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October 3, 2022

By Electronic Submission Only: DeWolfAP@Hotmail.com

Andrew P. DeWolf
7 Sisson Street
Lyons, NY 14489

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. DeWolf:

The Committee on Open Government ("Committee") received your request for an advisory opinion regarding the manner in which Wayne County responded to your request for copies of transcripts prepared in relation to a hearing before the Public Employment Relations Board ("PERB") and held by the County. You have raised several concerns and the County has asserted several grounds for denying access. The County's arguments for non-disclosure are addressed in the order presented in its appeal determination.

The County asserts that "[t]he transcript is exempt from disclosure based upon the intra/inter-agency exemption."

The County asserts that the transcript of the hearing constitutes intra/inter-agency material and, as such, is exempt from disclosure as set forth in Public Officers Law (POL) § 87(2)(g), which allows agencies to withhold inter- or intra-agency records unless they contain, inter alia, "i. statistical or factual tabulations or data."

Portions of such materials that are reflective of opinion, advice, or recommendation may be withheld. However, of particular 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.



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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).

In my opinion, when held by another agency, a record of testimony taken during an administrative proceeding cannot be characterized as anything other than factual. Testimony is merely a recounting of what someone said on the record during a proceeding. It is possible that testimony given during an administrative proceeding could include a person's opinion, but it is an opinion offered on the record to an impartial decision-making body and may not fairly be characterized as an internal communication of an agency or collaborating agencies.

The County also asserts that the testimony represents pre-decisional, non-final material exempt from disclosure pursuant to POL § 87(2)(g). In support of this contention, the County relies on two cases holding that testimony taken during an administrative proceeding is pre-decisional material when sought from the decision-making body before it renders a final determination based thereon. See *Sinicropi v. County of Nassau*, 76 A.D.2d 832, 833 (2d Dep't 1980); *Matter of Spring v. County of Monroe*, 141 A.D.3d 1151, 1152 (4th Dep't 2016). However, here the Freedom of Information Law (FOIL) request was directed to the County, which is a party to the administrative proceeding and not the decision-making body conducting the proceeding. A similar request to PERB, under conditions in which the sought testimony is not available for inspection or copying to anyone, PERB may be able successfully to rely on the cited case law, but I disagree with its application to the County. If one party to the proceeding has access to the record, as seems to be the case here, the rationale for withholding the record as pre-decisional is defeated. Similarly, if the record is available for in-person inspection by any FOIL-responsible agency, the rationale for withholding the record as pre-decisional is defeated. Here, the relationship between PERB and the County is not in our opinion an inter-agency relationship but rather as one of the parties to a proceeding pending before PERB. For these reasons, I do not believe that the inter or intra-agency exemption to disclosure applies here.

The County asserts that "[t]he transcript is not an agency record."

FOIL defines records broadly 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." In my view, transcripts that are "kept," "held," or "reproduced" by or for an agency are records under FOIL.

The County claims that it does not maintain a copy of the transcript but that the record is maintained solely by its outside counsel representing it on its proceeding before PERB and that there is no agreement that its retained counsel will provide this record to the County. The County's claim based on its assertion that this record is maintained for it by outside counsel and therefore it is not an "agency record" is in our opinion misplaced. The County relies on Committee advisory opinions that reflect the view that a contractor hired by an insurance company to defend litigation where the agency does not hire its own counsel directly does not create or collect records for the agency. See FOIL AO [17762](#), [19190](#). However, we believe that this situation is not covered by the cited opinions. Rather, here we believe that "outside counsel" simply means that the County Attorney's Office was unable to act as

counsel in the matter and the County hired a private law firm for this particular matter. In our opinion, the hired firm is not a contractor, and where, as here, records are held by an attorney, as the agent of an agency, they are accessible under FOIL unless one of the exemptions to disclosure applies. See FOIL AO 19562, 10796.

The County asserts that "[t]he transcript's release is specifically exempted by 4 NYCRR 208.3."

Records are exempt from disclosure under the FOIL only when a state or federal statute prohibits disclosure. POL § 87(2)(a). The County claims that NYS Department of Civil Service regulation, 4 NYCRR 208.3, exempts disclosure of the PERB transcripts here. In my view, there are several flaws in this assessment. First, the cited regulation relates to PERB. Under the regulation, stenographers hired by the PERB retain the right to reproduce copies and charge a fee apart from those laid out in FOIL. A copy is available for inspection at PERB offices. See 4 NYCRR 208.3. This is completely separate from access to the same transcripts once another agency gains possession of the transcript. More importantly, POL § 87(2)(a) limits records exempt from disclosure thereunder to those "specifically exempted from disclosure by state or federal statute." Here, the cited regulation makes clear that the record is in fact available and contains no language that could be read as specifically exempting disclosure. Lastly, and perhaps most dispositively, regulations are not statutes and cannot exempt records from disclosure under FOIL. See *Zuckerman v. NYS Board of Parole*, 53 A.D. 2d 405, 407 (3d Dep't 1976).

Certainly, there are statutes that may exempt disclosure of records held by or between an agency and retained counsel. Records prepared in conjunction with an attorney-client relationship are often considered privileged under Civil Practice Law and Rules (CPLR) § 4503. Likewise, the work product of an attorney may be confidential under CPLR § 3101(c). However, the transcripts at issue here do not appear to fit within the parameters of those statutes and the County did not raise those statutes as exemptions to disclosure.

The County asserts "[t]he Administrative Procedures Act authorizes a fee above that of FOIL."

POL § 87(1)(b) governs fees under FOIL and provides that "except when a different fee is otherwise prescribed by statute," agencies may charge a fee of \$0.25 per page for "photocopies not exceeding 9 by 14 inches" or the actual cost of reproduction for other records. As noted above, the regulations of PERB authorize the stenographer to charge directly for copies of the transcripts. If valid, that fee structure would apply to requests made through PERB or directly to the stenographer. However, this request was made to the County. Therefore, without a statute prescribing otherwise, I believe that the County is only authorized to charge fees as prescribed in FOIL. If producing a copy requires printing, either to produce the record or to perform appropriate redactions, it may charge \$0.25 per page. If the document already exists in electronic format and does not need redactions, no charge would be permitted.

These transcripts should be treated similarly to court transcripts, which are exempt from Disclosure.

The County asserts that PERB hearing transcripts are like stenographic transcripts produced by a court and should, therefore, be similarly exempt from disclosure under the FOIL. Specifically, in its response to your appeal the County states that

[i]t is well recognized that stenographic transcripts produced during the course of court proceedings are not subject to release pursuant to the provisions of FOIL. *See, e.g. Moore v Santucci*, 151 AD2d 677 (2d Dept. 1989) (“The respondent is not required to make available for inspection or copying any suppression hearing or trial transcripts of a witness’ testimony in its possession, because the transcripts are court records, not agency records”) and Committee on Open Government advisory opinion f8993 (“trial transcripts maintained by the office of a district attorney are court records that are not subject to the Freedom of Information Law.”).

Again, we believe that the County’s reliance on this particular advisory opinion and court decision is misplaced. More recently issued opinions are based upon judicial precedent from the Court of Appeals. For example, FOIL Advisory Opinion 19466 cites *Newsday, Inc. v. Empire State Development Corporation*, 98 N.Y.2d 359, 361 (2002) and offers the following:

FOIL pertains to all government agency records, and it has been held by the Court of Appeals that records in possession of an agency that emanate from the courts are “agency records” subject to FOIL. The Court in *Newsday* opined “ [Empire State Development Corporation] is not part of the judiciary. It does not claim to have been acting on behalf of the judiciary within a judicial process . . . Therefore, it is a governmental entity subject to FOIL and must disclose the subpoenas in its possession, irrespective of whether they are deemed to have been a mandate of a court and issued for a court.”

Both Wayne County and PERB are agencies under FOIL, and neither are part of the judiciary. In my opinion, the fact that PERB, like many other administrative agencies, holds the authority to conduct hearings and issue impartial decisions does not alter its status as an agency. In fact, PERB Regulations specifically provide that its records are subject to disclosure under FOIL. *See* 4 NYCRR 208.1 (“The records of the board available for public inspection and copying, in accordance with the procedures hereinafter set forth, are those described by section 87 of the Public Officers Law.”). Regardless, based upon judicial precedent, once a transcript is “kept, held, filed, produced or reproduced by, with or for” Wayne County, it becomes a record of the County apart from its status as a record of PERB.

In addition to the grounds for denial asserted by the County, you also raised other concerns which are addressed below.

Certification

In a follow up email to the Committee, you ask whether the records provided in a response to a FOIL request must be “certified.” To the extent that there is any confusion regarding references to certification in FOIL, POL § 89(3) provides that “upon payment of, or offer to pay, the fee prescribed therefor, the entity shall provide a copy of such record and certify to the correctness of such copy if so requested.” When a certification is requested, the agency shall certify that the record is a true copy of the record held by or on file with that agency. The certification does not verify the accuracy of the information contained within it.



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Authority of the Committee

Lastly, again in a follow up email, you ask “[d]oes NYS Penal Law Section 195 apply for Public Officers that fail to comply with ministerial duties and withhold records & certifications?” The Committee is authorized to provide advice, guidance, and opinions regarding the FOIL and the Open Meetings Law (OML). Since your question falls beyond the scope of our advisory jurisdiction, I am unable to offer an opinion.

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

cc: Richard House, Wayne County Administrator