



**State of New York
Department of State
Committee on Open Government**

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The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the facts presented in your correspondence.

Dear

We are in receipt of your request for an advisory opinion concerning application of the Freedom of Information Law to requests made to the Department of Finance of the City of New York. Specifically, you requested a "file containing information about all mortgages and deeds filed in the City during the immediate past year." For more than a decade, the City has maintained an electronic file of such information and has provided it in response to yearly requests from your company, Genesis Computer Consultants, Inc. This year, in response to your request, the Department denied your request and indicated: "... we believe that posting information on our Web site constitutes reasonable compliance with our obligation to make our records 'available for public inspection and copying'." You further indicated that "[s]uch data is of little or no use to you unless you have access to the entire file electronically so that you can make lists of various sorts and make comparisons of sets of data." It is our opinion that if the Department continues to have the ability to make one year's worth of data available to you in an electronic file, it is required to do so. In this regard, we offer the following comments.

First, the Freedom of Information Law has been construed expansively in relation to matters involving records stored electronically. As you are likely aware, that statute pertains to agency records, and §86(4) of the Law defines the term "record" expansively to include:

"...any information kept, held, filed, produced, reproduced by, with or for an agency or the state legislature, in any physical form whatsoever including, but not limited to, reports, statements, examinations, memoranda, opinions, folders, files, books, manuals, pamphlets, forms, papers, designs, drawings, maps, photos, letters, microfilms, computer tapes or discs, rules, regulations or codes."

Based upon the language quoted above, if information is maintained in some physical form, it would constitute a "record" subject to rights of access conferred by the Law. Further, the definition of "record" includes specific reference to computer tapes and discs, and it was held more than twenty years ago that "[i]nformation is increasingly being stored in computers and access to such data should not be restricted merely because it is not in printed form" [Babigian v. Evans, 427 NYS 2d 688, 691 (1980); aff'd 97 AD 2d 992 (1983); see also, Szikszay v. Buelow, 436 NYS 2d 558 (1981)].

When information is maintained electronically, it has been advised that if the information sought is available under the Freedom of Information Law and may be retrieved by means of existing computer programs, an agency is required to disclose the information. In that kind of situation, the agency would merely be retrieving data that it has the capacity to retrieve. Disclosure may be accomplished either by printing out the data on paper or perhaps by duplicating the data on another storage mechanism, such as a computer tape or disk. On the other hand, if information sought can be generated only through the use of new programs, so doing would in our opinion represent the equivalent of creating a new record.

Questions and issues have arisen in relation to information maintained electronically concerning §89(3) of the Freedom of Information Law, which states in part that an agency is not required to create or prepare a record in response to a request. In this regard, often information stored electronically can be extracted by means of keystrokes or queries entered on a keyboard. While some have contended that those kinds of steps involve programming or reprogramming, and, therefore, creating a new record, so narrow a construction would tend to defeat the purposes of the Freedom of Information Law, particularly as information is increasingly being stored electronically. If electronic information can be extracted or generated with reasonable effort, the courts have directed that an agency must follow that course of action.

Illustrative of that principle is a case in which an applicant sought a database in a particular format, and even though the agency had the ability to generate the information in that format, it refused to make the database available in the format requested and offered to make available a printout. Transferring the data from one electronic storage medium to another involved relatively little effort and cost; preparation of a printout, however, involved approximately a million pages and a cost of ten thousand dollars for paper alone. In holding that the agency was required to make the data available in the format requested and upon payment of the actual cost of reproduction, the Court in Brownstone Publishers, Inc. v. New York City Department of Buildings unanimously held that:

"Public Officers Law [section] 87(2) provides that, 'Each agency shall...make available for public inspection and copying all records...' Section 86(4) includes in its definition of 'record', computer tapes or discs. The policy underlying the FOIL is 'to insure maximum public access to government records' (Matter of Scott, Sardano & Pomerantz v. Records Access Officer, 65 N.Y.2d 294, 296-297, 491 N.Y.S.2d 289, 480 N.E.2d 1071). Under the circumstances presented herein, it is clear that both the statute and its underlying policy require that the DOB comply with Brownstone's reasonable request to have the information, presently maintained in computer language, transferred onto computer tapes" [166 Ad 2d, 294, 295 (1990)].

In another decision which cited Brownstone, it was held that: "[a]n agency which maintains in a computer format information sought by a F.O.I.L. request may be compelled to comply with the request to transfer information to computer disks or tape" (Samuel v. Mace, Supreme Court, Monroe County, December 11, 1992).

In short, assuming that the Department is able to transfer the requested data to a storage medium usable to you and you are willing to pay the requisite fee, in our opinion, based on judicial decisions, the Department is required to do so.

On behalf of the Committee on Open Government, we hope this is helpful to you.

Sincerely,

Camille S. Jobin-Davis
Assistant Director

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cc: Gerald S. Koszer