



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

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FOIL AO 19887

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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.

Dear:

I am writing in response to your request for an advisory opinion regarding the manner in which the Village of Southampton responded to your Freedom of Information Law (FOIL) request for a report and data prepared by a consultant for the Village relating to the potential expansion of historic districts.

After some back and forth with the Village, you received a highly redacted version of the consultant's report that, based on your understanding, withheld or redacted "a resource list containing addresses of properties, information about each property and classifications of individual properties as 'contributing' or 'noncontributing' resources to a proposed historic district." The Village FOIL Appeal Officer advised that the redacted and withheld portions were "recommendations and opinions" made to the Architectural Review Board (ARB) by the consultant and are considered "intra-agency or inter-agency" material.

After our office discussed the matter with both you and the FOIL Appeal Officer, the Village provided you with a version of the consultant report which disclosed "information such as the number of buildings identified as 'contributing' and the number identified as 'noncontributing.'" O'Reilly email January 7, 2026. The Village continued to withhold "the Resource List" which the Village characterized as "a series of opinions and recommendations submitted by the consultant."

As you know, FOIL is based upon a presumption of access. All records are presumed to be available unless the agency can assert one or more of the statutory grounds for denial. The intra-agency and inter-agency material exemption permits an agency to withhold records or portions of records that have only been shared within a single agency (intra-agency) or between or among multiple government agencies (inter-agency). The exceptions to the intra/inter-agency material exemption to rights of access are as follows:

- i. statistical or factual tabulations or data;
- ii. instructions to staff that affect the public;
- iii. final agency policy or determinations;

- iv. external audits, including but not limited to audits performed by the comptroller and the federal government.

The language quoted above contains what in effect is a double negative. While inter-agency or intra-agency materials may be withheld, portions of such materials consisting of statistical or factual information, instructions to staff that affect the public, final agency policy or determinations, and external audits must be made available unless an agency may appropriately assert a different ground for denial.

There are several court cases that offer guidance as to what constitutes statistical or factual information. Among those, the Court of Appeals held in *Gould v. New York City Police Department*:

The question before us, then, is whether the complaint follow-up reports contain “factual data.” Although the term “factual data” is not defined by statute, the meaning of the term can be discerned from the purpose underlying the intra-agency exemption, which is “to protect the deliberative process of the government by ensuring that persons in an advisory role [will] be able to express their opinions freely to agency decision makers” Consistent with this limited aim to safeguard internal government consultations and deliberations, the exemption does not apply when the requested material consists of “statistical or factual tabulations or data” Factual data, therefore, simply means objective information, in contrast to opinions, ideas, or advice exchanged as part of the consultative or deliberative process of government decision making

89 N.Y.2d 267, 276-77 (1996) (internal citations omitted).

While the term “factual tabulations” is not defined in FOIL, our courts view it as meaning “statements of objective information, fundamentally distinct from subjective expressions of policy or opinion.” *Matter of Weston v. Sloan*, 84 N.Y.2d 462, 467 (1994). In its application, courts have held that investigation reports where facts and subjective analysis were intertwined (*Ingram v. Axelrod*, 90 A.D.2d 568, 569 (3d Dep’t 1982)) and “facts and figures memorializing the expenditure of public funds” (*Matter of Weston v. Sloan*, 84 N.Y.2d at 467) each constitute factual tabulations. Indeed, in situations substantially similar to those found here, the Third Department, Appellate Division, held that “[t]he mere fact that some of the data might be an estimate or a recommendation does not convert it into an expression of opinion” subject to a FOIL exemption. *Matter of Polansky v. Regan*, 81 A.D.2d 102, 104 (3d Dep’t 1981). In another decision, the First Department held that Teacher Data Reports that contained both teachers’ names and the evaluation of the proficiency of their performance in their job duties must be disclosed as exceptions to the intra-agency materials exemption because they constituted “statistical or factual tabulations or data.” The court held that although some of the data might have been estimate or recommendation, that did not convert it into expression of opinion subject to a FOIL exemption. See *Mulgrew v. Board of Education of the City School District*, 87 A.D.2d 506, 507 (1st Dep’t 2011). Accordingly, in light of cases such as *Matter of Polansky* and *Mulgrew*, it is our view that a list or record reflecting which properties have been identified as contributing resources and which as noncontributing resources would constitute factual information available under subparagraph (i) of § 87(2)(g).

1/27/26

Page 3 of 3

Finally, I note that the Village FOIL Appeals Officer advised you that it was his “sincere hope that the ARB release the report soon but, that is a policy decision that I have no authority to enact.” In my view, this statement does not reflect an accurate understanding of the Appeal Officer’s role in responding to administrative appeals pursuant to FOIL. By statute, the FOIL Appeal Officer is the head or governing body of the agency or the individual designated by the head or governing body. Mr. Russell has been designated to act as FOIL Appeal Officer on behalf of the Village and, as such, has the authority to determine that the report must be disclosed. If the Appeal Officer determines that the report should be disclosed, the law requires that the ARB cooperate with that determination.

Sincerely,

Kristin Bergin
Deputy Director and Counsel