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FOIL AO 19690

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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 information presented in your correspondence, except as otherwise indicated.

Dear Ms. Kavney Harvey:

We are in receipt of your letter dated September 28, 2018 regarding the manner in which the Office of Parks, Recreation and Historic Preservation has responded to your client's Freedom of Information Law (FOIL) request.

In response to the request for records relating to the agency's project-specific minority and women owned business enterprise participation goal setting, the agency responded by stating "if such records did exist the Office would deny release of these records as such release would impair present or imminent contract awards pursuant to Public Officers Law section 87(2)(c)." You seek an advisory opinion as to whether the agency's response "which fails to acknowledge whether or not responsive documents exist, is a permissible response" under FOIL.

In its response, the agency has essentially adopted what is known under the federal Freedom of Information Act as a *Glomar* response. In other words, the agency has indicated that it will neither confirm nor deny the existence of the requested records. This is a type of response that has been engrafted onto the federal Freedom of Information Act and confirmed by federal courts and by the New York State Court of Appeals for use under very limited circumstances. Such response is typically used at the federal level for requests for records involving issues of national security or when an indication of the existence of a law enforcement record would have a stigmatizing effect.

On many occasions, this office has advised that FOIL permits an agency to respond in only one of three ways to a request for records. Under FOIL, an agency can grant access to a record in whole or in part, deny access to a record in whole or in part, or indicate that no such record exists. Recently, however, the New York State Court of Appeals, in Matter of Abdur-Rashid v. New York City Police Department, 31 N.Y.3d 217 (March 29, 2018), affirmed that the use of the *Glomar* exception by law enforcement agencies was permitted. The court held that "a police agency must be permitted to give a uniform response —to decline to confirm or deny the existence of responsive material in either scenario—on the rationale that whether or not it is investigating a particular person or organization constitutes information that is itself statutorily exempt from disclosure." The Court clarified, however, that this type of response should only be permitted under very particular circumstances:

> "It is the rare case where, due to the surrounding circumstances and the manner in which a FOIL request is structured, acknowledging that any responsive records exist would, itself, reveal information tethered to a narrow exemption under FOIL." Abdur-Rashid, 31 N.Y.3d 217, 233

The Court also noted:

> "[U]nder the circumstances presented here, where necessary to give full effect to the law enforcement and public safety statutory exemptions, the NYPD's response neither confirming nor denying the existence of the investigative or surveillance records sought is compatible with FOIL and the policy underlying those exemptions, which is to provide the public access to records without compromising a core function of government—the investigation, prevention and prosecution of crime." Abdur Rashid, 31 N.Y.3d 217, 239

As the records your client requested do not involve a law enforcement investigation or a public safety issue, it is our opinion that a *Glomar* response should not be permitted. Accordingly, it is our opinion that in order to comply with the requirements of FOIL, the agency must grant access to the records in whole or in part, deny access to the records in whole or in part, or indicate that no such records exist.

I hope this information proves useful.

Sincerely,

Kristin O'Neill
Assistant Director

Enclosure

cc: Petra Larsen