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July 26, 2022

By Electronic Mail Only: jbpegram@earthlink.net

John B. Pegram
496 1st Street
Brooklyn, NY 11215

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 Mr. Pegram:

The Committee on Open Government (“Committee”) received your request for an advisory opinion dated July 22, 2022 regarding the MTA’s response to your Freedom of Information Law (“FOIL”) request. Please be aware that the Committee is authorized to provide opinions addressing whether an agency’s actions are consistent with the FOIL. However, the Committee cannot make determinations regarding whether an agency’s actions are compliant with the requirements of the FOIL; only a court may make such determinations. Your concerns are addressed in turn below.

Insufficient Staffing

As you reference, Section 89(3)(a) provides, in relevant part,

[a]n agency shall not deny a request on the basis that the request is voluminous or that locating or reviewing the requested records or providing the requested copies is burdensome because the agency lacks sufficient staffing or on any other basis . . .

In my opinion, the legislature’s use of the phrase “on the basis that” implies that an agency may not outright refuse to process a voluminous or burdensome request based on staffing. While the MTA’s responses might be interpreted as a constructive denial of your request, I do not believe it has affirmatively refused to process your request based on insufficient staffing. The MTA’s appeal response clearly indicates that it intends to process your request and issue a substantive response, albeit at a timeframe that is arguably unreasonable for the circumstances.

The MTA cites “[i]n light of New York State’s reduction in workforce as part of the ongoing response to the COVID-19 pandemic, there may be delays in response to FOIL requests.” The Committee has previously opined that the executive orders issued during the COVID-19 pandemic did not toll the timeframes required by the FOIL. See [19780](#). The Appellate Division for the Fourth Department agreed with our opinion. See *Matter of Maziarz v Western Regional Off-track Betting Corp.*, WL 2022 N.Y. Slip Op. 04247 (2022). Thus, in our opinion, COVID-19 related staff reductions alone would not be sufficient to justify a response time of longer than twenty business days.

Reasonableness of Delay

Section 89(3)(a) also requires the MTA to issue a response conforming to certain requirements.

Each entity subject to the provisions of this article, 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 acknowledgment 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.

The Regulations of the Committee on Open Government provide additional clarification, stating that within five business days of receiving a request, the agency’s written acknowledgment shall include

an approximate date when the request will be granted or denied in whole or in part, which shall be reasonable under the circumstances of the request and shall not be more than twenty business days after the date of the acknowledgment, *or if it is known that circumstances prevent disclosure within twenty business days from the date of such acknowledgment, providing a statement in writing stating the reason for inability to grant the request within that time and a*

date certain, within a reasonable period under the circumstances of the request, when the request will be granted in whole or in part.

Emphasis added. 21 NYCRR 1401.5(c)(3). The Regulations further clarify the factors that an agency may consider in determining a reasonable timeframe for response.

In determining a reasonable time for granting or denying a request under the circumstances of a request, agency personnel shall consider the volume of a request, the ease or difficulty in locating, retrieving or generating records, the complexity of the request, the need to review records to determine the extent to which they must be disclosed, the number of requests received by the agency, and similar factors that bear on an agency's ability to grant access to records promptly and within a reasonable time.

The MTA's initial response to your request on February 28, 2022, stated that it would provide a response within sixty business days. The only reason possibly provided for requiring longer than twenty business days at that time was the pandemic related staff reductions discussed above. Its later response, on June 3, 2022, cited locating and reviewing responsive documents, if found, generally as justification for requiring an additional thirty days. While the MTA is correct in stating that there is no absolute timeframe by which an agency must issue a substantive response under the FOIL, it must provide adequate justification considering the factors above and a date certain when the request will be granted or denied. Failure to do so constitutes a constructive denial. See 21 NYCRR 1401.5(e).

Assuming the information you provided is correct and that the MTA was in receipt of and undergoing "internal" review of the feasibility study report at the time you made your request for the report, locating and retrieving the document should not have been time consuming. However, depending on the content of the report, the MTA would have been justified in taking time to review the document and to assess whether any of the contents fall within one of the statutory exceptions to disclosure under § 87(2) of the FOIL. Since the contents and details of the report are unknown, I am unable to offer a specific opinion on whether any of the exceptions to disclosure would appropriately apply. Additionally, in its appeal response, the MTA cited receiving "thousands of FOIL requests each year." Thousands of requests, presumably varying in complexity and attention, submitted prior to your request would also justify requiring some additional time to respond your request, even if your request should be simple to fulfill.

Nevertheless, in my opinion, the MTA's responses to your request, without more detail, likely would not meet the justification requirements for such a lengthy delay; however, that decision can only be made by the judiciary after reviewing all of the relevant facts.

Enforcement

Section 89(4)(a) requires that the Appeals Officer either “fully explain in writing to the person requesting the record the reasons for further denial, or provide access to the record sought” within ten business days. Thus, the Appeals Officer must either grant access or affirm the denial of access to the records sought. The MTA Appeals Officer denied your appeal but technically did not deny access to the requested records. Instead, the Appeals Officer essentially stated that your request was not constructively denied because the MTA’s delay in providing a substantive response is reasonable. Section 89(4)(b) states that “[f]ailure by an agency to conform to the provisions of paragraph (a) of this subdivision shall constitute a denial.” Thus, you may initiate a Civil Practice Law and Rules Article 78 proceeding in state Supreme Court within four months of date of the appeal decision.

Thank you for your inquiry.

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

cc: Harris Berenson, MTA Deputy General Counsel