



**State of New York
Department of State
Committee on Open Government**

One Commerce Plaza
99 Washington Ave.
Albany, New York 12231

(518) 474-2518
Fax (518) 474-1927

FOIL AO 19868

September 23, 2024

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.

Dear :

We are writing in response to your request for an advisory opinion relating to the manner in which the South Farmingdale Fire District (District) has responded to your Freedom of Information Law (FOIL) requests. In your emails, you raise a number of concerns, and we address them below.

Your first question is whether you are permitted to submit FOIL requests by email. Public Officers Law (POL) § 89(3)(a) states that:

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, including, where appropriate, a statement that access to the record will be determined in accordance with subdivision five of this section.

POL § 89(3)(b) states:

All entities shall, provided such entity has reasonable means available, accept requests for records submitted in the form of electronic mail and shall respond to such requests by electronic mail, using forms, to the extent practicable, consistent with the form or forms developed by the committee on open government pursuant to subdivision one of this section and provided that the written requests do not seek a response in some other form.

It is clear based upon the communications that the Committee on Open Government (Committee) has received from the District, and upon information contained on the District's website, that it "has reasonable means available" to accept FOIL requests by email. As such, in our view, the District is required by law to accept requests submitted in that form. Reviewing the District's website, I located an electronic form submission for the purpose of submitting a FOIL request to the District. While there is nothing prohibiting the District from making such a form available, it may not require that you use that form. The statement on its website that "[t]his form is the ONLY acceptable method of making a records request (FOIL request) via the internet. Requests made via direct emails or on other forms will not be processed or responded to," is clearly inconsistent with its statutory obligations to accept any FOIL request submitted in writing and, specifically, any request submitted in writing by electronic mail (e.g., email).

You also inquire whether you are permitted to submit a request for records anonymously and/or without providing proof of your identity. When records are accessible under FOIL, the courts have routinely from the earliest days of interpreting FOIL held that they should be made equally available to any person, regardless of one's name, status, interest or the intended use of the records. *See, e.g., Burke v. Yudelson*, 368 N.Y.S.2d 779, 786 (Supr. Ct. Monroe Co. 1975), *aff'd* 378 N.Y.S.2d 165 (4th Dep't 1976) (adopting and following resolution of the Committee). The State's highest court has further unambiguously held that

FOIL does not require that the party requesting records make any showing of need, good faith or legitimate purpose; while its purpose may be to shed light on government decision-making, its ambit is not confined to records actually used in the decision-making process. . . . Full disclosure by public agencies is, under FOIL, a public right and in the public interest, irrespective of the status or need of the person making the request.

Farbman v. New York City Health and Hospitals Corporation, 62 NY 2d 75, 80 (1984). *Farbman* involved a situation in which a person involved in litigation against an agency requested records from that agency under FOIL. The Court of Appeals held that one's status as a litigant had no effect upon that person's rights as a member of the public when using FOIL, irrespective of the intended use of the records. Similarly, unless there is a basis for withholding records in accordance with the grounds for denial appearing in POL § 87(2), in our opinion, the name of an applicant or his/her use of the records are irrelevant to the obligation to provide such records in response to a request.¹

Next, you inquire about the availability of emails sent and received by a public official under FOIL. FOIL governs access to existing records and the term "record" is defined broadly to include "any information kept, held, filed, produced or reproduced by, with or for an agency or the state legislature, in any physical form whatsoever." POL § 86(4). Given this broad definition, it is clear that an email sent or

¹ Though not relevant here, it is worthy of note that in our view, the only instance in which a person seeking records would be required to identify themselves would involve a request for records pertaining to themselves that would be accessible only to themselves, and which could be withheld from others on the ground that disclosure would constitute "an unwarranted invasion of personal privacy." POL §§ 87(2)(b), 89(2)(b), (c).

received by a public official relating to public business is a “record” subject to rights of access under FOIL. Whether those emails must be disclosed will depend upon content of the emails and whether any of the permissible grounds for denial can be asserted by the District.

While I do not know the exact wording of your original request for records, I note that in your September 19, 2024, email addressed to bofc@southfarmingdalefd.org, you state you were awaiting an acknowledgement of your FOIL request dated September 11, 2024, “for all ingoing and out going emails from commissioner heffels (sic) official email.” Brad Pinsky, of the Pinsky Law Group, LLC, responded on behalf of the District that same day, stating: “This request is denied as overbroad and not subject to FOIL.” In response to your appeal of this denial, in which you indicate that you are willing to narrow the scope of your request to the months of August and September, Mr. Pinsky again responded by merely stating “Appeal is denied. Your request is overbroad.” This exchange of communications raises serious concerns. It is my understanding, based upon the information you have provided, that Kiki Pakrakis serves as records access officer for the District. If this is accurate, Ms. Pakrakis is responsible for coordinating the District’s response to your FOIL requests. It is not necessary that the records access officer for an agency respond to a request directly, however the records access officer must ensure that any response that is sent meets the agency’s statutory and regulatory obligations. The original response from Mr. Pinsky does not, in our view, meet these obligations.

POL § 89(3)(a) states, in relevant part, that “[a]n agency shall not deny a request on the basis that the request is voluminous or that locating or reviewing the requested records or providing the requested copies is burdensome.” Relying on judicial precedent, the Committee has offered advisory opinions relating to requests for all emails sent or received by a particular official or employee over a period of time. *See, e.g., FOIL AO 19273*. We have advised, relying on court precedent, that where a request “transcends a normal or routine request by a taxpayer,” an agency may consider the request as not reasonably described and ask that the requester narrow their request to assist the agency to locate records with reasonable effort.

The District does not appear to have made this response to you, however. Whether the request, that you appear to have narrowed *sua sponte*, for all emails sent or received by Commissioner Heffels during the months of August and September “transcends a normal or routine request . . . [and] bring[s] in its wake an enormous administrative burden that would interfere with the day-to-day operations” of the District is a fact specific analysis that must be conducted by the District. We observe that in any event, that based on the information provided by both you and the District, the District did not explain its denial of your appeal or your narrowed request. This failure in our view is not compliant with the District’s statutory obligations.

I note that Committee regulations, which have the force and effect of Law, require that the records access officer ensure that agency personnel engage with the FOIL requestor in an attempt to resolve these types of concerns. Specifically, the regulations require that the records access officer ensure that agency personnel:

- (2) Assist persons seeking records to identify the records sought, if necessary, and when appropriate, indicate the manner in which the

records are filed, retrieved or generated to assist persons in reasonably describing records.

(3) Contact persons seeking records when a request is voluminous or when locating the records sought involves substantial effort, so that agency personnel may ascertain the nature of records of primary interest and attempt to reasonably reduce the volume of the records requested.

21 N.Y.C.R.R. § 1402.2(b). As noted just above, and as is required by Committee regulations, it does not appear that anyone within the agency has attempted to engage with you regarding your request in an effort to reasonably reduce the volume of the records requested or to reasonably describe the records you are seeking. In addition, the denial of access did not include information “advising the person denied access of his or her right to appeal to the person or body designated to determine appeals, and that person or body shall be identified by name, title, business address and business telephone number” as required by *21 N.Y.C.R.R. § 1401.7(b)*.

Also noted above, in response to your administrative appeal dated September 19, 2024, (time 1:38 p.m.), Mr. Pinsky denied your appeal. The responsibility of the FOIL appeal officer is, pursuant to POL § 89(4)(a), to “fully explain in writing to the person requesting the record the reasons for further denial, or provide access to the record sought.” Mr. Pinsky has done neither. Further, Committee regulations state that “[t]he records access officer shall not be the appeals officer.” *21 N.Y.C.R.R. § 1401.7(b)*. The intent of this provision is to ensure that a different individual from the one who issued the initial denial of access reviews the appeal and issues an appeal determination. Therefore, pursuant to law and regulation, Mr. Pinsky cannot serve as the FOIL appeals officer when he is the individual who issued the original denial of access.

By copy of this letter, we encourage the District and its outside counsel to review your request for records and issue a determination that is consistent with its obligations under FOIL and the corresponding regulations promulgated by the Committee. To assist in this matter, we are providing herein for the benefit of the District and its outside counsel a web link to the Committee guidance document titled [“Your Right to Know.”](#)

Thank you for your inquiry.

Sincerely,

Kristin O’Neill
Deputy Director and Counsel