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August 27, 2024

By Electronic Mail Only

Frank G. Runyeon
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The Committee on Open Government is authorized to issue advisory opinions. The ensuing advisory opinion is based solely upon the information presented in your correspondence.

Dear Mr. Runyeon,

The Committee on Open Government (“Committee”) received your August 16, 2024, request for an advisory opinion addressing two Freedom of Information Law (“FOIL”) requests made to the Office of Court Administration (“OCA”) for records held by its Ethics Commission for the New York State Unified Court System (“Commission”). Your first request sought “data on all judicial titles who submitted annual financial disclosure statements for calendar year 2022.” In response, OCA instructed you to complete separate request forms for each individual’s financial disclosure statement and direct them to the Commission. In your second request, you sought “lists of required filers of annual financial disclosure statements for the years 2020 through 2024.” OCA again instructed you to complete its request form and send it to the Commission directly. The Commission also indicated that you would need to identify individual filers. You subsequently provided more than 1,400 request forms for individual filings. Additionally, the Commission then notified you that it would be unable to provide the data by “data export” and has instead provided .pdf files without selectable text for at least a portion of your request. Your requests asked that “documents be provided in their native electronic format (xls/csv, PDF, JPEG, PPT, etc.)” and “provided in their native electronic format (xls/csv, PDF, etc.) – especially if it exists in a spreadsheet, database or text-selectable format.” Your correspondence raises several concerns regarding FOIL: (i) whether an agency can require use of its prescribed request form; (ii) when records can be withheld as confidential; (iii) when is a request reasonably described; and (iv) whether an agency is obligated to provide records in the format requested. I address each in turn below.

The Committee has long taken the position that an agency may not require that an applicant for records use its own form. See FOIL-AOs [7747](#), [10004](#), [14159](#), [16607](#). Public Officers Law (POL) § 89(3) permits agencies to require that a request be made in writing. The regulations promulgated by the Committee require agencies to respond to a written request that reasonably describes the record sought within five business days of receiving a request. See 21 NYCRR 1401.5. In our opinion, the operative word is “written”: neither the law nor the regulation limits such writing to the agency’s specific form.

Although Public Officers Law specifically excludes the “judiciary” from the statutory definition of “agency,” the OCA is an agency governed by FOIL. *See Quirk v. Evans*, 455 N.Y.S. 2d 918, 921 (1983). In our opinion, it follows that the various commissions of the OCA are also agencies governed by FOIL.

All records of an agency are presumed available under FOIL, unless the content of the record falls within one of the exemptions to disclosure found in POL § 87(2)(a)-(t). POL § 87(2)(a) requires agencies to withhold records which “are specifically exempted from disclosure *by state or federal statute*” (emphasis added). Courts have held that other laws, such as regulations or local laws, are not state or federal statutes and for that reason do not supersede the disclosure requirements of FOIL. *See, e.g., Zuckerman v. NYS Board of Parole*, 385 N.Y.S. 2d 811, 813 (3d Dep’t 1976) (“exemptions can only be controlled by other Statutes, not by Regulations which go beyond the scope of specific statutory language”); *Sheehan v. City of Syracuse*, 521 N.Y.S. 2d 207, 208 (Supr. Ct. Onondaga Co. 1987) (“the Syracuse Revised General Ordinances is an ordinance, not a statute, and therefore a fee greater than that stated in the Public Officers Law cannot be charged”).

The OCA cites 21 NYCRR 40.1(p)(1), a regulation, in denying access to the requested financial disclosure forms. It does not cite to a statute and, after conducting our own research, we believe that the Legislature has not passed a statute deeming the financial disclosure forms submitted to the Commission confidential. In contrast, the Legislature has contemplated and included provisions in state statutes it has passed for financial disclosure forms filed with other agencies. For example, Judiciary Law § 45 provides “all complaints, correspondence, commission proceedings and transcripts thereof, other papers and data and records of the commission shall be confidential and shall not be made available to any person” with limited exceptions. However, it did not similarly deem financial statements submitted to the Commission confidential. Therefore, given the statutory language of POL § 87(2)(a) and the relevant case law cited above, we do not believe that the cited regulation supersedes the disclosure requirements of FOIL.

As referenced above, POL § 89(3) requires agencies to respond to reasonably described requests for records. A reasonably described request describes the records sought with enough information that the agency can perform a search of its records to locate any that are responsive. The Court of Appeals in *Konigsberg v. Coughlin*, 68 N.Y.2d 245, 247 (1986), established the guiding principles relating to an applicant’s obligation in this regard. In our view, the decision stands for two essential principles. First, insofar as an agency can locate and identify records with reasonable effort based on the description provided by the applicant, a request would meet the standard that it must reasonably describe the records sought. *See id.* at 247. Second, the Court suggested that whether or the extent to which a request meets that standard may be dependent on the nature of an agency’s filing, indexing or retrieval systems. *See id.* at 250.

Therefore, whether a particular request reasonably describes the records sought largely depends on how the agency’s files are organized or indexed. If an agency cannot perform a search with reasonable effort for the particular record(s), due to the way the files are indexed, the request is likely not reasonably described. However, in our opinion, if, for example, the agency may search for financial disclosure statements by name or year and the request identified the year for which all financial statements are sought, the request would be reasonably described, and the agency would have an obligation to search for and produce any responsive records. In our opinion, under those facts, requiring the requestor to identify every individual who filed and then submit individual requests for each of

those financial statements sought is inconsistent with the requirements of FOIL and constitutes a denial of access. Moreover, the controlling inquiry is whether a request is reasonably described and can be retrieved with reasonable effort, not the whether the request is voluminous. A request may not be denied simply because it is voluminous. *See* POL § 89(3)(a). Instead, a voluminous request would likely justify the agency taking longer than the twenty business days envisioned by the statute. *See id.* (“if circumstances prevent disclosure . . . within twenty business days from the date of the acknowledgement of the receipt of the request, the agency shall state, in writing, both the reason for the inability to grant the request within twenty business days and a date certain within a reasonable period, depending on the circumstances, when the request will be granted in whole or in part”).

Regarding electronic records, the POL requires agencies “to retrieve or extract a record or data maintained in a computer storage system” if the agency has the ability to do so with “reasonable effort” POL § 89(3)(a). Additionally, “[a]n agency shall provide records on the medium requested by a person, if the agency can reasonably make such copy or have such copy made by engaging an outside professional service.” *Id.* § 87(5)(a). Doing so “shall not be deemed to be the preparation or creation of a new record.” *Id.* According to your email, the financial statement forms, or portions of forms, that the agency did produce in response to your request were provided in .pdf form without “selectable text.” In our opinion, if the Commission received .pdf forms by any method which does not create an electronic database (by email or mail), the agency would not be under an obligation to input the information from the forms into an electronic database in order to provide the records in spreadsheet or other data export format. It would, however, likely need to provide the responsive .pdf forms in a format with searchable or selectable text if it possesses .pdf software with capabilities to reformat the .pdf with those functions. On the other hand, if either the fields of information from the .pdf files is routinely input into a database or if the forms are submitted through an electronic database, the agency would be required to extract or export the fields from such database(s) in a format dependent on the capabilities of the agency’s software. If the agency accepts the financial reporting forms in multiple forms, the responsive records might, depending on the agency’s capabilities, be appropriately provided in different electronic formats.

Sincerely,

s/ Christen L. Smith
Senior Attorney