



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

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FOIL AO 19832

August 30, 2022

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 :

The Committee on Open Government (“Committee”) received your request for an advisory opinion regarding the availability of appraisal records of hydro-facilities on July 18, 2022. In an effort to obtain the information needed to form a complete, accurate opinion, we have been in contact with the Town of Moreau and its attorneys (“Town”). The following opinion considers the information you provided as well as the information supplied by the Town.

In a letter dated August 17, 2022, the attorneys for Erie Boulevard Hydro assert that the responsive appraisal reports “were part of an ongoing litigation and not a public record of the town,” are “under seal with the court,” and “contain CEII information . . . [and the] data therein constitutes a ‘trade secret.’” We address those issues in turn below.

Records

The Freedom of Information Law (“FOIL”) 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.

FOIL § 86(4). Accordingly, the fact that materials may be received as a “part of an ongoing litigation” does not render those documents “not a public record of the town.” Records received by the Town are “records” under FOIL regardless of who generates the records or how they are obtained. Whether and to what extent those records are disclosable depends on the content contained within the record(s). As a general matter, FOIL is based upon 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 (r) of the Law. The introductory language of § 87(2) refers to the

authority to withhold “records or portions thereof” that fall within the scope of the exemptions that follow. It has long been the Committee’s view that the reference in the law to the production of “records or portions thereof” evidences the legislative recognition that a single document or report, for example, might include portions that are available under the statute as well as portions that might justifiably be withheld. That being so, it also imposes an obligation on an agency to review records sought, in their entirety, to determine which portions, if any, might properly be withheld or redacted prior to disclosing the remainder.

The Court of Appeals has held that “[t]o ensure maximum access to government records, the exemptions [to FOIL disclosure] are to be narrowly construed, with the burden resting on the agency to demonstrate that the requested material indeed qualifies for exemption. . . . Only where the material requested falls squarely within the ambit of one of these statutory exemptions may disclosure be withheld.” *Gould v. New York City Police Department*, 89 N.Y.2d 267, 275 (1994) (internal quotations and citations omitted). The Court in *Gould* repeatedly specified that a categorical denial of access to records is inconsistent with the requirements of FOIL (“the exemption does not justify complete nondisclosure of the reports” and “blanket exemptions for particular types of documents are inimical to FOIL’s policy of open government”). *Id.* at 276, 275. Finally, the court offered guidance to agencies and lower courts in determining rights of access and referred to several decisions it had previously rendered, stating that:

to invoke one of the exemptions of section 87(2), the agency must articulate particularized and specific justification for not disclosing requested documents. If the court is unable to determine whether withheld documents fall entirely within the scope of the asserted exemption, it should conduct an *in camera* inspection of representative documents and order disclosure of all nonexempt, appropriately redacted material.

Id. at 275.

Court Orders

In denying your FOIL request, the Town initially cited that a contract between the parties, the “CEII Stipulation & Order,” prevented the Town from disclosing the responsive documents. On appeal, the Town asserted that the “CEII Stipulation & Order” is a Court Order that affirmatively prohibits the Town from disclosing the responsive records. Then, as referenced above, counsel for Erie Boulevard Hydro claimed as well that the responsive records are “under seal with the court.” The Committee received two pieces of information from the Town; one is entitled “Stipulation of Confidentiality” dated September 10, 2015 (“Stipulation”) and the second is entitled “CEII Stipulation and Order” dated April 6, 2018 (“Order”). Nothing we received indicates that the responsive records have been “sealed” by the Court.

The Stipulation is not a court order; rather, it is a contract between the parties. The Committee has long opined that contracts or agreements containing a confidentiality clause are insufficient to overcome the

disclosure requirements of the FOIL. In our view, any limitation on access to the record must be governed by FOIL, and the public statutory right to access government records cannot be bargained away by contract or agreement.

The Order was signed by the parties and the presiding Judge, making it a valid Court Order. The Order states that the Town “will not disclose such CEII information to the public in the event of a Freedom of Information Law (“FOIL”) request.” There is only one mandatory exemption to disclosure under FOIL; this exemption prohibits the disclosure of records deemed confidential by “state or federal *statute*.” FOIL § 87(2)(a) (emphasis added). Courts have held that other laws, such as regulations or local laws, are not state or federal statutes and, therefore, do not supersede the disclosure requirements of FOIL. *See, e.g., Zuckerman v. NYS Board of Parole*, 385 N.Y.S. 2d 811, 813 (3d Dep’t 1976) (“exemptions can only be controlled by other Statutes, not by Regulations which go beyond the scope of specific statutory language”); *Sheehan v. City of Syracuse*, 521 N.Y.S. 2d 207, 208 (Supr. Ct. Onon. Co. 1987) (“the *Syracuse Revised General Ordinances* is an ordinance, not a statute, and therefore a fee greater than that stated in the *Public Officers Law* cannot be charged”).

While we have found no court so holding, we believe that these precedents establish that court orders are similarly not “state or federal statutes” for FOIL purposes. As such and in light of the above distinction between state or federal statutes and other laws, it is unlikely in my opinion that a court order could supersede the disclosure requirements of FOIL. It is also worth noting that the FOIL exemptions and exceptions do not separately enumerate court orders. However, court orders are legally binding on the parties and the Committee cannot advise a party to violate a court order. This unresolved issue is most appropriately decided by the courts or Legislature.

It is worth noting, however, that even if the Order does ultimately supersede the disclosure requirements of FOIL, it would likely only prohibit disclosure of “CEII information,” not all responsive records in their entirety.

Critical Energy Infrastructure Information, Endangerment & Trade Secrets

FOIL § 87(2)(d) allows agencies to withhold “records or portions thereof” that “are trade secrets or are submitted to an agency by a commercial enterprise or derived from information obtained from a commercial enterprise and which if disclosed would cause substantial injury to the competitive position of the subject enterprise.”

Section 87(2)(f) allows an agency to withhold “records or portions thereof” that “if disclosed could endanger the life or safety of any person.” This exception can be appropriately applied to information involving “critical infrastructure.” Section 86(5) defines critical infrastructure as “systems, assets, places or things, whether physical or virtual, so vital to the state that the disruption, incapacitation or destruction of such systems, assets, places or things could jeopardize the health, safety, welfare or security of the state, its residents or its economy.”

The Order defines CEII as

all information obtained by a Qualified Person from Petitioner during this litigation or in connection with it, designated and marked “CEII Information”. CEII is a designation applied to specific engineering,

vulnerability, or detailed design information about proposed or existing critical infrastructure (physical or virtual) that:

- Relates details about the production, generation, transmission, or distribution of energy;
- Could be useful to a person planning an attack on critical infrastructure;
- Is exempt from mandatory disclosure under the Freedom of Information Act (“FOIA”);

and

- Gives strategic information beyond the location of the critical infrastructure.

Thus, the CEII information could fall within either the trade secret or the endangerment exemptions, or both, to disclosure under FOIL. As discussed above, the Town’s initial response and its appeal response invoke the Stipulation and the Order as grounds for withholding disclosure and do not reference any of the exemptions enumerated in § 87(2).

In its letter, counsel for Erie raises the trade secret exception and does not raise any infrastructure or safety concerns.

Erie asserts that *the reports* are protected under FOIL because the data contained therein constitutes a “trade secret.” . . . The financial and other information contained in the reports could potentially allow the competitors to understand Erie’s position and provide them with insights as to how they could position their own bids to their advantage and to the disadvantage of Erie. The reports and the highly confidential and proprietary information contained therein was prepared at substantial cost and effort, is not available from other sources and contains trade secret information

The letter does not address whether all information or certain pieces of information within those reports constitutes CEII or trade secrets. It also does not explain how release of any portion of the appraisal reports would cause the type of harm claimed. Without knowing the contents of the appraisal reports, it is difficult to opine on whether portions of record or the entire record appropriately fit within the claimed exemption. However, in my opinion, it is unlikely that disclosure of all of the information contained with the appraisal reports would “cause substantial injury to the competitive position of the subject enterprise.” It is more likely that some of the information could be appropriately redacted, while the rest could be disclosed. Paragraph 9 of the 2015 Stipulation seems to acknowledge that not all of the information contained within the appraisal report should be “confidential.” That paragraph states, in relevant part, “[t]o the extent appraisals . . . include any confidential information said information will be deleted or otherwise blacked out from any copies . . .”

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Upon receipt of the August 17, 2022, letter from attorneys for Erie Boulevard Hydro (forwarded to us by the Town), we asked the Town if they intended to issue a revised FOIL determination asserting one or more of the permissible statutory grounds for denial. As of the date of this letter, the Town has not done so. Accordingly, it is our opinion that the Town has not asserted a ground for denying access to the appraisal reports that is consistent with the statute or judicial precedent. While it is possible that portions of the report could be withheld based on one of the statutory exemptions to rights of access, the Town has not, as of now, asserted one.

I hope this information proves useful.

Sincerely,

Kristin O'Neill
Assistant Director

cc: Karla W. Buettner, Esq.