



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

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FOIL-AO-15893

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E-Mail

TO:

FROM: Robert J. Freeman, Executive 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 information presented in your correspondence.

Dear

I have received your letter in which you asked the following question: "If a town councilman uses his private email address (not paid for by the town) to conduct business for the town, does that require those emails that pertain to material matters of town business constitute a public record subject to foil requests?"

From my perspective, email kept, transmitted or received by a town official in relation to the performance of his or her duties is subject to the Freedom of Information Law, even if the official "uses his private email address" and his own computer. In this regard, I offer the following comments.

First and most significantly, the scope of the Freedom of Information Law is expansive, for it encompasses all government agency records within its coverage. Section 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 upon the language quoted above, documentary materials need not be in the physical possession of an agency, such as a school district, to constitute agency records; so long as they are produced, kept or filed for an agency, the law specifies and the courts have held that they constitute "agency records", even if they are maintained apart from an agency's premises.

In a decision rendered by the Court of Appeals, the state's highest court, it was found that materials received by a corporation providing services for a branch of the State University pursuant to a contract were kept on behalf of the University and constituted agency "records" falling within the coverage of the Freedom of Information Law. It is emphasized that the Court rejected "SUNY's contention that disclosure turns on whether the requested information is in the physical possession of the agency", for such a view "ignores the plain language of the FOIL definition of 'records' as information kept or held

'by, with or for an agency'" [see *Encore College Bookstores, Inc. v. Auxiliary Services Corporation of the State University of New York at Farmingdale*, 87 NY 2d 410, 417 (1995)].

Also pertinent is the first decision in which the Court of Appeals dealt squarely with the scope of the term "record", in which the matter involved documents pertaining to a lottery sponsored by a fire department. Although the agency contended that the documents did not pertain to the performance of its official duties, i.e., fighting fires, but rather to a "nongovernmental" activity, the Court rejected the claim of a "governmental versus nongovernmental dichotomy" and found that the documents constituted "records" subject to rights of access granted by the Law. Moreover, the Court determined that:

"The statutory definition of 'record' makes nothing turn on the purpose for which it relates. This conclusion accords with the spirit as well as the letter of the statute. For not only are the expanding boundaries of governmental activity increasingly difficult to draw, but in perception, if not in actuality, there is bound to be considerable crossover between governmental and nongovernmental activities, especially where both are carried on by the same person or persons" [*Westchester-Rockland Newspapers v. Kimball*, 50 NY2d 575, 581 (1980)].

The point made in the final sentence of the passage quoted above appears to be especially relevant, for there may be "considerable crossover" in the activities of town officials. In my view, when the officials communicate with one another in writing, in their capacities as government officials, any such communications constitute agency records that fall within the framework of the Freedom of Information Law.

Also relevant is another decision rendered by the Court of Appeals in which the Court focused on an agency claim that it could "engage in unilateral prescreening of those documents which it deems to be outside of the scope of FOIL" and found that such activity "would be inconsistent with the process set forth in the statute" [*Capital Newspapers v. Whalen*, 69 NY 2d 246, 253 (1987)]. The Court determined that:

"...the procedure permitting an unreviewable prescreening of documents - which respondents urge us to engraft on the statute - could be used by an uncooperative and obdurate public official or agency to block an entirely legitimate request. There would be no way to prevent a custodian of records from removing a public record from FOIL's reach by simply labeling it 'purely private.' Such a construction, which would thwart the entire objective of FOIL by creating an easy means of avoiding compliance, should be rejected" (*id.*, 254).

Any "prescreening" of records to determine whether they fall within the coverage of the Freedom of Information Law would, in my view, conflict with the clear direction provided by the Court of Appeals and the language of the law itself.

In a case involving notes taken by the Secretary to the Board of Regents that he characterized as "personal" in conjunction with a contention that he took notes in part "as a private person making personal notes of observations...in the course of" meetings. In that decision, the court cited the definition of "record" and determined that the notes did not consist of personal property but rather were records subject to rights conferred by the Freedom of Information Law [*Warder v. Board of Regents*, 410 NYS 2d 742, 743 (1978)].

Second, the definition of the term "record" also makes clear that email communications between or among board members fall within the scope of the Freedom of Information Law. Based on its specific language, if information is maintained by or for an agency in some physical form, it constitutes a "record" subject to rights of access conferred by the Freedom of Information Law. The definition includes specific reference to computer tapes and discs, and it was held soon after the reenactment of the statute 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 NYS2d 688, 691 (1980); *aff'd* 97 AD2d 992 (1983); see also, *Szikszy v. Buelow*, 436 NYS2d 558 (1981)]. Whether information is stored on paper, on a computer tape, or in a computer, it constitutes a "record." In short, email is merely a means of transmitting information; it can be viewed on a screen and printed, and I believe that the email communications at issue must be treated in the same

manner as traditional paper records for the purpose of their consideration under the Freedom of Information Law.

Third, the foregoing is not intended to suggest that the email communications that you requested must be disclosed in their entirety. Like other records, the content of those communications is the primary factor in ascertaining rights of access.

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. The records at issue, because they involve communications between or among agency officials, fall with one of the exceptions, §87(2)(g). Due its structure, however, that provision may require substantial disclosure. Specifically, §87(2)(g) 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..."

I emphasize that the introductory language of §87(2) refers to the authority to withhold "records or portions thereof" that fall within the scope of the exceptions that follow. In my view, the phrase quoted in the preceding sentence evidences a recognition on the part of the Legislature that a single record or report, for example, might include portions that are available under the statute, as well as portions that might justifiably be withheld. That being so, I believe that it also imposes an obligation on an agency to review records sought, in their entirety, to determine which portions, if any, might properly be withheld or deleted prior to disclosing the remainder.

In this vein, the Court of Appeals reiterated its general view of the intent of the Freedom of Information Law in *Gould v. New York City Police Department* [89 NY2d 267 (1996)], 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).

Just as significant, the Court in *Gould* repeatedly specified that a categorical denial of access to records is inconsistent with the requirements of the Freedom of Information Law. In that case, the Police Department contended that complaint follow up reports could be withheld in their entirety on the ground that they fall within the exception regarding intra-agency materials, §87(2)(g). The Court, however, wrote that: "Petitioners contend that because the complaint follow-up reports contain factual data, the exemption does not justify complete nondisclosure of the reports. We agree" (*id.*, 276), and stated as a general principle that "blanket exemptions for particular types of documents are inimical to FOIL's policy of open government" (*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, stating 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.).

When records consist of intra-agency material, that they may be preliminary to a decision does not remove them from rights of access. One of the contentions offered by the agency in *Gould* was that certain reports could be withheld because they are not final and because they relate to matters for which no final determination had been made. The Court rejected that finding and stated that:

"...we note that one court has suggested that complaint follow-up reports are exempt from disclosure because they constitute nonfinal intra-agency material, irrespective of whether the information contained in the reports is 'factual data' (see, *Matter of Scott v. Chief Medical Examiner*, 179 AD2d 443, 444, supra [citing Public Officers Law §87[2][g][iii]]. However, under a plain reading of §87(2)(g), the exemption for intra-agency material does not apply as long as the material falls within any one of the provision's four enumerated exceptions. Thus, intra-agency documents that contain 'statistical or factual tabulations or data' are subject to FOIL disclosure, whether or not embodied in a final agency policy or determination (see, *Matter of Farbman & Sons v. New York City Health & Hosp. Corp.*, 62 NY2d 75, 83, supra; *Matter of MacRae v. Dolce*, 130 AD2d 577)..." (id., 276).

In short, that a record is predecisional would not represent an end of an analysis of rights of access or an agency's obligation to review the entirety of its contents.

The Court also dealt with the issue of what constitutes "factual data" that must be disclosed under §87(2)(g)(i). In its consideration of the matter, the Court found 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 [quoting *Matter of Sea Crest Constr. Corp. v. Stubing*, 82 AD2d 546, 549]). 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][1]. 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, affd on op below, 61 NY2d 958; *Matter of Miracle Mile Assocs. v. Yudelson*, 68 AD2d 176, 181-182)" (id., 276-277).

I hope that I have been of assistance.

RJF:jm

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