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By Electronic Mail Only

FOIL AO 19838

Chris Bragg
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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 unless otherwise noted.

Mr. Bragg:

I write in response to your request for an advisory opinion relating to the manner in which the Commission on Ethics and Lobbying in Government (COELIG) responded to your Freedom of Information Law (FOIL) request for “a copy of any document produced by staff of the Commission on Ethics and Lobbying in Government related to a commission investigation into Prince Harry.”

In response to your request, COELIG stated:

This request is denied because the materials sought, if they exist, are, or would be, specifically exempted from disclosure by state statute. Executive Law § 94(11)(b) prohibits the release of information relating to “the status of an investigation, testimony received, or any other information obtained by a commissioner or staff of the commission . . . to any person or entity outside of the commission during the pendency of any matter.” The FOIL statute itself expressly states that documents “specifically exempted from disclosure by state or federal statute” are not subject to its disclosure requirements (see Public Officers Law § 87(c)(2)(a)) [sic]. Therefore, any documents responsive to your request, if they existed, would be protected from disclosure. Nothing in this response is intended, or should be read to suggest the existence, or not, of any inquiry or investigation by or under the jurisdiction of the Commission.

Based on this response, you asked us the following question: “When the Commission on Ethics and Lobbying in Government possesses no record responsive to a FOIL request that seeks records stemming from an investigation, can the agency, in its response, employ an exemption as a means of obscuring the fact that no responsive records exist?”

As you are aware, 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. COELIG advised you that the category of records that you requested is subject to one of those statutory grounds for denial: § 87(2)(a), which provides that an agency must withhold from production pursuant to FOIL records which are “specifically exempted from disclosure by state or federal statute.” This provision of FOIL means that when a record is exempt from disclosure pursuant to state or federal statute, the applicable state or federal statute, rather than FOIL, governs disclosure of the record.

In this instance, COELIG asserted that Executive Law § 94(11)(b) governs disclosure of the category of records an example of which you sought. Executive Law § 94(11)(b) provides:

the status of an investigation, testimony received, or any other information obtained by a commissioner or staff of the commission, shall not be disclosed by any such individual to any person or entity outside of the commission during the pendency of any matter. Any confidential communication to any person or entity outside the commission related to the matters before the commission shall occur only as authorized by the commission. For the purposes of this paragraph, “matter” shall mean any complaint, review, inquiry, or investigation into alleged violations of this chapter.

Of significant note, this statutory provision prohibits disclosure of records and information. Underscoring the policy rationale for this statutory prohibition, Executive Law § 94(11)(d) makes it a crime – a class A misdemeanor – for “[a]ny commission member or person employed by the commission who intentionally and without authorization releases confidential information received or generated by the commission.”

As referenced above, where, as here, a specific state or federal statute governs disclosure of an entire category of information and/or records, that statute – here the Executive Law – supersedes and governs in place of FOIL. Your acknowledgement that your request for records relating to Prince Harry “admittedly was absurd” does not change the fact that COELIG is required to apply the Executive Law in a consistent manner regardless of whether the request is “absurd.” Here, disclosing even the existence of such records would, in our view, subject COELIG personnel to possible criminal liability pursuant to Executive Law § 94(11)(d). Under these circumstances, it is our view that the agency’s response to your request was consistent with the requirements of FOIL and Executive Law.

Thank you for your inquiry.

Very truly yours,

/s/ Shoshanah Bewlay

Shoshanah Bewlay
Executive Director

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