

# COMMITTEE ON OPEN GOVERNMENT

## STATE OF NEW YORK DEPARTMENT OF STATE

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## FOIL AO 19829

April 29, 2022

*By Electronic Mail Only*

Javid Afzali, Esq.

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*The Committee on Open Government is authorized to issue advisory opinions. The ensuing advisory opinion is based solely upon the information presented in your correspondence unless otherwise noted.*

Dear Mr. Afzali:

The Committee on Open Government (“Committee”) received your request for an advisory opinion regarding the responsibilities of your client, the Town of Forestburgh (“Town”), in relation to a Freedom of Information Law (FOIL) request it recently received.

By way of background, it is our understanding that the FOIL request received by the Town dated April 13, 2022, was the second request from this applicant for records relating to “Lost Lake.” The first request was dated October 28, 2021. The Town responded to the October request in two stages: first on December 2, 2021, and second on December 21, 2021. The applicant appealed the Town’s partial denial on February 11, 2022, and on February 28, 2022, the Town issued its appeal determination. The second request in April 2022 followed.

Upon review of the two requests, there appears to be substantial overlap. For example, I note that the April 2022 requests labeled (2) and (4) appear to be duplicative of the October 2021 requests labeled (6) and (10). Insofar as the April 2022 request involves records that had previously been denied both initially and following an appeal, it is our view that the Town is not required to respond, unless there is a change in circumstances that would alter the authority of the Town to deny access. *See Matter of Mendez v. New York City Police Dept.*, 260 A.D.2d 262, 262-63 (1st Dep’t 1999) (FOIL requests were duplicative and properly dismissed as an untimely attempt to obtain judicial review of the denial of the first request). Further, the Appellate Division, Second Department has held that an agency need not make available records that had been previously disclosed to the applicant or that person’s attorney unless there is an allegation “in evidentiary form, that the copy was no longer in existence.” *Moore v. Santucci*, 151 A.D. 2d 677, 678 (2d Dep’t 1989).

Based upon this judicial precedent, it is our opinion that any portion of the request dated April 13, 2022, that requests the same records as the records described in applicant’s October 28, 2021, FOIL request may be denied on the ground that the request is duplicative of an earlier request.

To the extent that the applicant has made requests for records that are not duplicative of previous requests, I note that one of the possible reasons an agency may not be able to locate records is where a request does not adequately or reasonably describe the records sought. Section 89(3) of FOIL requires

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an applicant seeking records to “reasonably describe” the records sought. The New York Court of Appeals has laid out what we believe are the two essential principles relevant here. *See Konigsberg v. Coughlin*, 68 N.Y.2d 245 (1986). First, if an agency can locate and identify records with *reasonable effort*, a request would meet the standard that it must reasonably describe the records sought. *See id.* at 249. Second, whether or the extent to which a request is reasonably described may be dependent upon the nature of an agency’s filing, indexing or retrieval systems. *See id.* at 250. In furtherance of these principles, the Committee has advised that an agency need not search through the haystack in an effort to find the needles, even if it is known that the needles are there somewhere.

While I am unfamiliar with the recordkeeping systems of the Town, in our opinion a request for “all records” or “all letters, emails, memoranda, and correspondence and other records” relating to a particular subject does not necessarily reasonably describe records sought. In our view, requests of this nature may make it difficult, if not impossible, for agency staff to identify and locate the responsive records with reasonable effort based on the nature of the agency’s filing system.

Finally, I note that FOIL pertains to existing records and states, in general, that an agency need not create a record in response to a request for information. Applicant’s requests labeled (8) and (18), for example, appear to be requesting information, not records. If the Town does not possess “a list of the former Town Comprehensive Plan Committee members’ names, titles and the email addresses used by each member to conduct Committee’s business” or a record that contains “the names of all Town Zoning Committee members and Town Comprehensive Plan Committee members, their dates of service, and their email addresses used to conduct Committee business,” the Town would not be obligated to prepare such records in order to respond to this request for information.

I hope you find this information useful.

Sincerely,

Kristin O’Neill  
Assistant Director