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FOIL AO 19829a

June 27, 2022

Seneca County Attorney
Attn.: David K. Ettman
1 Di Pronio Drive
Waterloo, NY 13165

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. Ettman:

The Committee on Open Government ("Committee") received your request for an advisory opinion regarding the release of records related to the Seneca County Hotel or Motel Occupancy Tax. You raise several questions which we address in turn below.

Disclosure of Records Exempted by Statute

As you reference, § 87(2)(a) of the Freedom of information Law ("FOIL") requires that agencies withhold information deemed confidential by state or federal statute. You specifically inquire whether Tax Law § 1146 prohibits Seneca County ("County") from releasing quarterly tax returns filed by the entities subject to the local law establishing the "Hotel/Motel Tax."

Section 1146 states, in relevant part, that

it shall be unlawful for the tax commission, any tax commissioner, any officer or employee of the department of taxation and finance, any person engaged or retained by such department on an independent contract basis, or any person who in any manner may acquire knowledge of the contents of a return or report filed with the tax commission pursuant to this article, to divulge or make known in any manner any particulars set forth or disclosed in any such return or report.

However, Tax Law § 1202-o provides, in relevant part:

(1) Notwithstanding any other provision of law to the contrary, the county of Seneca is hereby authorized and empowered to adopt and amend local laws imposing in such county a tax, in addition to any other tax authorized and imposed pursuant to this article, such as the

legislature has or would have the power and authority to impose upon persons occupying hotel or motel rooms in such county. . .

(2) Such tax may be collected and administered by the Seneca county treasurer, or other fiscal officers of Seneca county by such means in such manner as other taxes which are now collected and administered by such officers or as otherwise may be provided by such local law. . .

Assuming that the County is not required to report § 1202-o filings to the Tax Commission or Department of Taxation and Finance, it is our opinion that § 1202-o, authorizing the Hotel/Motel tax in Seneca County, rather than § 1146, governs the quarterly Hotel/Motel Tax filings.

Section 87(2)(a) of the FOIL applies only when the records are “specifically exempted from disclosure by state or federal statute.” Unlike Tax Law § 1146, Tax Law § 1202-o is silent with respect to disclosure of the filing information. As such, we believe that § 87(2)(a) does not apply and would not prevent disclosure of the Hotel/Motel Tax filing records.

Access Based on Contractual Relationship

FOIL confers rights of access to the public, regardless of relationship between the requestor and the agency. When a requester seeks records pursuant to FOIL, courts have held that an applicant does so as a member of the public and that the status or interest of the applicant is irrelevant to rights of access. *See M. Farbman & Sons v. New York City Health and Hosps. Corp.*, 62 N.Y.2d 75, 79-80 (1984); *Burke v. Yudelson*, 368 N.Y.S.2d 779, 786-787 (1975), *aff'd* 51 A.D.2d 673, 378 N.Y.S.2d 165 (1976). Thus, whether the requester and agency are interacting according to a contract or other special relationship is largely irrelevant.

The Committee has previously opined that when public employees from one agency request information from another agency in order to perform their job duties, information that could otherwise be withheld under any of the exemptions found in §§ 87(2)(b)-(r) might be disclosed considering the purpose of the disclosure. *See* FOIL AO [15948](#). However, that is merely suggestive advice given that the exemptions permitted under §§ 87(2)(b)-(r) are discretionary rather than mandatory, unlike the mandatory disclosure exemption found in § 87(2)(a). I would like to point out that if § 1146, or another statute, did apply, it would prevent disclosure of the records regardless of relationship.

In my opinion, it seems unlikely that any of the content reported on the “Occupancy Tax Return” form would appropriately fall within any of the § 87(2) exemptions. While it is possible that the address of the person filing the form could be withheld pursuant to § 87(2)(b) as an unwarranted invasion of personal privacy, that would only be appropriate if the filer is a person rather than a corporate entity and the address provided is a personal address. Business addresses are not personal and therefore disclosure cannot invade “personal privacy.” Similarly, while disclosure of personal income or other tax information might, depending on circumstances, constitute an unwarranted invasion of personal privacy, disclosure of income or tax information of a business could not invade “personal privacy.”

Intra-Agency Exemption

You have specifically inquired whether the intra-agency materials exemption found to § 87(2)(g) applies to the disclosure of the Hotel/Motel Tax records requested. As referenced above, the requester, the

Chamber of Commerce, is under contract with the County. Section 87(2)(g) permits an agency to withhold certain portions of records that contain information exchanged between members of the same agency or members of different agencies working collaboratively. Here, the information or content subject to disclosure is exchanged between the County and the business filing the tax return, not the FOIL requestor. Additionally, the Chamber of Commerce is not an agency subject to the FOIL; therefore, communications between the Chamber of Commerce and the County could not be classified as intra- or inter-agency communications despite the existence of a contract between the two. Therefore, I do not believe that § 87(2)(g) appropriately exempts disclosure of the content of the Hotel/Motel Tax records.

In my opinion, since none of the exemptions seem to apply, FOIL would require disclosure of the "Occupancy Tax Return" forms filed by businesses to anyone requesting them.

Prospective Requests

Your letter also states that the request included a prospective request for records. The FOIL pertains to existing records and does not obligate agencies to grant or deny access to records that do not yet exist. See § 89(3). Thus, an agency's response to a prospective request for records might indicate that its obligations under the FOIL do not apply to prospective requests and that the requestor might consider making additional requests at a future date.

Thank you for your inquiry.

Sincerely,

s/Christen L. Smith

Christen L. Smith

Senior Attorney