn a hearing on the issue of the search's diligence.²⁴⁰ In *Jackson v. Albany County District Attorney's Office*,²⁴¹ a criminal defendant commenced an Article 78 proceeding after his numerous FOIL requests to the Albany County district attorney for photographs relating to his criminal case elicited no response.²⁴² An assistant district attorney then stated that, based on his review of the records and from conversations with the staff that maintained records, no records could be found after a diligent search.²⁴³ Citing *Rattley*, the Third Department held that the assistant district attorney's averment satisfied the office's section 89(3) diligent search obligation.²⁴⁴ The requester then introduced a police department property report listing a roll of

233. *See id.*

234. 1 N.Y.S.3d 376 (App. Div. 2d Dep't 2015).

235. *Id.* at 380 (quoting statement by a records access officer). In *Baez*, an incarcerated individual submitted a FOIL request for documents relating to his trial and conviction. *See id.* at 378. After denying certain requested documents pursuant to FOIL exemptions, the records access officer also denied certain materials because she stated that she could not find them. *See id.* at 378–80.

236. *See id.* at 380.

237. *See Kairis*, 973 N.Y.S.2d at 888; *see also* *Thomas v. Kane*, 163 N.Y.S.3d 464, 465–66 (App. Div. 3d Dep't 2022) (finding respondent police department's diligent search certification to be insufficient because respondent certified that a diligent search did not uncover dashboard camera video, whereas petitioner requested information regarding the retention of dashboard camera video, not the video itself).

238. *See Baez*, 1 N.Y.S.3d at 380.

239. *See Oddone v. Suffolk Cnty. Police Dep't*, No. 002036/2011, 2013 WL 361143 (N.Y. Sup. Ct. Jan. 11, 2013).

240. *See Gould v. N.Y.C. Police Dep't*, 675 N.E.2d 808, 814 (N.Y. 1996) (noting that if agency meets its burden to certify a diligent search, FOIL requester can rebut the certification and receive a hearing if they can "articulate a demonstrable factual basis to support [the] contention" that the agency possesses the documents).

241. 113 N.Y.S.3d 313 (App. Div. 3d Dep't 2019).

242. *See id.*

243. *See id.* at 315. The assistant district attorney also stated that if the records did previously exist, they were either not maintained by the respondent or could not be found by the respondent after a diligent search. *See id.*

244. *See id.* (citing *Rattley v. N.Y.C. Police Dep't*, 756 N.E.2d 56, 58 (N.Y. 2001)).

film as evidence that the photographs in fact existed, but the court held that this did not constitute a “demonstrable factual basis . . . that the requested documents existed and were within the entity’s control” sufficient to earn a hearing to review the agency’s search.²⁴⁵

In *Oddone*, the petitioner was able to meet the high demonstrable-factual-basis standard needed to rebut the agency’s assertion.²⁴⁶ There, in response to a FOIL request, the police department turned over only about eighty pages of documents from eighteen witness interviews, but the petitioner averred that there were seventy witnesses in the criminal trial, and that a police officer had testified with a six-inch binder full of documents.²⁴⁷ However, many more requesters lack the compelling evidence to meet the high standard and are denied a hearing to review agency search efforts²⁴⁸ as in *Jackson*.²⁴⁹ In *Gould v. New York City Police Department*,²⁵⁰ for example, the petitioner’s statement that the requested documents previously existed was insufficient to form a demonstrable factual basis needed to grant a hearing on the diligence issue.²⁵¹ In *DeFreitas v. New York State Police Crime Lab*,²⁵² although the agency produced 1,356 pages of requested DNA testing documents relating to an incarcerated individual’s conviction, the requester was not able to establish a demonstrable factual basis that documents relating to the discrepancy and error rates behind that same DNA testing existed.²⁵³ FOIL’s legislative history demonstrates an intent to place the burden of nondisclosure on the agency,²⁵⁴ but *Rattley* allows agencies to easily shift the burden back to the requester. This leaves petitioners who cannot generate sufficient evidence without legal recourse in the form of a hearing guaranteed under section 89(4) and without the requested documents guaranteed under section 89(3).

245. *Id.* (quoting *Gould v. N.Y.C. Police Dep’t*, 675 N.E.2d 808, 814 (N.Y. 1996)).

246. *See* *Oddone v. Suffolk Cnty. Police Dep’t*, 946 N.Y.S.2d 580, 584 (App. Div. 2d Dep’t 2012); *see also* *Surveillance Tech. Oversight Project v. N.Y.C. Police Dep’t*, No. 156442/2021, 2021 N.Y. Misc. LEXIS 6780, at *8–11 (Sup. Ct. Dec. 28, 2021) (finding petitioner met demonstrable-factual-basis standard to prove that NYPD possessed materials related to accuracy and bias of facial recognition software—despite NYPD’s diligent search certification to the contrary—by highlighting the existence of publicly available NYPD documents that specifically referenced source materials relied on in developing department protocols for facial recognition technology).

247. *See* *Oddone*, 946 N.Y.S.2d at 582.

248. *See* *Tesler*, *supra* note 93 and accompanying text.

249. *See* *Jackson*, 113 N.Y.S.3d at 315 (finding that submission of police department report listing roll of film was insufficient to articulate demonstrable factual basis that department possessed photographs).

250. 675 N.E.2d 808, 814 (N.Y. 1996).

251. *See id.*

252. 35 N.Y.S.3d 598 (App. Div. 3d Dep’t 2016).

253. *See id.* at 599–600.

254. *See supra* notes 51–53 and accompanying text.

3. *Rattley's* Reliance on Formalism over Substance to Assess the Adequacy of an Agency's Search

Under *Rattley*, New York state courts allow agencies to certify that they performed a diligent search uncovering no documents without providing a detailed description of the underlying search.²⁵⁵ Conversely, courts do not allow agencies to justify a denial under a specific section 87(2) exemption using similarly nondescript certifications, instead requiring a showing of particularized suspicion.²⁵⁶ In *McFadden v. Fonda*,²⁵⁷ an incarcerated individual filed a FOIL request with the police for forensic evidence from three victims in his criminal case.²⁵⁸ The police provided the evidence for one victim, denied the request for the next victim on the grounds that a diligent search did not uncover responsive records, and denied the request for the final victim pursuant to a FOIL law enforcement exemption.²⁵⁹

In an Article 78 proceeding challenging the denials, the Third Department held that the section 89(3) denial based on a diligent search producing no documents was proper under *Rattley*,²⁶⁰ but the section 87(2) denial pursuant to a FOIL exemption was improper.²⁶¹ The court found that the police did not demonstrate specific justifications as to why the requested record was exempted from disclosure under FOIL, but instead “merely paraphrased the statutory language of the exemptions without describing the records withheld or providing any factual basis for its conclusory assertions.”²⁶² Thus, the court allowed the agency to parrot FOIL's language to meet its burden for a denial after a diligent search under *Rattley*, but did not allow the agency to similarly paraphrase the statutory language to meet its burden of proof for a denial pursuant to a specific exemption.

In *Grabell v. New York City Police Department*,²⁶³ the requester brought an Article 78 proceeding to challenge the NYPD's denial of a FOIL request for documents relating to the NYPD's use of Z Backscatter Vans to combat terrorism.²⁶⁴ The First Department held that the NYPD's section 87(2) denial of certain requested documents pursuant to specific exemptions was improper, but that its section 89(3) denial of documents based on a statement that a diligent search failed to produce requested documents was proper.²⁶⁵ The court held that the NYPD's affidavit did not adequately explain how

255. See *Rattley v. N.Y.C. Police Dep't*, 756 N.E.2d 56, 58 (N.Y. 2001).

256. See *Gould*, 675 N.E.2d at 811 (explaining that “to invoke one of the exemptions of section 87(2), the agency must articulate ‘particularized and specific justification’ for not disclosing requested documents” (quoting *Fink v. Lefkowitz*, 393 N.E.2d 463, 465 (N.Y. 1979))).

257. 50 N.Y.S.3d 605 (App. Div. 3d Dep't 2017).

258. See *id.* at 607.

259. See *id.*

260. See *id.* at 608 (citing *Rattley v. N.Y.C. Police Dep't*, 756 N.E.2d 56, 58 (N.Y. 2001)).

261. See *id.* at 608–09.

262. *Id.* at 609.

263. 32 N.Y.S.3d 81 (App. Div. 1st Dep't 2016).

264. See *id.* at 83–84.

265. See *id.* at 84.

documents concerning the van's radiation and health effects could be exploited by terrorists, thus allowing for the records to fall under the specific exemption,²⁶⁶ but accepted the NYPD's affidavit averring that they conducted a diligent search without further justification.²⁶⁷ The First Department therefore found that the lower court erred in ordering the NYPD to submit an affidavit describing the search.²⁶⁸

The decisions in *McFadden* and *Grabell* uncover New York state courts' acceptance of formalism, focusing on whether the agency's denial contains the proper language rather than substantively evaluating the actual diligence of the search performed under *Rattley*. The *Hynes* court emphasized that the requirement of evidentiary proof—and the notion that conclusory statements are insufficient to supply such proof—applies equally when an agency denies a FOIL request because they cannot find a document or when a document is exempted from disclosure.²⁶⁹ New York state courts maintain a high burden of proof to justify a section 87(2) denial by exemption,²⁷⁰ but allow agencies to justify a section 89(3) denial by paraphrasing FOIL's language.²⁷¹ Given this disparity between the burden of proof facing an agency seeking to justify a section 87(2) denial compared to when it seeks to justify a section 89(3) denial, the inability to locate documents becomes an advantage for the agency, given the easier path for justifying final denial under *Rattley*.

C. Comparing Acceptable Certifications of Adequate Searches Under the Federal Standard and the Rattley Standard

While New York state courts relying on *Rattley* do not require an agency to supply either a detailed description of the search or a statement from the official who performed the search to affirm the search's adequacy,²⁷² federal courts require more. When a FOIA requester challenges the adequacy of an

266. *See id.* In *Grabell*, petitioner requested documents pertaining to the NYPD's use of Z Backscatter Vans. *See id.* at 83. To demonstrate that the requested documents were exempted, deputy commissioner of intelligence and counterterrorism Richard Daddario provided an affidavit explaining how releasing information about the NYPD's operational tactics and strategy would undermine ongoing counterterrorism operations and increase the likelihood of another terrorist attack. *See id.* at 84. While the court held that the affidavit properly established that most of the documents were exempted from disclosure under FOIL, the court found that the affidavit did not explain how tests and reports about radiation and other health effects from the vans qualified for FOIL's law enforcement exemption, and concluded that the lower court properly directed the NYPD to disclose those documents. *See id.* at 83–84.

267. *See id.* at 84 (citing *Rattley v. N.Y.C. Police Dep't*, 756 N.E.2d 56, 58 (N.Y. 2001)).

268. *See id.*

269. *See Key v. Hynes*, 613 N.Y.S.2d 926, 928 (App. Div. 2d Dep't 1994) (“There is no basis in law or in reason to apply . . . a rule any different from the general rule of civil practice which states that conclusory allegations . . . are legally valueless.”), *invalidated by Rattley v. N.Y.C. Police Dep't*, 756 N.E.2d 56 (N.Y. 2001).

270. *See, e.g.,* *McFadden v. Fonda*, 50 N.Y.S.3d 605, 608–09 (App. Div. 3d Dep't 2017); *Grabell*, 32 N.Y.S.3d at 84.

271. *See McFadden*, 50 N.Y.S.3d at 608; *Grabell*, 32 N.Y.S.3d at 84; *see also Baez v. Brown*, 1 N.Y.S.3d 376, 380 (App. Div. 2d Dep't 2015) (holding that agency's certification failing to contain averment as to diligence in search performed did not meet *Rattley* standard).

272. *See Rattley v. N.Y.C. Police Dep't*, 756 N.E.2d 56, 58 (N.Y. 2001).

agency's search, the agency must show that it has "conducted a search reasonably calculated to uncover all relevant documents,"²⁷³ and it can meet this burden by producing a "reasonably detailed affidavit, setting forth the search terms and the type of search performed."²⁷⁴ Unlike New York state courts, the D.C. Circuit requires a reasonable amount of detail regarding the search so that a requester can meaningfully challenge the adequacy of the search, and a district court can effectively evaluate whether the search was adequate.²⁷⁵ If any agency's affidavit lacks such detail and leaves doubt as to whether the agency performed a sufficient FOIA search, ruling for the agency at summary judgment is improper.²⁷⁶

The federal reasonableness standard requires more than a conclusory affidavit from an agency to meet its FOIA burden. The result is that, compared to New York agencies, federal agencies provide more detail about their searches to requesters and courts to justify a denial.²⁷⁷ In *Freedom Watch, Inc. v. National Security Agency*,²⁷⁸ the NSA met its burden by providing declarations outlining the full-text electronic searches used to look for terms relevant to the FOIA request.²⁷⁹ In *Baker & Hostetler LLP v. United States Department of Commerce*,²⁸⁰ the D.C. Circuit held that the U.S. Department of Commerce met its burden by providing an affidavit outlining in detail the manner and method of the searches conducted.²⁸¹ On the other hand, in *Morley v. Central Intelligence Agency*,²⁸² the D.C. Circuit held that the CIA's declaration that "records . . . were a product of a reasonable, diligent and thorough search" did not provide the court with enough detail to assess the search's adequacy.²⁸³ Because federal courts require more detailed certifications than New York courts do under *Rattley*, district courts can discern what searches are sufficient based on the facts of

273. *Weisberg v. U.S. Dep't of Just.*, 705 F.2d 1344, 1351 (D.C. Cir. 1983). The D.C. Circuit emphasizes that the agency need not provide the meticulous details of a massive search but must provide an adequately reasonable description of the search. *See Perry v. Block*, 684 F.2d 121, 127 (D.C. Cir. 1982).

274. *Oglesby v. U.S. Dep't of the Army*, 920 F.2d 57, 68 (D.C. Cir. 1990).

275. *See id.* (emphasizing that such an affidavit is "necessary to afford a FOIA requester an opportunity to challenge the adequacy of the search and to allow the district court to determine if the search was adequate").

276. *See Truitt v. Dep't of State*, 897 F.2d 540, 542 (D.C. Cir. 1990).

277. *See, e.g., Maynard v. CIA*, 986 F.2d 547, 559–60 (1st Cir. 1993) (establishing that a satisfactory affidavit should at least describe the search's scope and methods, as well as the general layout of the agency's filing system).

278. 783 F.3d 1340 (D.C. Cir. 2015).

279. *See id.* at 1345.

280. 473 F.3d 312 (D.C. Cir. 2006).

281. *See id.* at 318.

282. 508 F.3d 1108 (D.C. Cir. 2007).

283. *Id.* at 1121, 1124 ("[V]ague, conclusory affidavits, or those that merely paraphrase the words of a statute, do not allow a reviewing judge to safeguard the public's right of access to government records." (quoting *Church of Scientology of Cal., Inc. v. Turner*, 662 F.2d 784, 787 (D.C. Cir. 1980))).

the search performed and develop jurisprudence on what constitutes an adequate search, unlike New York state courts.²⁸⁴

Federal courts afford agency affidavits a presumption of good faith,²⁸⁵ but this presumption only applies once an agency meets its initial burden of proof with a reasonably detailed affidavit attesting to the search performed.²⁸⁶ Once the agency meets its initial burden, the burden shifts back to the requester, who can then rebut the agency's affidavit only with evidence of the agency's bad faith.²⁸⁷ The contrast between the burden-shifting frameworks in federal court and New York state court illuminates the more difficult path for challenging an agency's denial under FOIL than under FOIA. Federal courts afford a presumption of good faith only after the agency meets its initial burden with reasonable detail,²⁸⁸ and the good-faith presumption does not substitute for the need to demonstrate the search's adequacy.²⁸⁹ But under *Rattley*, because an agency need not provide details and can meet its burden by parroting FOIL's language, a New York state agency's certification receives a de facto presumption of good faith, and the burden swings back to the requester quasi-automatically.²⁹⁰

The burden-shifting in *Rattley*—favorable to agencies and unfavorable to requesters—is especially detrimental to citizens in sunshine law litigation because the agency alone has knowledge of the documents it possesses and information about the searches it performs.²⁹¹ During FOIL's enactment and amendment, New York legislators recognized this same imbalance favoring the agency and therefore intended for the agency to bear the burden of proof to justify nondisclosure.²⁹² But *Rattley* creates a lighter burden on New York

284. See, e.g., *id.* at 1124; *Oglesby v. U.S. Dep't of the Army*, 920 F.2d 57, 68 (D.C. Cir. 1990); *supra* Part II.B.

285. See, e.g., *Carney v. U.S. Dep't of Just.*, 19 F.3d 807, 812 (2d Cir. 1994) (citing *SafeCard Servs., Inc. v. SEC*, 926 F.2d 1197, 1200 (D.C. Cir. 1991)).

286. See 5 U.S.C. § 552(a)(4)(B); *Carney*, 19 F.3d at 812.

287. See *Maynard v. CIA*, 986 F.2d 547, 560 (1st Cir. 1993) (noting that a sufficient agency affidavit cannot be rebutted by “purely speculative claims about the existence and discoverability of other documents” (quoting *Ground Saucer Watch, Inc. v. CIA*, 692 F.2d 770, 771 (D.C. Cir. 1981))).

288. See *Carney*, 19 F.3d at 812.

289. See *Morley v. CIA*, 508 F.3d 1108, 1121, 1124 (D.C. Cir. 2007).

290. Compare *Carney*, 19 F.3d at 812, with *Grabell v. N.Y.C. Police Dep't*, 32 N.Y.S.3d 81, 84 (App. Div. 1st Dep't 2016); see also *supra* note 193 and accompanying text.

291. See *Vaughn v. Rosen*, 484 F.2d 820, 824–25 (D.C. Cir. 1973) (emphasizing that only agencies have the information necessary to categorize documents as exempt from disclosure, and that the lack of knowledge held by requesters “seriously distorts the traditional adversary nature of our legal system . . .” where both sides should generally have access to relevant facts); see also A. Jay Wagner, “*Longstanding, Systemic Weaknesses*”: *Hillary Clinton's Emails, FOIA's Defects and Affirmative Disclosure*, 29 U. FLA. J.L. & PUB. POL'Y 359, 391–92 (2019) (concluding that the “inherent imbalance of the requestor release system” disfavors FOIA requesters and favors agencies because agencies protect their time and resources, while requesters only pursue their requested records, resulting in the court presuming good faith on behalf of agency searches).

292. See Press Release, Mario M. Cuomo, *supra* note 51 (emphasizing that the 1977 FOIL amendments allocate burden of proof of record denial to the agency); Esposito, *supra* note 52 (arguing that placing the burden of proof on the requester to justify disclosure is inconsistent with FOIL's presumption of disclosure and access); Letter from Robert J. Dryfoos to Judah

agencies to certify the adequacy of their search and removes a key incentive that compels document disclosure.²⁹³ On the contrary, federal courts maintain this incentive by requiring a search reasonably calculated to uncover the documents, as well as a reasonably detailed affidavit describing the search performed.²⁹⁴ Federal courts are not alone in maintaining a reasonableness standard. State courts in Washington,²⁹⁵ Maryland,²⁹⁶ Vermont,²⁹⁷ and New Jersey²⁹⁸ require agencies to provide a reasonable level of detail about the search performed to ensure compliance with the state's sunshine law. After *Rattley*, New York agencies face less resistance on the path to nondisclosure and denial, while requesters in federal court seeking documents under FOIA—as well as requesters in states that apply a reasonableness standard—benefit from a stronger likelihood of successfully receiving documents.

III. REVISITING *RATTLEY*: JUDICIAL AND LEGISLATIVE SOLUTIONS TO REALIGN THE DILIGENT SEARCH STANDARD WITH FOIL'S PROMISE OF TRANSPARENCY AND DISCLOSURE

The time is now for the New York Court of Appeals and the New York state legislature to revisit FOIL and rectify the deficiencies of the diligent search certification standard under *Rattley*. In unprecedented times when everyday citizens rely with increasing urgency on the guidance and action of their state—particularly during the COVID-19 pandemic²⁹⁹—transparency, accountability, and access to information matter. FOIL guarantees such access, but *Rattley* warps New York's sunshine law into a broken promise. Part III.A summarizes how New York State's current standard for evaluating an agency's diligent search certification under *Rattley* fails to effectively distinguish diligent searches from ineffective ones, creates inequitable burdens favoring agencies and disfavoring requesters, and allows agencies to meet their burden of proof by paraphrasing FOIL's language instead of adequately describing their search efforts. Part III.B argues that the New York Court of Appeals should adopt the federal reasonableness test and explains why the federal test realigns New York's diligent search standard with FOIL's presumption of disclosure. Part III.C proposes a potential legislative solution if New York state courts fail to adopt the federal reasonableness test.

Gribetz, *supra* note 53 (noting that FOIL procedure favors the agency because it can base arguments on intimate knowledge of documents that requester lacks).

293. *See supra* Part II.B.

294. *See* Weisberg v. U.S. Dep't of Just., 705 F.2d 1344, 1351 (D.C. Cir. 1983); Oglesby v. U.S. Dep't of the Army, 920 F.2d 57, 68 (D.C. Cir. 1990).

295. *See, e.g.*, Neighborhood All. of Spokane Cnty. v. Spokane Cnty., 261 P.3d 119, 127–29 (Wash. 2011).

296. *See, e.g.*, Glass v. Anne Arundel Cnty., 160 A.3d 658, 676 (Md. 2017).

297. *See, e.g.*, Toensing v. Att'y Gen. of Vt., 178 A.3d 1000, 1012–13 (Vt. 2017).

298. *See, e.g.*, Paff v. N.J. Dep't of Lab., 920 A.2d 731, 736 (N.J. Super. Ct. App. Div. 2007).

299. *See supra* notes 10–16.

A. *Rattley's Application Weakens the Diligent Search Requirement, Robs Requesters of Meaningful Judicial Review, and Conflicts with FOIL's Promise of Document Disclosure*

New York legislators deliberately designed FOIL in the likeness of FOIA to increase the public's access to government records,³⁰⁰ yet the *Rattley* holding has the opposite effect. FOIL's language requires an agency to certify that it performed a "diligent" search,³⁰¹ but conclusory affidavits from agencies averring to a search without any detail, acceptable under *Rattley*, cloud the ability of courts and requesters alike to discern whether an agency performed an adequate, diligent search.³⁰²

Examples from this Note demonstrate the low bar for agencies under *Rattley*. The burden only functionally rejects affidavits that fail to mention any search at all³⁰³ or fail to even paraphrase the statute's language.³⁰⁴ Concurrently, the low bar risks letting many inadequate searches fall through the cracks—in particular, those that fail to uncover requested documents due to a lack of careful attention, incompetence, laziness, gross negligence, or even malice.³⁰⁵ FOIL's diligent search certification requirement should function as a mechanism both for compelling agency officials to perform careful searches on behalf of requesters and for allowing a court to review the agency's efforts to comply with FOIL when challenged in court. *Rattley* does not advance these goals.

Because sunshine law litigation inherently disadvantages the requester given their lack of knowledge regarding an agency's documents, New York legislators intended the agency to bear the burden of justifying nondisclosure.³⁰⁶ But the *Rattley* standard allows agencies to easily shift the burden back to the requester to justify disclosure.³⁰⁷ Under *Rattley*, the agency faces a low bar, requiring neither detail nor personal knowledge to justify its denial, while the requester—unfamiliar with the documents they seek or the search allegedly performed by the agency—faces a higher burden when requesting a hearing on the agency's search.³⁰⁸ FOIL affords the requester a statutory path for challenging the agency's compliance with FOIL in court, but *Rattley* stacks the deck against the requester by setting a low burden for the agency to demonstrate compliance, all while the requester's high bar remains unchanged.³⁰⁹ FOIL theoretically maintains a presumption of disclosure by placing the burden on the agency to justify denying documents legally guaranteed to the public.³¹⁰ But contrary to this

300. See *supra* Part I.A.1.

301. See N.Y. PUB. OFF. LAW § 89(3)(a) (McKinney 2022).

302. See *supra* Part II.B.1.

303. See *supra* Part II.B.1.

304. See *supra* Parts II.B.1, II.B.3.

305. See *supra* Part II.B.1; *supra* notes 212–15 and accompanying text.

306. See *supra* Parts I.A.1, II.C; *supra* notes 291–92 and accompanying text.

307. See *supra* Part II.B.2.

308. See *supra* Part II.B.2.

309. See *supra* Part II.B.2.

310. See *supra* notes 48–53 and accompanying text.

underlying premise, under *Rattley*, courts take the agency at its word without requiring specific proof about the search's adequacy,³¹¹ and leave it to the ill-equipped requester to prove their right to access records.

B. Implementing the Federal Reasonableness Test as a Viable Solution to Correct the Diligent Search Certification Standard in New York State Courts

The New York Court of Appeals should overturn *Rattley* and adopt the federal reasonableness standard to determine whether an agency has met its burden of proof in demonstrating compliance with FOIL's diligent search certification requirement.³¹² The federal test more effectively weeds out inadequate document searches at the summary judgment stage,³¹³ ensures that the burden rests with the agency to justify its inability to find documents,³¹⁴ and sustains the requester's right to meaningful judicial review of agency decisions by requiring a reasonable level of detail regarding the search.³¹⁵ New York legislators enacted and amended FOIL specifically to incorporate FOIA's presumption of disclosure,³¹⁶ and New York courts have previously held that federal FOIA jurisprudence is instructive in New York FOIL litigation.³¹⁷ Not only are FOIL and FOIA similar statutes, but FOIL goes further than FOIA by requiring a "diligent" search for documents.³¹⁸ Adopting the federal reasonableness test is the logical next step in aligning FOIL with FOIA and ensuring that New York's sunshine law preserves a presumption of disclosure, transparency, and access.

In its brief to the New York Court of Appeals arguing for a low burden, the NYPD argued in *Rattley* that a higher burden of proof requiring more detail about the search was applicable only to instances where documents were found after the search was certified.³¹⁹ The NYPD further contended that a presumption of regularity—an assumption that government officials under oath will not act contrary to their duty—attaches to all agency action, and that a high certification standard would impose enormous burdens on agencies.³²⁰ The NYPD's arguments in *Rattley* were successful and formed the basis for the current standard used by New York state courts.³²¹ However, implementing the federal reasonableness standard would not lead to the dangers raised by the NYPD for several reasons.

First, cases in which requested documents were found after an agency's certification that they could not find them demonstrate that the facts of *Hynes*

311. See *supra* Parts II.B.2, II.B.3.

312. See N.Y. PUB. OFF. LAW § 89(3)(a) (McKinney 2022).

313. See *supra* Parts II.B.1, II.C.

314. See *supra* Part II.B.2.

315. See *supra* Part II.B.3; see also *supra* note 291 and accompanying text.

316. See *supra* Part I.A.1.

317. See *supra* notes 166–68 and accompanying text.

318. See *supra* note 186 and accompanying text.

319. See *supra* Part II.A; see also *supra* note 192.

320. See *supra* Part II.A; see also *supra* notes 193–94 and accompanying text.

321. See *Rattley v. N.Y.C. Police Dep't*, 756 N.E.2d 56, 58 (N.Y. 2001).

are not unique, and that documents routinely slip through the cracks during searches.³²² FOIL guarantees citizens the right to access all documents that are not specifically exempted,³²³ and therefore the chance that a search fails to uncover requested documents emphasizes the need for effective review of an agency's search. The federal test achieves this result more effectively than the *Rattley* standard by requiring a reasonable description of the scope and methods of the search, as well as a description of the agency's filing system, for judges and requesters to evaluate.³²⁴ The *Rattley* standard fails to similarly distinguish inadequate searches from diligent ones, and instead allows all agencies to regurgitate FOIL's language certifying a diligent search regardless of the level of diligence used.³²⁵ Finally, the federal standard bakes in the possibility that some documents will be missed and specifically evaluates the adequacy of the search itself, rather than its results, at the summary judgment stage.³²⁶

Second, the federal reasonableness test affords a presumption of good faith toward agency affidavits,³²⁷ in line with New York case law,³²⁸ but reserves affording a presumption of good faith until after the agency has met its initial burden of demonstrating that it performed a search reasonably calculated to uncover the requested documents.³²⁹ In practice, under *Rattley*, a presumption of regularity attaches to the agency's affidavit too early. The good-faith presumption, instead of attaching to an agency affidavit that provides reasonable detail of the search performed, swallows the agency's requirement to certify the diligent search.³³⁰

New York legislators designed FOIL so that citizens did not need to take bureaucrats at their word and could review the documents and statistics underlying the agency decisions affecting them.³³¹ FOIL's built-in mechanisms for a requester to challenge the agency's denial, both administratively and through an Article 78 proceeding, discredit the idea that a presumption of regularity should supplant the agency's burden to demonstrate compliance under FOIL.³³² The federal test, which grants this presumption after the agency has met its initial burden, keeps the burden on the agency to demonstrate its statutory compliance when justifying the

322. See *supra* Part II.B.1; *supra* note 156 and accompanying text.

323. See *supra* note 50.

324. See *supra* Part II.C; *supra* note 277 and accompanying text.

325. See *supra* Part II.B.3.

326. See *supra* notes 156–58.

327. See *supra* note 285.

328. See *supra* note 193 and accompanying text.

329. See *supra* Part II.C.

330. See *supra* Part II.C; *supra* notes 288–90 and accompanying text.

331. See N.Y. PUB. OFF. LAW § 84 (McKinney 2022) (“The people’s right to know the process of governmental decision-making and to review the documents and statistics leading to determinations is basic to our society. Access to such information should not be thwarted by shrouding it with the cloak of secrecy or confidentiality.”).

332. See *supra* Parts I.A.2–3.

nondisclosure of documents, and aligns more properly with FOIL's legislative intent for the agency to bear the burden of nondisclosure.³³³

Third, adoption of the federal test by the New York Court of Appeals will not overburden state agencies. The cornerstone of the federal test is reasonableness³³⁴—agencies need not boil the ocean, find the needle in the haystack, or leave no stone unturned when searching for documents responsive to a FOIA request. Federal courts do not require a statement from every single agency official who searched for documents, but will consider affidavits from the search's supervisor.³³⁵ Furthermore, not only has the D.C. Circuit utilized the test for over thirty years,³³⁶ but the adoption of the federal standard by several states,³³⁷ including New York's neighbor, New Jersey,³³⁸ suggests that the test is viable. Finally, FOIL's text recognizes that searches for documents can be burdensome and specifically notes that a burdensome search is not an appropriate reason for an agency to deny a FOIL request.³³⁹

C. A Legislative Amendment as an Alternative Solution for Resolving FOIL's Ambiguity and Placing the Burden on Agencies to Demonstrate FOIL Compliance

If the New York Court of Appeals fails to adopt the reasonableness test, the New York state legislature can implement language clarifying how an agency must certify that it performed a diligent search and emphasizing the agency's burden to prove its compliance with FOIL's diligent search requirement. To that end, this Note suggests making the following addition to New York Public Officers Law section 89(4)(b):

In the event that access to any record is denied because such record cannot be found after diligent search pursuant to the provisions of paragraph (a) of subdivision three of section eighty-nine of this article, the agency involved shall have the burden of proving that the search was diligent, and shall do so by means of a reasonably detailed affidavit.³⁴⁰

This added provision would solve FOIL's ambiguity as to how an agency must certify a diligent search³⁴¹ and would allow New York courts to determine the diligence of a search on a case-by-case basis.³⁴² This

333. See *supra* notes 51–53, 288–90 and accompanying text.

334. See *supra* Part I.B.2; *supra* notes 155–59 and accompanying text.

335. See *supra* note 154 and accompanying text.

336. See *Weisberg v. U.S. Dep't of Just.*, 705 F.2d 1344, 1351 (D.C. Cir. 1983); *supra* Part I.B.2.

337. See *supra* Part I.C.2.

338. See *supra* notes 179–80.

339. See N.Y. PUB. OFF. LAW § 89(3)(a) (McKinney 2022).

340. This Note recommends that the proposed addition fall in section 89(4)(b) before the last sentence, "Failure by an agency to conform . . . shall constitute a denial." See *id.* § 89(4)(b).

341. See *supra* note 187 and accompanying text.

342. See *Jud. Watch, Inc. v. U.S. Dep't of State*, No. CV 15-687, 2021 WL 3363423, at *3 (D.D.C. Aug. 3, 2021) (noting that the adequacy of a search depends on the facts of each case).

clarification of FOIL's ambiguous language would set a clear path for the courts to implement a reasonableness test as required by statute.

The proposed legislative amendment to section 89(4)(b) further resets the burden-shifting framework misconstrued under *Rattley*. Federal courts ruling on FOIA cases³⁴³ and New York legislators designing and amending FOIL³⁴⁴ recognized the importance of placing the burden on the government to justify nondisclosure, as opposed to placing the burden on the requester to justify disclosure. In the game of document disclosure, the agency holds all the cards—without placing the burden on the agency to show its hand and reveal details about its search, neither requesters nor judges can evaluate whether the agency complied with FOIL's requirement to diligently search for requested documents.³⁴⁵ FOIL adamantly maintains that “government is the public's business,”³⁴⁶ and the adoption of the federal reasonableness test by New York courts or the enactment of the legislative amendment proposed by this Note will ensure that New York makes good on FOIL's promise.

CONCLUSION

FOIL promises transparency, access, and disclosure to the citizens of New York, but the New York Court of Appeals's holding in *Rattley* has hampered the people's right to know. The *Rattley* standard fails to distinguish diligent searches from lackluster ones, allowing agencies to skirt disclosure and leaving New York FOIL requesters helpless to challenge the agency's denial. In sunshine law litigation, the requester is already at a disadvantage as only the agency possesses the relevant information regarding the documents at hand. But *Rattley* leaves requesters in New York in a worse position than their counterparts requesting documents in federal court or in other states that have adopted the federal standard. This Note argues that, in an age where governmental transparency is pivotal, the New York Court of Appeals should replace *Rattley* with the federal reasonableness test—a viable solution that strengthens the courts' ability to accurately assess agency compliance with FOIL's diligent search requirement, resets the burden equilibrium between the requester and agency, and restores FOIL's original promise of disclosure.

343. See *supra* note 291 and accompanying text.

344. See *supra* notes 51–53 and accompanying text.

345. See *supra* notes 283, 291 and accompanying text; PUB. OFF. § 89(3)(a).

346. PUB. OFF. § 84.