

May 26, 2015

FOIL 19273

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 :

This is in response to your request for an advisory opinion regarding application of the Freedom of Information Law to electronic records requested from the Town of Islip, and the fees associated therewith.

Specifically, you requested copies of all electronic correspondence exchanged between multiple offices of the Town and any person at the NYS Department of Environmental Conservation regarding four roads and/or 8 tax map lots; all electronic and paper correspondence exchanged between multiple offices in the Town and any person at the Federal Emergency Management Agency regarding four roads and 8 tax map lots; and any application made by 8 named individuals to multiple offices of the Town since 1990. In response, the Town indicated that upon receipt of \$2,000 it would begin searching for such records.

Initially, we note the breadth of the request for both electronic and paper records, which does not provide any limitation by time frame for the first two types of records, would require the town to search a period of 25 years for the third type of record (which may be around the time that the Town began utilizing email), and sets forth any number of variations of searches that would be required to be performed, depending on the nature of the Town's email system, its search capabilities, and the Town's retention practices.

In response to the requests for electronic communications, the Town indicated that "[w]ithout having actual names of employees that may have sent or received electronic communication ... gathering the information requested would be very difficult and time consuming." Although we are not familiar with the capabilities of the Town's email software, we are aware that it is not possible, through the email system currently in place at our office, for example, to electronically search email accounts without names of employees. When that is so, a request would not "reasonably describe" the records sought as is required by §89(3)(a) of FOIL.

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This request brings to mind an opinion rendered several years ago involving a request for all records contained in several file cabinets located in or near the office of a certain agency employee. It was advised in that situation that the request did not reasonably describe the records, and that the guidance offered in Fisher & Fisher v. Davison (Supreme Court, New York County, September 27, 1988) was applicable. The court referred to and rejected the voluminous request, finding that:

“Petitioner’s actual demand transcends a normal or routine request by a taxpayer. It...bring[s] in its wake an enormous administrative burden that would interfere with the day-to-day operations of an already heavily burdened bureaucracy.”

Similarly, inquiries have been directed to this office concerning requests for all email communications transmitted or received by a particular government officer or employee over a period of several years, without regard to subject matter or content. In the case of many officers or employees, there would be thousands of email communications involving scores of topics. Review of those communications to ascertain rights of access in our opinion would, in the words of the decision cited above, “transcend a normal...request...”

Whether the Town has authority to charge \$2,000 for the requested records depends on whether such time is necessary for the Town to “prepare the electronic record”. There may be limitations to the Town’s electronic search capabilities, referenced above, that would require the Town to spend an inordinate amount of time preparing such records. While we believe that the effort required to locate both the electronic and the paper records that you have requested is not necessarily required by law, to the extent that the Town is willing to do so, this will confirm that pursuant to §87(1)(c) if it takes more than two hours to prepare electronic records, the Town is permitted to charge the hourly rate of the lowest paid person capable of doing so. This will further confirm that there is no basis in law to charge for time spent searching for paper records, or redacting either paper or electronic records.

We hope this is helpful.

Sincerely,

Camille S. Jobin-Davis
Assistant Director

CSJ: paf

CC: Senior Assistant Town Attorney