



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

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June 1, 2023

FOIL AO 19846

By Electronic Mail Only

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:

The Committee on Open Government (“Committee”) received your request seeking an advisory opinion regarding the applicability of the law enforcement exemption to your Freedom of Information Law (FOIL) request. Specifically, you inquire whether the exemption permitting law enforcement agencies to withhold records which would impair a law enforcement investigation appropriately applies to a case that is nearly fifty-five years old.

Public Officers Law Section 87(2)(e) allows an agency to withhold records which

are compiled for law enforcement purposes only to the extent that disclosure would:

- i. interfere with law enforcement investigations or judicial proceedings, provided however, that any agency, which is not conducting the investigation that the requested records relate to, that is considering denying access pursuant to this subparagraph shall receive confirmation from the law enforcement or investigating agency conducting the investigation that disclosure of such records will interfere with an ongoing investigation;
- ii. deprive a person of a right to a fair trial or impartial adjudication;
- iii. identify a confidential source or disclose confidential information relating to a criminal investigation; or
- iv. reveal criminal investigative techniques or procedures, except routine techniques and procedures

Thus, the law enforcement exemption requires two prongs be met to be properly invoked. The records must have been compiled for law enforcement purposes and disclosure of the records must cause one of the harms envisioned in subsections (i)-(iv).

Additionally, subsection (i) was amended in 2021 to add the requirement that agencies other than those conducting the investigation obtain confirmation from the investigating law enforcement agency before invoking this exemption.¹ The 2021 amendment was passed as Chapter 808 of the Laws of 2021. The Sponsor's Memo for Chapter 808 states that this change was to "make clear that records cannot be withheld solely because they relate in some manner to an investigation or criminal proceeding." It also reiterates the legislature's intention that government records are presumed available.

FOIL provides individuals with greater access to their government which helps achieve the goal of an open and transparent government. To that end, there is a strong presumption under FOIL that government records are accessible to the public and there are several defined exceptions of access to records. Under current law, access to records or to portions of records is sometimes withheld when they should not be. Too often records that were prepared in the ordinary course of business, which should be accessible to the public, have been withheld. This bill would clarify certain provisions of FOIL . . . to make sure that people are not wrongfully denied access to public records.

In my opinion, that amendment and the language used in the Sponsor's Memo reflect an intention that the agency have some actual indication or belief that disclosing the records will "interfere with" an actual, on-going investigation. In other words, a mere possibility that disclosure could under some set of facts interfere with an investigation would be inconsistent with FOIL.

This notion is consistent with case law on the topic. Although a law enforcement agency is not required to identify the risk associated with every potentially responsive record, it does have an obligation to "identify the generic kinds of documents for which the exemption is claimed, and the generic risks posed by disclosure of these categories of documents [T]he agency must still fulfill its burden under Public Officers Law § 89(4)(b) to articulate a factual basis for the exemption" in an Article 78 proceeding. *Matter of Leshner v. Hynes*, 19 N.Y.3d 57, 67 (2012).

In 2003, the Committee issued Advisory Opinion [13916](#) pertaining to a different FOIL request for records of the same murder investigation. At that time, the New York State Police ("NYSP") issued a blanket denial of access to records related to the investigation citing that disclosure of the records would interfere with the homicide investigation, as well as other exemptions to disclosure. As further discussed in that Advisory Opinion, blanket denials of access to agency records are almost always inconsistent with the requirements of FOIL. See *Gould v. New York City Police Department*, 87 NY 2d 267, 275 (1996); Advisory Opinion [19701](#) (opining that denial of access to all records pertaining to a fifty-year-old arson investigation would likely not interfere with the investigation or prosecution of the crime). At that time the Committee opined

¹ Portions of Chapter 808 of the Laws of 2021 were further amended and removed by Chapter 155 of the Laws of 2022; however, those changes did not impact the changes Chapter 808 imposed regarding law enforcement investigations.

In view of the fact that nearly thirty-five years have passed since the murder, it is inconceivable that every aspect of every record relating to the murder would, if disclosed, interfere with an investigation. Whether investigative activity has recently occurred or is in any way ongoing is questionable. The less such activity has recently occurred or is ongoing, the less is the ability, in my view, to contend that disclosure would interfere with an investigation. If the case has effectively been closed, it might be contended that disclosure at this juncture would neither have an effect on nor interfere with the investigation; in essence, the investigation would be over.

The April 11, 2023, appeal determination you received states

As of the date of this letter, the responsive records are part of an open and on-going law enforcement investigation and, if disclosed, would interfere with the ongoing investigation. (*see Public Officers Law § 87(2)(e)(i)*). The New York State Police Bureau of Criminal Investigation currently has an investigator assigned and actively working this case, with the latest entry/activity to the file being on November 11, 2022.

After considering the legislative intent with the 2021 amendment to the law enforcement investigation exemption and despite the NYPD claims that such an old investigation is still open and that an investigator last did something on the case two months after receiving your FOIL request (almost six months ago now), in our view, the response to your FOIL request also inappropriately constitutes a blanket denial of access and a use of the law enforcement investigation exemption that is inconsistent with the requirements of FOIL. In my opinion, it is highly improbable that every responsive record in an almost fifty-five-year-old murder investigation file, where most of those parties involved in the crime and investigation are deceased, could appropriately be withheld under the exemptions to disclosure.

Given the age of the case and that the victim and the suspected officer are deceased, and at least one of the potential witnesses is likely deceased, it is improbable that disclosure of every record in its entirety would interfere with any continuing investigation. In particular, your request asks for several records related to the late Trooper Hennigan, a potential suspect in the murder. Since he is now deceased, it is difficult to imagine how release of records reflecting Trooper Hennigan's stop of the victim on the night she was murdered, lab results of Trooper Hennigan's clothing, communications made by Trooper Hennigan to other officers, and records reflecting a stop of Trooper Hennigan thirty-one years after the murder would interfere with any continuing investigation efforts. Albeit surmise on my part, it is conceivable that release of some of those records might actually serve to assist the investigation by refreshing the public's recollection of the case and potentially connecting pieces of information the public is generally unaware of with previously undiscovered witnesses or evidence. However, that is not to say that some of the other exemptions to disclosure would not justify withholding portions of those records.

Since your request for an advisory opinion is limited to the application of the law enforcement investigation exemption, I will withhold from opining on the applicability of the remaining exemptions asserted by the NYSP.

June 1, 2023
Page 4 of 4

Thank you for your inquiry.

Sincerely,

s/Christen L. Smith

Senior Attorney



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