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Department of State
Committee on Open Government

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ADVISORY OPINION

TO: Whom it May Concern

FROM: Kristin O'Neill
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Re: Obligation to Redact

DATE: September 16, 2024

The Committee on Open Government is authorized to issue advisory opinions.

In the past few years, the Appellate Division, First Department has issued four decisions relating to rights of access under Public Officers Law (POL) Article 6, the Freedom of Information Law (FOIL), specifically concerning the obligation to redact portions of records to protect information exempt under FOIL, which we believe are *inconsistent with binding Court of Appeals precedent* on the issues addressed therein.

In these recent decisions the First Department appears to interpret one Court of Appeals decision, *New York Civil Liberties Union v. New York City Police Department*, 32 N.Y.3d 556, 568-69 (2018) (the *NYCLU* decision), which addressed only one of the many circumstances in which a response to a FOIL request might require the redaction of records, but failed to address other binding Court of Appeals precedent addressing the many other circumstances in which that Court has held that redaction of records is necessary. The First Department, interpreting the 2018 *NYCLU* decision, has now issued a line of cases[1] holding, essentially, that an agency is obligated to redact records *only* when disclosure of the redacted information would constitute an unwarranted invasion of personal privacy and in no other circumstances is required to do so. Stated another way, the First Department holdings appear to suggest that where redactions to a record will render the remainder of the record available and not subject to any FOIL exemption, agencies need not provide even the non-exempt portion of the record if *any* portion of the record is exempt for any reason other than on grounds of personal privacy.

[1] *Judicial Watch, Inc. v. City of New York*, 178 A.D.3d 540, 541 (1st Dep't 2019); *Stengel v. Vance*, 140 N.Y.S.3d 707, XXX (1st Dep't 2021); *Queensrail Corporation v. Metropolitan Transportation Authority*, 202 N.Y.S.3d 53, 54 (1st Dep't 2023); *Center for Constitutional Rights v. New York City Administration for Children's Services*, 205 N.Y.S.3d 365, 366 (1st Dep't 2024).

We believe this is an erroneous statement of Court of Appeals precedent and will serve to improperly limit FOIL disclosure of non-exempt portions of records.

It is the opinion of the Committee on Open Government (Committee) that the First Department's interpretation of the *NYCLU* decision, upon which it relies for its recent holdings, goes beyond what the Court of Appeals intended. In our view, the recent decisions issued by the First Department are inconsistent with the plain language of the statute relating to the disclosure of "records or portions thereof" (POL § 87(2)) and prior Court of Appeals decisions which require that agencies review responsive records for both exempt and non-exempt material. The agency *may* redact the exempt portions but *must* disclose the non-exempt portions.

In the NYCLU decision, the Court of Appeals addressed a situation in which a record is specifically exempt from disclosure by state or federal statute pursuant to POL § 87(2)(a), and held that access to such record is governed by the separate statute and not FOIL. Under those circumstances, the agency is not obligated to delete identifying details even if "preservation of individual confidentiality – may be served by deletion of identifying details." *Id*. at 569. The Court of Appeals addressed no other FOIL exemption. Indeed, underscoring this conclusion is a footnote within the decision which serves to clarify its intended limits: "our holding today . . . appl[ies] only to Public Officers Law § 87(2)(a), the FOIL exemption at issue. To the extent another FOIL exemption might authorize redaction as a means of separating "exempt" from "non-exempt" material within a record . . . , that issue is not before us." *NYCLU*, 33 N.Y.3d at 570.

As the Court of Appeals referenced within this footnote in the NYCLU decision, it has previously addressed situations in which a record contains both "exempt" and "non-exempt" material under other applicable exemptions to FOIL. For example, in *Matter of Xerox Corp. v. Town of Webster*, 65 N.Y.2d 131, 133 (1985), the Court of Appeals held that

> To the extent the reports contain "statistical or factual tabulations or data" (Public Officers Law § 87[2][g][i])), or other material subject to production, *they should be redacted and made available to appellant*. Since it does not appear that either court below reviewed the reports to make such a determination, the matter must be remitted to permit an *in camera* inspection.

(emphasis added). Further, citing *Matter of Xerox*, in 1996 the Court of Appeals held in *Gould v. New York City Police Dep't*, 89 N.Y.2d 267, 275 (1996), that:

> blanket exemptions for particular types of documents are inimical to FOIL's policy of open government . . . . Instead, 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*."

(emphasis added; internal citations omitted).

In light of this clear line of precedent, which in our opinion is consistent with the underlying goals and aims of FOIL in New York, we are concerned with the First Department decisions which we believe improperly expand the limited holding in *NYCLU* and fail to address other binding Court of Appeals precedent discussed herein.

In sum, it is the opinion of the Committee that when a record contains both exempt and non-exempt material, the agency:

- must withhold the record in its entirety if it is exempt from FOIL disclosure by state or federal statute and access is governed by that separate statute (POL § 87(2)(a));
- may withhold the record if disclosure "would constitute an unwarranted invasion of personal privacy under the provisions of subdivision two of section eighty-nine of this article" (POL § 87(2)(b)), but that "disclosure shall not be construed to constitute an unwarranted invasion of personal privacy . . . when identifying details are deleted" (POL § 89(c)(i)); and
- with respect to records other than those that are exempt from FOIL disclosure by state or federal statute, and which contain both "exempt" and "non-exempt" material, *may* redact the portions subject to one or more of the permissible grounds for denial, but *must* disclose the remaining portions.