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EXECUTIVE DIRECTOR
SHOSHANAH BEWLAY

MEMORANDUM

TO: Whom it May Concern

FROM: Shoshanah V. Bewlay
Executive Director, Committee on Open Government

Re: *POL § 89(4)(a): Furnishing FOIL Appeals and Determinations to the Committee*

DATE: October 18, 2023

Public Officers Law § 89(4)(a) provides that “each agency shall immediately forward to the committee on open government [(“Committee”)] a copy of [each Freedom of Information Law (“FOIL”)] appeal when received by the agency and the ensuing determination thereon.” This provision of FOIL is intended to make appeals and ensuing determinations available to the Committee to facilitate its furnishing of advisory opinions.

Recently, the Committee received an inquiry asking whether the quoted sentence of the statute means that an agency must separately provide a copy of an appeal to the Committee “immediately . . . when received” by the agency *before* the agency issues its ensuing determination on the appeal within ten business days. In our opinion, the answer is “no.” Such a reading of the statute is myopic; there is nothing in the statute, its history, or judicial precedent interpreting it that suggests that the appeal and its ensuing determination must be sent separately. Rather, we believe that the word “immediately” in the statute modifies the phrase “appeal . . . and ensuing determination”: an agency must provide both of these documents to the Committee without delay. Indeed, the Committee has long offered the opinion that this practice complies with an agency’s statutory obligation to provide appeals and ensuing determinations pursuant to POL § 89(4)(a). Perhaps as a result, it is the practice of many state agencies, local governments, and other FOIL-responsible agencies to furnish to the Committee copies of appeals and the ensuing determinations together, immediately upon the issuance of the determination.

The Committee tracks appeals and determinations. Sending both the appeal and the ensuing determination together creates efficiency for both the agency and the Committee. Where a determination and its originating appeal are delivered together, the Committee has an intact and easily accessible record of the administrative process behind that appeal. A reading of the statute that requires an agency to send these documents separately makes no practical sense. Without the ensuing determination, the Committee has absolutely no way of making use of the information contained in an appeal. If the appeal and determination are sent together, the Committee does not have to search among the thousands of appeals and determinations received each year to match them up and review the record.

Memorandum re POL § 89(4)(a)

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Submitting the documents separately imposes an increase in administrative burden, both in search and record-keeping, and a decrease in efficiency. This cannot be the intent of the statute. It is our opinion that the statutory obligation to provide appeals and determinations to the Committee was not designed to increase the burdens of agencies and the Committee, but rather was intended to enhance the ability of the Committee to recognize trends and respond to outstanding issues with legal advice and opinions.

In sum, we believe that the intent and plain meaning of Public Officers Law § 89(4)(a) is satisfied when an agency delivers to the Committee the appeal and the ensuing determination together, immediately upon the issuance of such determination.