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Foil AO 19831

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By Electronic Mail Only: gthompso867@gmail.com

George Thompson
867 Serenity Road
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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. Thompson:

The Committee received your August 23, 2022, letter and attachments regarding access to a water survey conducted in the towns of Torrey, Milo, and Starkey. Without knowing the content of all of the responses, and primarily any comments provided, I am unable to provide a detailed opinion. However, I offer a few comments regarding access to the survey responses and results generally.

As you referenced, it appears that Yates County hired an engineering firm, Clark, Patterson, Lee ("CPL"), to conduct a county-wide water infrastructure study. You ask whether CPL would be "required to honor a FOIL request." FOIL requires that "agencies" respond to requests for "records," and defines agency as "any state or municipal department, board, bureau, division, commission, committee, public authority, public corporation, council, office or other governmental entity performing a governmental or proprietary function for the state or any one or more municipalities thereof, except the judiciary or the state legislature." POL § 86(3). Thus, the Yates County Legislature and the towns of Torrey, Milo and Starkey are "agencies," but CPL is not. In my opinion, CPL would not be required to respond to a FOIL request.

However, when an agency contracts with a non-governmental entity to provide consultative services, the records generated by that entity for the contracted project are "records" of the agency. Whether those records are in the possession of the agency does not end the inquiry into whether the records are subject to rights of access under FOIL, which defines record as

> any information kept, held, filed, produced or reproduced by, with or for an agency or the state legislature, in any physical form whatsoever including, but not limited to, reports, statements, examinations, memoranda, opinions, folders, files, books, manuals, pamphlets, forms, papers, designs, drawings, maps, photos, letters, microfilms, computer tapes or discs, rules, regulations or codes.

POL § 86(4). The Town of Torrey sent a letter dated April 26, 2022, inviting the "resident or business owner" to complete the survey; accordingly, it appears that the Town of Torrey assisted in administering the survey. It is unclear whether the towns of Milo and Starkey also did so. However, the email chain between the Town of Milo and CPL reveals that CPL was the entity that received the survey responses from individuals within those three towns and reported the results to the towns.

The question as to which "agency" the survey responses are "kept, held, . . . [or] produced" for is perhaps less clear. I believe that it is fair to interpret the County Legislature's authorization of the county-wide study and hiring of CPL to conduct the study to mean that the responses are "kept, held . . . [or] produced" for the County. Similarly, I believe it is fair to conclude that the towns are involved and have an interest in the survey process such that the survey responses, at least those from within the boundaries of each individual town, are "kept, held . . . [or] produced" for each of the towns. Therefore, in my opinion, each of the towns has a duty to respond to FOIL requests for survey responses held by CPL on its behalf.

Having reviewed the survey questions, I offer guidance based on the two exceptions to disclosure that seem most likely to apply. First, POL § 87(2)(b) allows agencies to withhold "records or portions thereof" which, "if disclosed would constitute an unwarranted invasion of personal privacy." The law provides a non-exhaustive list of examples of such unwarranted invasions of privacy, including "disclosure of information of a personal nature when disclosure would result in economic or personal hardship" or "information of a personal nature reported in confidence to an agency" and "not relevant to the ordinary work of such agency." § 89(2)(b)(iv), (v). Ultimately, whether disclosure constitutes an unwarranted invasion of personal privacy is determined by "what would be offensive and objectionable to a reasonable man of ordinary sensibilities," which requires "balancing the competing interests of public access and individual privacy." *Dobranski v. Houper,* 154 A.D.2d 736, 737 (3d Dep't 1989).

Again, without knowing the content of the responses, I cannot form an opinion regarding the application of this exception to the survey responses. However, I think it is fair to surmise that some of the information shared in the responses, when paired with names and addresses, could constitute an unwarranted invasion of personal privacy. For example, one of the questions asks if there are concerns about contamination of the water or the composition of the water at a particular site. Responses in the comment section could very well include concerns and maybe more detailed information about a particular person's health. Other questions ask about willingness or ability to pay for water. Again, those responses coupled with comments and a name or property address might divulge personal income information. I believe that you could fairly determine that disclosure in those examples would constitute an unwarranted invasion of personal privacy.

Bearing these issues in mind, there are two ways in which the agencies may protect personal privacy while still disclosing most of the responses. First, information that would constitute an unwarranted invasion of personal privacy can be redacted from the document, leaving content remaining to be disclosed. Additionally, you have stated that you are not interested in the names or exact addresses of people who responded. Where data can be aggregated to protect against an unwarranted invasion of personal privacy, the agency should do so. Here, a fairly large number of responses were received, which suggests that aggregating the data might sufficiently protect personal privacy. Accordingly, if the survey response data is maintained in a database from which aggregated data may reasonably be extracted to guard against unwarranted invasions of privacy, we believe that the towns should provide it. In aggregating the data, names of individuals and property numbers could be withheld, while most of

the responses could be disclosed without constituting an unwarranted invasion of personal privacy. *See e.g.*, FOIL AO 12088 (copy enclosed).

The second exception to disclosure that could apply here is the inter or intra-agency exception. Section 87(2)(g) allows agencies to withhold inter- or intra-agency records unless they contain:

> i. statistical or factual tabulations or data;
> ii. instructions to staff that affect the public;
> iii. final agency policy or determinations; or
> iv. external audits, including but not limited to audits performed by the comptroller and the federal government.

Portions of such materials that are reflective of opinion, advice, or recommendation may be withheld. Therefore, any results, discussions, or comments made about the responses or results between CPL and the County or towns might properly fall within this exception to disclosure. Of possible relevance here:

> Although the term "factual data" is not defined by statute, the meaning of the term can be discerned from the purpose underlying the intra-agency exemption, which is "to protect the deliberative process of the government by ensuring that persons in an advisory role [will] be able to express their opinions freely to agency decision makers." Consistent with this limited aim to safeguard internal government consultations and deliberations, the exemption does not apply when the requested material consists of "statistical or factual tabulations or data." Factual data . . . simply means objective information, in contrast to opinions, ideas, or advice exchanged as part of the consultative or deliberative process of government decision making.

Gould v. New York City Police Department, 89 N.Y.2d 267, 276-77 (1996) (internal citations omitted); *see also Ingram v Axelrod*, 90 A.D.2d 568, 570 (3d Dep't 1982) ("mere fact that some of the data might be an estimate or a recommendation does not convert it into an expression of opinion subject to a FOIL exemption"); *Mulgrew v Board of Education of the City School District*, 87 A.D.3d 506, 507 (1st Dep't 2011). However, it is important to note that this exception applies only to communications between members of the same agency or other agencies, including retained consultants, working on a shared project. Therefore, it is important to note that the responses to the survey from residents, property owners and businesses would not fall within this exception.

In an effort to clarify rights of access to these records, a copy of this letter will be provided to the County as well as the three towns you reference. You might consider making new requests of the various agencies or appealing the responses that you believe constitute an improper denial of access. Since I have previously provided you with advice regarding the timeframes applicable to FOIL requests and appeals, I direct your attention to those communications for reference.

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

cc: Yates County
Town of Milo
Town of Torrey
Town of Starkey