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Department of State
Committee on Open Government

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By Electronic Mail Only

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.

We are writing in response to your request for an advisory opinion concerning the time limits associated with an agency's obligation to respond to a Freedom of Information Law (FOIL) request. Specifically, you seek the interpretation of the Committee on Open Government (Committee) of the following language from a 2005 amendment to Public Officers Law § 89(3)(a):

> If an agency determines to grant a request in whole or in part, and if circumstances prevent disclosure to the person requesting the record or records within twenty business days from the date of the acknowledgement of the receipt of the request, the agency shall state, in writing, both the reason for the inability to grant the request within twenty business days and a date certain within a reasonable period, depending on the circumstances, when the request will be granted in whole or in part.

Also in 2005, the Legislature amended § 89(3)(a) to add the phrase emphasized in the paragraph below:

> Each entity subject to the provisions of this article, within five business days of the receipt of a written request for a record reasonably described, shall make such record available to the person requesting it, deny such request in writing or furnish a written acknowledgment of the receipt of such request and a statement of the approximate date, *which shall be reasonable under the circumstances of the request*, when such request will be granted or denied . . . .

From our perspective, it is important to consider the language of FOIL in its totality when interpreting these provisions. Upon receipt of a FOIL request, an agency is obligated to locate and retrieve the records sought. If an agency is unable to provide or deny access to the record sought within five business days, it is obligated to acknowledge receipt of the request and provide an approximate date, which must be reasonable given the circumstances of the request, when the request will be granted or denied. The statutory language then goes on to address how long an agency may take to disclose records once it has determined that it will grant the request in whole or in part. Once the determination to grant the request in whole or in part is made, the agency must either provide access within twenty

business days from the date of the acknowledgement or it must provide a "date certain within a reasonable period" when the records will be disclosed (in whole or in part). We do not believe that the agency's obligation to disclose records, either within twenty business days of the acknowledgement, or by a date certain that is reasonable given the circumstances of the request, is triggered when an agency renders a determination regarding rights of access. Rather, we feel that the time limit for responding and disclosing records (in whole or in part) is triggered once the agency determines that it possesses records that are responsive to the request, and that at least a portion of those records will be disclosed in response to that request.

In our view, once the determination to grant the request in whole or in part has been made, the agency must disclose the records within a statutory time frame that began on the date of acknowledgment ("if circumstances prevent disclosure to the person requesting the record or records within twenty business days from the date of the acknowledgement of the receipt of the request"). Reading the two phrases relating to time limits contained in § 89(3)(a) together, it is our view that an agency initially has five business days to determine whether the request will be granted or denied or to provide a reasonable date, in writing, by which that determination will be made. The agency then has another twenty business days to either grant or deny access to the requested records, or to notify the applicant that it is unable to grant access within twenty business days, provide a reason why it is unable to do so, and to provide a date certain by which the records will be disclosed, in whole or in part.

Notwithstanding the above, and as you have noted, a majority of court decisions interpreting the time limit provisions of § 89(3)(a) have done so in a manner different from that of the Committee, perhaps due to what we perceive to be a certain lack of clarity in the language of the statute.[1] In a relatively recent example, in a decision involving an agency's use of repeated extensions, the Appellate Division, Third Department has held that:

> [i]n this context, the response, made within four months of the request, was certainly reasonable. It bears further emphasis that at no point prior to the February 8, 2019 response did respondent determine to grant the request in whole or in part so as to trigger the 20 business days and "date certain" provision.

Save Monroe Ave., Inc. v. New York State Department of Transportation, 197 A.D.3d 808, 810 (3d Dep't 2021). In our view, this decision is inconsistent with the intent of the statute and if followed, could permit an agency to delay response to a FOIL request indefinitely by repeatedly notifying an applicant that it had not yet decided whether to grant the request – an intent clearly not contemplated by the Legislature.[2] It is also important to note that in support of its holding, the court in *Save Monroe* quotes

[1] For the past several years, the Committee has recommended or supported clarifying amendments to FOIL to ensure that agencies respond to requests for records in a timely manner. *See* 2023 Committee on Open Government Annual Report to the Governor and Legislature, at p.9.

[2] The facts of *Save Monroe* reveal that a decision to grant the request in whole or in part had been made prior to the February 8, 2019, notification "that respondent had located over 800 pages of responsive records, disclosed over 600 pages with some redactions and advised that the redactions and withholding of the remaining pages were authorized by the intra- and inter-agency records exemptions set forth in Public Officers Law § 87(2)(g)." *Save Monroe*, 157 A.D.3d at 809. In other words, the decision to grant the request in part had been made when the agency determined that it maintained responsive records, that at least a portion of the records would be disclosed, and that it needed more time to review those records to determine rights of access (*i.e.*, whether to apply – and then to apply – appropriate redactions).

from a Court of Appeals decision that, while issued after the May 2005 FOIL amendment went into effect, was based on a FOIL request that had been made prior to those amendments, in January 2004: "Generally, an agency must respond to a written request for records within a reasonable time and 'there is no specific time period in which the agency must grant access to the records." *Id.* at 809 (quoting *Matter of Data Tree, LLC v. Romaine*, 9 N.Y.3d 454, 465 (2007)). In *Data Tree,* the Court of Appeals held that:

> Section 89(3) of the Public Officers Law requires that upon receipt of a request, an agency has five business days in which it must either grant access to the records, deny access or furnish a written acknowledgment of the receipt of such request. When such acknowledgment is given, it must include a statement of the approximate date when the request will be granted or denied.

Matter of Data Tree, 9 N.Y.3d at 465. The decision contains no references to "reasonableness" or to the obligation imposed upon the agency established by those May 2005 amendments. To us, this calls into question the utility of the *Save Monroe* decision in interpreting the meaning of those 2005 amendments.

The Legislature intentionally built into the statute a level of flexibility which allows agencies to notify the applicant "in writing, both the reason for the inability to grant the request within twenty business days and a date certain within a reasonable period, depending on the circumstances, when the request will be granted in whole or in part." In our opinion, this flexibility does not authorize an agency to delay making the decision whether to grant or deny access indefinitely; instead, it affords the agency the time it requires to gather and review the records to determine rights of access while considering

> the volume of a request, the ease or difficulty in locating, retrieving or generating records, the complexity of the request, the need to review records to determine the extent to which they must be disclosed, the number of requests received by the agency, and similar factors that bear on an agency's ability to grant access to records promptly and within a reasonable time.

21 N.Y.C.R.R. 1401.5(d).

In our view, it is inconsistent with an agency's obligations under the statute to acknowledge receipt of every FOIL request received with a notification that the agency needs forty-five days, sixty days, or even six months, to respond. When a request is made for a record that is readily available and clearly public, we believe that it is not reasonable for an agency to delay a determination whether to grant or deny access and ultimately, if required, to disclose the record. Further, it is our opinion that it is inconsistent with the intent of the statute for an agency to repeatedly issue letters delaying its response by taking the position that it has not yet made a determination whether to grant the request in whole or in part.

Finally, you also ask us to explain the role of the FOIL regulations of the Committee. Public Officers Law § 89(1)(b)(iii) requires the Committee to "promulgate rules and regulations with respect to the implementation of subdivision one and paragraph (c) of subdivision three of section eighty-seven of this article." Through this statutory authority, the regulations of the Committee carry out the purpose and

goals of FOIL have the force and effect of law upon any "agency" as that term is defined by Public Officers Law § 86(3):

> It is well recognized that the Legislature may, by statutory authority, confer upon a subordinate public board or agency the power to adopt rules and regulations reasonably adapted to carry out the purposes or objects for which it was created and reasonable rules when duly adopted pursuant to such authority have the force and effect of law.

Wickham v. Levine, 261 N.Y.S.2d 702, 706 (Supr. Ct.), *aff'd*, 264 N.Y.S.2d 785 (1965), *aff'd*, 23 N.Y.2d 923 (1969). As such, agencies are obligated to comply with the Committee's regulations, regardless of whether their own regulations have been amended to comply with current obligations under the statute.

Thank you for your inquiry.

Sincerely,

Kristin O'Neill
Deputy Director and Counsel