



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

---

One Commerce Plaza  
99 Washington Ave.  
Albany, New York 12231  
(518) 474-2518  
Fax (518) 474-1927

June 2, 2023

**FOIL AO 19847**

By Electronic Mail Only to: [bgonzalez@boc.nyc.gov](mailto:bgonzalez@boc.nyc.gov)

Mr. Brian J. Gonzalez  
New York City Board of Correction  
2 Lafayette, 12<sup>th</sup> Floor, Room 1221  
New York, NY 10007

*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. Gonzalez:

The Committee on Open Government (“Committee”) has prepared this advisory opinion after receiving your inquiry regarding the availability of criminal history records held by the New York City Department of Correction. After reviewing the relevant statutes, case law and prior advisory opinions issued on the topic, this advisory opinion is intended to amend the Committee’s opinion reflected in portions of our past advisory opinions.<sup>1</sup>

As you know, the Freedom of Information Law (FOIL) is based on a presumption of access. All records of an agency are available, except to the extent that records or portions thereof fall within one or more grounds for denial appearing in §87(2)(a) through (s) of the Law. The question posed for our consideration is whether criminal history records prepared by the Division of Criminal Justice Services (“DCJS”) are exempt from disclosure pursuant to § 87(2)(a) of the Law as records that “are specifically exempted from disclosure by state or federal statute,” even when such records are possessed by an agency other than DCJS.

Executive Law §§ 837(6) and 837(8) state, respectively, that DCJS shall:

Establish, through electronic data processing and related procedures, a central data facility with a communication network serving qualified agencies anywhere in the state, so that they may, upon such terms and conditions as the commissioner, and the appropriate officials of such qualified agencies shall agree, contribute information and, except as provided in subdivision two of section 306.2 of the family court act, have access to information contained in the central data facility, which shall

---

<sup>1</sup>FOIL AOs 18663, 17688, 16623, 11176, 11097, 9859, 9727, 9287, 8952, 8602, 8383, 7988.

include but not limited to such information as criminal record, personal appearance data, fingerprints, photographs, and handwriting samples...

Adopt appropriate measures to assure the security and privacy of identification and information data.

As a result of this statutory obligation imposed upon DCJS and pursuant to its statutory authority to adopt regulations necessary to the performance of the Division's functions powers and duties (Executive Law § 837(13)), the Division promulgated regulation which state, in relevant part, that

...the following types of records shall be exempt from public inspection and/or copying .... [D]isclosure of information contained in the criminal history file, license and employment file and wanted and missing persons file, maintained by DCJS, including any and all information contained in such files [9 NYCRR § 6150.4(b)(6)].

Previous advisory opinions prepared by the Committee have questioned whether the language of Executive Law §§ 837(6) and (8) and the corresponding regulations at 9 N.Y.C.R.R. §6150.4 were sufficient to render criminal history records "exempt by state statute." Specifically, the Committee noted that:

According to judicial decisions, an agency's regulations may not render records deniable or confidential, unless there is a basis for so doing pursuant to one or more of the grounds for denial appearing in the Freedom of Information Law. Again, § 87 (2)(a) refers to records that are specifically exempted from disclosure by statute. A statute, based upon judicial interpretations of the Freedom of Information Law, is an act of the State Legislature or Congress [see *Sheehan v. City of Syracuse*, 521 NYS 2d 207 (1987)], and it has been found that agencies' regulations are not equivalent to statutes for purposes of §87 (2)(a) of the Freedom of Information Law [see *Zuckerman v. NYS Board of Parole*, 385 NYS 2d 811, 53 AD 2d 405 (1976); *Morris v. Martin, Chairman of the State Board of Equalization and Assessment*, 440 NYS 2d 365, 82 AD 2d 965, reversed 55 NY 2d 1026 (1982) ]. Therefore, insofar as an agency's regulations render records or portions of records deniable in a manner inconsistent with the Freedom of Information Law or some other statute, those regulations would, in our opinion, be invalid. Regulations cannot operate, in our view, in a manner that provides fewer rights of access than those granted by the Freedom of Information Law.

[FOIL AO 17688.](#)

However, judicial review of this issue has resulted in consistent case law holding that criminal history records maintained by DCJS are exempt from disclosure pursuant to Public Officers Law § 87(2)(a) and Executive Law § 837. In *Capital Newspapers v. Poklemba*, Supreme Court, Albany County (April 6, 1989), the court held:

There is no requirement that a statute specifically identify records as confidential or make precise reference to a FOIL exemption (See: *Capital Newspapers v Burns*, 67 NY2d 562, 565-567). The legislative history establishing the centralized criminal data facility indicates an intent by the Legislature to create a closed system whereby dissemination of information would be severely restricted and limited to specifically delineated agencies for law enforcement and criminal justice purposes only. Additions to those entitled to access have been few and far between, and only when authorized by specific statutory amendment. Adopting petitioner's view that there is no statutory basis exempting these records from disclosure would require the court to ignore this entire body of legislative history. That it cannot do. Both the language of the statute and the consistent history of limited access to the criminal records maintained by DCJS lead this court to conclude that an exception to the mandate of FOIL exists with respect to the disclosure sought by petitioner.

In *Bennett v. Girgenti*, 226 A.D.2d 792, 792 (3d Dep't 1996), the appellate division rejected an inmate petitioner's claim that he was entitled to disclosure of records concerning his victim's criminal history maintained by DCJS. *Bennett* also cites the Third Department's previous holding in *Smith v. Department of Criminal Justice Services*, 210 A.D.2d 708, 709 (3d Dep't 1994), wherein it affirmed the trial court's holding that criminal history records which are in the possession of DCJS are exempt from the disclosure provisions of FOIL.

The next question that must be addressed is whether those same records would be exempt from disclosure pursuant to Executive Law § 837 when held by another agency. As previously mentioned, ordinarily, records are exempt from disclosure under § 87(2)(a) of FOIL only when a state or federal statute deems the records or content confidential or exempt from disclosure. In some circumstances, the relevant statute may only govern access to records maintained by a particular agency even when that same record is also possessed by one or more other agencies. If that is the case, the statute and § 87(2)(a) could not be asserted by the other agencies to restrict access to the record. However, one or more of the other exemptions to disclosure may be asserted, depending on the content of the record(s).

Many of our previously issued advisory opinions considered existing caselaw; however, the case law has since evolved and requires the Committee to amend its prior opinion and assessment of the topic. In 1996, the Second Department, in a case involving a FOIL request by a criminal defendant to the Kings County District Attorney's Office for copies of criminal history records compiled by DCJS, held:

[t]o the extent that our decision in [Matter of Geames v. Henry, 173 A.D.2d 825, 572 N.Y.S.2d 635](#), may hold that criminal history records are not exempt from disclosure, it should no longer be followed.

Criminal history records or "rap sheets" compiled by the Division of Criminal Justice Services are exempt from disclosure under the Freedom of Information Law (see, Public Officers Law § 87 [2] [b]; Executive Law § 837 [8]; 9 NYCRR 6150.4 [b] [6]; *Matter of Bennett v Girgenti*, 226 AD2d 792).

*Woods v. Kings County District Attorney's Office*, 234 A.D.2d 554, 555 (2d Dep't 1996).

Subsequently, the Appellate Divisions of both the Second and the Fourth Departments have held that the criminal history records compiled by DCJS but possessed by the DA were exempt from disclosure. *See, e.g., Williams v. Erie County Dist. Atty.*, 255 A.D.2d 863, 864 (4th Dep't 1998) (except when such records pertain to "witnesses called by the People in a criminal trial"); *Gerace v. Mandel*, 267 A.D.2d 386 (2d Dep't 1999) (records compiled by DCJS but possessed by DA are exempt from FOIL disclosure).

Taking into consideration the clear judicial precedent on this matter, the Committee must opine that criminal history records compiled by DCJS are generally exempt from FOIL disclosure regardless of which agency holds the records.

Thank you for your inquiry.

Sincerely,  
*s/Christen L. Smith*  
Senior Attorney