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January 5, 2023

FOIL AO 19836

By Electronic Mail Only

Jesse Coburn
jesse@streetsblog.org

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.

Dear Jesse Coburn:

I am writing in response to your request for an advisory opinion regarding the manner in which the New York City Office of Technology and Innovation (the Office) has responded to your March 9, 2022, Freedom of Information Law (FOIL) request seeking 311 customer satisfaction survey results.

Since you submitted your request, the Office has sent repeated letters extending the deadline by which it planned to respond to your request. These letters merely stated that “[t]he Office of Technology and Innovation (Department of Information Technology and Telecommunications) is continuing to research and review your request and requires an additional thirty business days to complete the work of this request.”

By way of background, FOIL provides direction concerning the time and manner in which agencies must respond to requests. Each specifically, § 86(3)(a) of the law states that, 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.... If an agency determines to grant a request in whole or in part, and 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.

Accordingly, the Committee has long advised that when an agency is unable to deny or provide access to records within five business days, it must provide an acknowledgement within that time indicating an approximate date, not to exceed twenty additional business days, on which it will grant access in whole or in part. If an agency determines, either within five business days of the receipt of the request, or at or near the expiration of twenty business days of its acknowledgement, that it is unable to respond within twenty additional business days, it must indicate a “date certain” that includes both the date and the reasons for requiring additional time. Although we recognize that there are occasions when an agency will require an extension of time beyond that which it initially predicted, there is no provision in the statute for an extension beyond the date certain or repeated extensions. The date certain must be reasonable based on attendant facts and circumstances.

When an agency fails to comply with the time limits for response as described in §89(3)(a), or denies access to records in writing, FOIL permits the applicant to file an administrative appeal, and, if the agency denies the appeal, that person may seek judicial review pursuant to Article 78 of the Civil Practice Law and Rules. We note that the Legislature chose to distinguish the two types of denials in § 89(4)(a), as follows:

any person denied access to a record may within thirty days appeal in writing such denial to the head, chief executive or governing body of the entity, or the person therefor designated by such 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. . . . Failure by an agency to conform to the provisions of subdivision three of this section shall constitute a denial.

Because it distinguishes between the two types of denials, one in writing and the other due to a failure to respond in a timely manner, it is our opinion that the Legislature intended that there may be two types of appeals: one, from a denial of access in writing based on an exception to rights of access, and the other, from a constructive denial of access as a result of the agency’s failure to comply with the time limits for response required by § 89(3)(a).

You have attempted to pursue your legal remedy of appealing a constructive denial on three separate occasions prior to contacting our office. The first appeal was sent on August 2, 2022, after having received a third notice of extension. The Office responded on August 18, 2022, by advising you that your appeal was premature. The Office did not provide the Committee on Open Government with a copy of its response as required by Law. On September 27, 2022, Ava Lubell of the Cornell Law School First Amendment Clinic filed a second appeal on your behalf; the Office failed to respond to this appeal. Heather Murray filed a third appeal on October 28, 2022, on your behalf. Again, the Office responded by advising Ms. Murray that the appeal was premature and failed to provide the Committee on Open Government with a copy of its response as required by Law.

The Office has sent an additional three extension letters, the most recent on January 5, 2023, since your initial appeal in August.

In our view, it was reasonable, upon receipt of the third extension notice, to construe this failure to determine rights of access as a constructive denial on the part of the agency. I point out that § 89(3)(a) of FOIL requires an agency to state “the reason for the inability to grant the request within twenty

business days” when advising a requestor that it requires additional time to respond. I note that none of the six notices of delay issued by the Office include a reason for the delay in response. As noted above, they merely state: “The Office of Technology and Innovation (Department of Information Technology and Telecommunications) is continuing to research and review your request and requires an additional thirty business days to complete the work of this request.”

As noted, the Office has advised you and your representatives that they believe your appeals to be premature. In our view, this is not accurate. Pursuant to the [Committee on Open Government regulations](#), which have the force and effect of law:

- (e) A failure to comply with the time limitations described herein shall constitute a denial of a request that may be appealed. Such failure shall include situations in which an agency:
 - (1) fails to grant access to the records sought, deny access in writing or acknowledge the receipt of a request within five business days of the receipt of a request;
 - (2) acknowledges the receipt of a request within five business days but fails to furnish an approximate date when it will grant or deny a request in whole or in part;
 - (3) furnishes an acknowledgment of the receipt of a request within five business days with an approximate date for granting or denying access in whole or in part that is unreasonable under the circumstances of the request;
 - (4) fails to respond to a request within a reasonable time after the approximate date given or within twenty business days after the date of its acknowledgment of the receipt of a request;
 - (5) determines to grant a request in whole or in part within twenty business days of its acknowledgment of the receipt of a request, but fails to do so, unless the agency provides the reason for its inability to do so in writing and a date certain within which the request will be granted in whole or in part;
 - (6) does not grant a request in whole or in part within twenty business days of its acknowledgment of the receipt of a request and fails to provide the reason in writing explaining its inability to do so and a date certain by which the request will be granted in whole or in part; or
 - (7) responds to a request, stating that more than twenty business days is needed to grant or deny the request in whole or in part and provides a date certain within which it will do so, but such date is unreasonable under the circumstances of the request.

21 N.Y.C.R.R. 1401.5(e) (emphasis added).

As of the writing of this letter, it is my understanding that the agency still has yet to provide a date certain by which is plans to issue a determination. It appears from your correspondence that you and the Office disagree on the reasonableness of the date by which the agency intends to provide a response to your FOIL request. On these facts, the cited Committee on Open Government FOIL regulation provides that you may file an appeal and seek production of responsive material or an explanation of why the date selected by the agency is reasonable under the circumstances.

Coburn
January 5, 2023
Page 4

As such, it is our view that your appeal is not premature, and the agency has a responsibility to either provide access to the records sought or to “fully explain” (see Public Officers Law 89(3)(a)) the reason for further denial of access.

Thank you for your inquiry.

Sincerely,

Kristin O’Neill
Assistant Director

cc: Mauro, Dominic dmauro@oti.nyc.gov
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