



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

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FOIL-AO-15950

May 5, 2006

E-Mail

TO:

FROM: Camille S. Jobin-Davis, Assistant Director

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, unless otherwise indicated.

Dear Ms. Iken:

We are in receipt of your request for an advisory opinion concerning application of the Freedom of Information Law to a request made to the Lower Manhattan Development Corporation ("LMDC"), a subsidiary of New York State Urban Development Corporation ("UDC"), doing business as the Empire State Development Corporation ("ESDC"). Based on our telephone conversation with representatives of ESDC and LMDC, it is our understanding that they are under the mistaken impression that they have complied with the legal requirements pertaining to response times set forth in the Freedom of Information Law. Further, it is our opinion that if certain materials which you have requested exist, they should be made available to you, at least in part.

The following is an outline of our understanding of correspondence exchanged between yourself, ESDC and LMDC:

ESDC received your initial request for records on February 13, 2006, and acknowledged its receipt on February 21, 2006, indicating that further response would be forwarded on or before March 7, 2006. Because ESDC failed to inform you of the grounds for further delay past its self-imposed deadline, and because ESDC failed to respond on or before March 7, 2006, in our opinion, the provisions of §89(3) were not met, and access was constructively denied. In fairness, we note that ESDC now submits that the Records Access Officer was out of the office for several days during that time period due to a death in his family. However, that information was not expressed in our early April telephone conversation with the Records Access Officer, nor in subsequent correspondence from ESDC dated March 17, April 4, April 10 or April 17, 2006.

Your appeal of ESDC's constructive denial of your request was received on March 8, 2006. Your intention to appeal the denial is clear from your subject line, "Freedom of Information Law Appeal", and your opening sentence, "I hereby appeal the denial of access regarding my request...".

On March 17, the FOIL Appeals Officer of ESDC acknowledged receipt, characterized your appeal as a "request", and wrote as follows:

"ESDC is granting you access to those documents which are responsive to your request, on file at our offices and not exempt from disclosure.... We are currently gathering and reviewing these documents which should be available by March 30, 2006."

ESDC asserts now, that on March 30, 2006, you were informed by telephone to contact LMDC regarding the documents, and that on April 3, 2006 you spoke by telephone to an LMDC representative.

Without reference to your appeal, by correspondence dated April 4, 2006, LMDC forwarded copies of generic environmental impact statements, which are available on its website, and a copy of one email dated June 20, 2005. You were informed that "the remaining portion of the records responsive to your request that are not exempt will be made available at a later date."

In response to your appeal, ESDC responded by letter dated April 10, 2006, (23 business days later) indicating the following:

"The responsive emails, correspondence and consultants' reports are exempt from disclosure pursuant to Section 87, subsection 2, subdivision (g) of the Freedom of Information Law ..."

And further:

"Please be advised that LMDC is continuing to review emails responsive to item 3 of your February 10th request in accordance with the Freedom of Information Law (Public Officers Law, Section 84 et seq.) and its rules concerning access to the records of the Corporation. ESDC will notify you of its determination with respect to these emails within five (5) business days from the date hereof."

The only other information the writer indicated was that you could direct your appeal of this determination to General Counsel of UDC.

Crossing in the mail at that time was your correspondence of April 10 requesting explanation of the denials of access, and certification, pursuant to §89(3) of the Freedom of Information Law, that the agency does not possess or has diligently searched for any records which are publicly available, and to which you have not been provided access.

On April 17, 2006, ESDC forwarded copies of some records and indicated that all other documents identified in response to your third request were "not to be released", citing §87(2)(g), but providing no further explanation. The letter indicated "LMDC is continuing to review emails responsive to item 3 of your February 10th request..." and "ESDC will notify you of its determination with respect to these emails within five (5) business days from the date hereof." The writer indicated you could direct your appeal of this determination to General Counsel of UDC.

Finally, by correspondence dated April 19, 2006, ESDC set forth its position that it has responded in a timely manner to your requests by indicating it was "continuing to review documents responsive to your request", and that because your April 10, 2006 appeal does not address "ESDC's final determination regarding items 1,2, and 4 of your request and ESDC's April 17, 2006 final determination regarding item 3 of your request, [it] cannot give a final determination regarding your April 10, 2006 appeal." The closing paragraph of this letter, written by the FOIL Appeals Officer, "Senior Vice President - - Legal and General Counsel", indicated that you could address an appeal of ESDC's "final determinations" to her attention.

In this regard, the Freedom of Information Law provides direction concerning the time and manner in which agencies must respond to requests. Specifically, §89(3) of the Freedom of Information Law states in part that:

"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, deny such request in writing or furnish a written acknowledgement of the receipt of such request and a statement of the approximate date, which shall be reasonable under the circumstances of the request, when such request will be granted or denied..."

It is noted that new language was added to that provision on May 3 (Chapter 22, Laws of 2005) stating that:

"If circumstances prevent disclosure to the person requesting the record or records 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."

Based on the foregoing, an agency must grant access to records, deny access in writing, or acknowledge the receipt of a request within five business days of receipt of a request. When an acknowledgement is given, it must include an approximate date within twenty business days indicating when it can be anticipated that a request will be granted or denied. If it is known that circumstances prevent the agency from granting access within twenty business days, or if the agency cannot grant access by the approximate date given and needs more than twenty business days to grant access, however, it must provide a written explanation of its inability to do so and a specific date by which it will grant access. That date must be reasonable in consideration of the circumstances of the request.

The amendments clearly are intended to prohibit agencies from unnecessarily delaying disclosure. They are not intended to permit agencies to wait until the fifth business day following the receipt of a request and then twenty additional business days to determine rights of access, unless it is reasonable to do so based upon "the circumstances of the request." It is our perspective that every law must be implemented in a manner that gives reasonable effect to its intent, and we point out that in its statement of legislative intent, §84 of the Freedom of Information Law states that "it is incumbent upon the state and its localities to extend public accountability wherever and whenever feasible." Therefore, when records are clearly available to the public under the Freedom of Information Law, or if they are readily retrievable, there may be no basis for a delay in disclosure. As the Court of Appeals, the state's highest court, has asserted:

"...the successful implementation of the policies motivating the enactment of the Freedom of Information Law centers on goals as broad as the achievement of a more informed electorate and a more responsible and responsive officialdom. By their very nature such objectives cannot hope to be attained unless the measures taken to bring them about permeate the body politic to a point where they become the rule rather than the exception. The phrase 'public accountability wherever and whenever feasible' therefore merely punctuates with explicitness what in any event is implicit" [Westchester News v. Kimball, 50 NY 2d 575, 579 (1980)].

In a judicial decision concerning the reasonableness of a delay in disclosure that cited and confirmed the advice rendered by this office concerning reasonable grounds for delaying disclosure, it was held that:

"The determination of whether a period is reasonable must be made on a case by case basis taking into account the volume of documents requested, the time involved in locating the material, and the complexity of the issues involved in determining whether the materials fall within one of the exceptions to disclosure. Such a standard is consistent with some of the language in the opinions, submitted by petitioners in this case, of the Committee on Open Government, the agency charged with issuing advisory opinions on FOIL"(Linz v. The Police Department of the City of New York, Supreme Court, New York County, NYLJ, December 17, 2001).

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 beyond the approximate date of less than twenty business days given in its acknowledgement, if it acknowledges that a request has been received, but has failed to grant access by the specific date given beyond twenty business days, or if the specific date given is unreasonable, a request may be considered to have been constructively denied [see §89(4)(a)]. In such a circumstance, the denial may be appealed in accordance with §89(4)(a), which states in relevant part that:

"...any person denied access to a record may within thirty days appeal in writing such denial to the head, chief executive, or governing body, who shall within ten business days of the receipt of such appeal fully explain in writing to the person requesting the record the reasons for further denial, or provide access to the record sought."

Section 89(4)(b) was also amended, and it states that a failure to determine an appeal within ten business days of the receipt of an appeal constitutes a denial of the appeal. In that circumstance, the appellant has exhausted his or her administrative remedies and may initiate a challenge to a constructive denial of access under Article 78 of the Civil Practice Rules. [See also, Floyd v. McGuire, 87 AD 2d 388, appeal dismissed 57 NY 2d 774 (1982)].

It is our opinion, based on the facts presented above, that because neither ESDC nor LMDC responded to your initial request within the self-imposed March 7, 2006 deadline, you were correct to construe the lack of

response as a denial and to appeal. Further, it is clear in our view that ESDC's efforts to inform you of its "continuing review of documents responsive to your request" without setting forth any basis for any delay evidence its lack of understanding of or compliance with the provisions of §89(4) of the Freedom of Information Law, which require an agency to respond to an appeal within ten business days of receipt thereof, fully explaining in writing to the person requesting the record the reasons for further denial or providing access to the records sought.

We also note that you were informed of repeated opportunities to appeal certain communications to the FOIL Appeals Officer, and in conjunction with its most recent correspondence, you were informed of an opportunity to file an appeal of the FOIL Appeals Officer's "final" determination with the FOIL Appeals Officer. A careful reading of §89 of the Freedom of Information Law indicates that there is no provision for such an appeal. While we are not advising you to do so, it is our opinion that you have exhausted your administrative remedies and have the right to pursue the denial of your request pursuant to Article 78 of the Civil Procedure Law and Rules.

Turning now to the substantive aspects of your request, we offer the following comments with respect to each of the documents requested.

Your first request was for "... copies of any supporting documentation related to the reasons why the number of entry and exit ramps at the memorial was reduced from 4 to 2...". As a general matter, the Freedom of Information Law is based upon a presumption of access. Stated differently, all records of an agency are available, except to the extent that records or portions thereof fall within one or more grounds for denial appearing in §87(2)(a) through (i) of the Law.

In consideration of the nature of the records sought, the provision of primary significance under that statute is §87(2)(g), which enables an agency to withhold records that:

"are inter-agency or intra-agency materials which are not:

- i. statistical or factual tabulations or data;
- ii. instructions to staff that affect the public;
- iii. final agency policy or determinations; or
- iv. external audits, including but not limited to audits performed by the comptroller and the federal government..."

It is noted that the language quoted above contains what in effect is a double negative. While inter-agency or intra-agency materials may be withheld, portions of such materials consisting of statistical or factual information, instructions to staff that affect the public, final agency policy or determinations or external audits must be made available, unless a different ground for denial could appropriately be asserted. Concurrently, those portions of inter-agency or intra-agency materials that are reflective of opinion, advice, recommendation and the like could in our view be withheld pursuant to FOIL.

With respect to the substance of §87(2)(g) and the capacity to withhold records similar to that at issue, it has been held that:

"There is no exemption for final opinions which embody an agency's effective law and policy, but protection by exemption is afforded for all papers which reflect the agency's group thinking in the process of working out that policy and determining what its law ought to be. Thus, an agency may refuse to produce material integral to the agency's deliberative process and which contains opinions, advice, evaluations, deliberations, policy formulations, proposals, conclusions, recommendations or other subjective matter (National Labor Relations Bd. v. Sears, Roebuck & Co., supra, pp 150-153; Wu v. National Endowment for Humanities, 460 F2d 1030, 1032-1033, cert den 410 US 926). The exemption is intended to protect the deliberative process of government, but not purely factual deliberative material (Mead Data Cent. v United States Dept. of Air Force, 566 F2d 242, 256, supra). While the purpose of the exemption is to encourage the free exchange of ideas among government policy-makers, it does not authorize an agency to throw a protective blanket over all information by casting it in the form of an internal memo (Wu v. National Endowment for Humanities, supra, p1033). The question in each case is whether production of the contested document would be injurious to the

consultative functions of government that the privilege of nondisclosure protects..." [Miracle Mile Associates v. Yudelson, 68 AD 2d 176, 182-183; motion for leave to appeal denied, 48 NY 2d 706 (1979)].

Insofar as intra-agency materials in which officials or employees of the ESDC expressed their opinions in relation to ESDC's final decision, we believe that those materials ordinarily may be withheld. However, insofar as the documents in question include opinions or recommendations adopted by ESDC and reflective of ESDC's collective determination, they would, in our view, be available.

It has been held that a record adopted by a decision-maker as the agency's determination is accessible under §87(2)(g)(iii). In *Miller v. Hewlett-Woodmere Union Free School District #14* (Supreme Court, Nassau County, NYLJ, May 16, 1990), the court wrote that:

"On the totality of circumstances surrounding the Superintendent's decision, as present in the record before the Court, the Court finds that petitioner is entitled to disclosure. It is apparent that the Superintendent unreservedly endorsed the recommendation of the Term [sic; published as is], adopting the reasoning as his own, and made his decision based on it. Assuredly, the Court must be alert to protecting 'the deliberative process of the government by ensuring that persons in an advisory role would be able to express their opinions freely to agency decision makers' (*Matter of Sea Crest Construction Corp. v. Stubing*, 82 A.D. 2d 546, 549 [2d Dept. 1981], but the Court bears equal responsibility to ensure that final decision makers are accountable to the public. When, as here, a concord exists as to intraagency views, when deliberation has ceased and the consensus arrived it represents the final decision, disclosure is not only desirable but imperative for preserving the integrity of governmental decision making. The Team's decision no longer need be protected from the chilling effect that public exposure may have on principled decisions, but must be disclosed as the agency must be prepared, if called upon, to defend it."

In sum, we do not believe that §87(2)(g) may serve as a basis for withholding to the extent that the documentation in question has been adopted as a final agency determination. If that is the case, we believe that it would be accessible under §87(2)(g)(iii).

With respect to your second request, for "LMDC studies performed internally or by outside consultants from 3/14/2003 to the present that pertain to the projected number of visitors to the future memorial and memorial museum...", we note ESDC's refusal to disclose on the ground that it does not reflect statistical or factual information. Pertinent in our view is a decision rendered by the Court of Appeals in which the Court focused on what constitutes "factual data", stating that:

"...Although the term 'factual data' is not defined by statute, the meaning of the term can be discerned from the purpose underlying the intra-agency exemption, which is 'to protect the deliberative process of the government by ensuring that persons in an advisory role [will] be able to express their opinions freely to agency decision makers' (*Matter of Xerox Corp. v. Town of Webster*, 65 NY2d 131, 132, 490 N.Y.S. 2d 488, 480 N.E.2d 74 [quoting *Matter of Sea Crest Constr. Corp. v. Stubing*, 82 AD2d 546, 549, 442 N.Y.S.2d 130]). Consistent with this limited aim to safeguard internal government consultations and deliberations, the exemption does not apply when the requested material consists of 'statistical or factual tabulations or data' (Public Officers Law §87(2)(g)(i)). Factual data, therefore, simply means objective information, in contrast to opinions, ideas, or advice exchanged as part of the consultative or deliberative process of government decision making (see, *Matter of Johnson Newspaper Corp. v. Stainkamp*, 94 AD2d 825, 827, 463 N.Y.S.2d 122, mod on other grounds, 61 NY2d 958, 475 N.Y.S.2d 272, 463 N.E. 2d 613; *Matter of Miracle Mile Assocs. v. Yudelson*, 68 AD2d 176, 181-182, 417 N.Y.S.2d 142)" [*Gould v. New York City Police Department*, 89 NY2d 267, 276, 277 (1996)].

From our perspective, the specific language of §87(2)(g), coupled with the direction offered by the Court of Appeals, provide the basis for reviewing and determining the extent to which the records in question might justifiably be withheld. Reference was made earlier to the thrust of the Freedom of Information Law, and the Court in *Gould* reiterated its stance expressed in previous decisions, stating that:

"To ensure maximum access to government records, the 'exemptions are to be narrowly construed, with the burden resting on the agency to demonstrate that the requested material indeed qualifies for exemption' (*Matter of Hanig v. State of New York Dept. of Motor Vehicles*, 79 N.Y.2d 106, 109, 580 N.Y.S.2d 715, 588 N.E.2d 750 see, Public Officers Law §89(4)(b)). As this Court has stated, '[o]nly where the material requested falls squarely within the ambit of one of these statutory exemptions may disclosure be withheld' (*Matter of Fink v. Lefkowitz*, 47 N.Y.2d, 567, 571, 419 N.Y.S.2d 467, 393 N.E.2d 463)" (id., 275).

The Court also offered guidance to agencies and lower courts in determining rights of access and referred to several decisions it had previously rendered and held that:

"...to invoke one of the exemptions of section 87(2), the agency must articulate 'particularized and specific justification' for not disclosing requested documents (Matter of Fink v. Lefkowitz, supra, 47 N.Y.2d, at 571, 419 N.Y.S.2d 467, 393 N.E.2d 463). If the court is unable to determine whether withheld documents fall entirely within the scope of the asserted exemption, it should conduct an in camera inspection of representative documents and order disclosure of all nonexempt, appropriately redacted material (see, Matter of Xerox Corp. v. Town of Webster, 65 N.Y.2d 131, 133, 490 N.Y.S. 2d, 488, 480 N.E.2d 74; Matter of Farbman & Sons v. New York City Health & Hosps. Corp., supra, 62 N.Y.2d, at 83, 476 N.Y.S.2d 69, 464 N.E.2d 437)" (id.).

Based on the foregoing, the agency is required to review the records sought in their entirety to determine, which portions constitute statistical or factual information or any other material required to be disclosed pursuant to subparagraphs (I), (ii), or (iii) of §87(2)(g).

With regard to your third request, for "[i]nternal or external emails addressed or copied to or from" certain named individuals, we note that the Freedom of Information Law pertains to all agency records, and §86(4) of that statute 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 on the foregoing, we believe that e-mail communications between ESDC employees or between those persons and others would clearly constitute "records" that fall within the coverage of the Freedom of Information Law.

We note, too, that agencies cannot merely destroy records when they have the desire to do so or when they run out of storage space. On the contrary, retention and disposal of records are governed by law. Specifically, §57.05 of the Arts and Cultural Affairs Law provides that the Commissioner of Education is empowered:

"[t]o authorize the disposal or destruction of state records including books, papers, maps, photographs, microphotographs or other documentary materials made, acquired or received by any agency. At least forty days prior to the proposed disposal or destruction of such records, the commissioner of education shall deliver a list of the records to be disposed of or destroyed to the attorney general, the comptroller and the state agency that transferred such records. No state records listed therein shall be destroyed if within thirty days after receipt of such list the attorney general, comptroller, or the agency that transferred such records shall notify the commissioner that in his opinion such state records should not be destroyed."

In the context of your request, it would be important to ascertain the appropriate minimum retention periods pertinent to the substance of the emails identified. Assistance may be obtained by contacting State Archives at (518) 474-6926.

With respect to any documents which you believe have been omitted from the responses to your requests or may have been destroyed prior to your request, when an agency indicates that it does not maintain or cannot locate a record, an applicant for the record may seek a certification to that effect. Section 89(3) of the Freedom of Information Law provides in part that, in such a situation, on request, an agency "shall certify that it does not have possession of such record or that such record cannot be found after diligent search."

We note that ESDC has chosen to disregard your April 10, 2006 request for such certification. In our opinion, its inaction serves as a failure to comply with law. It is our opinion that on request, an agency must provide such certification.

Lastly, although compliance with the Freedom of Information Law involves the use of public employees' time and perhaps other costs, the Court of Appeals has found that the Law is not intended to be given effect "on a cost-accounting basis", but rather that "Meeting the public's legitimate right of access to information concerning government is fulfillment of a governmental obligation, not the gift of, or waste of, public funds" [Doolan v. BOCES, 48 NY 2d 341, 347 (1979)].

In an effort to enhance compliance with and understanding of the Freedom of Information Law, copies of this opinion will be forwarded to ESDC and LMDC officials. Should you have any further questions or comments, please contact me directly.

CSJ:tt

cc: Anita W. Laremont  
Antovk Pidejian  
Avalon Simon

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