

COMMITTEE ON OPEN GOVERNMENT

STATE OF NEW YORK
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By electronic mail only

June 29, 2020

Tanya Garment

tgarment@kingston.ny.us

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the information presented in your correspondence, except as otherwise indicated.

Dear Ms. Garment,

I am writing in response to your request for an advisory opinion regarding the manner in which the City of Kingston has responded to your Freedom of Information Law (FOIL) request for e-mail communications between and among City employees and officials.

By way of a brief summary, it is my understanding that you submitted your original request for e-mail communications encompassing the dates of March 1, 2020 through April 14, 2020. On April 20, 2020, the City contacted you to ask if you would be willing to withdraw your request. While initially agreeing to the withdrawal, you very shortly thereafter, in writing, advised the City that you were not withdrawing your request, but that you were willing to narrow the scope of the request to encompass the dates of April 1, 2020 through April 14, 2020. On April 21, 2020, you received a denial of access from the City Clerk. The ground for the denial was that all of the requested records "as the materials sought are interagency (sic) material which are not subject to FOILs, and the exceptions do not apply Public Officers Law, Section 87(2)(g)."

In response to your administrative appeal, the City's FOIL appeal officer claimed your appeal was moot as he contended that you had withdrawn your initial request and had submitted a second, separate, request. In our view, this contention is not consistent with the facts. As of April 21, 2020, the City was on notice that you did not intend to withdraw your request, but instead, you were willing to narrow the scope of the request. A willingness on the part of a requestor to narrow the scope of a request, in our view, should not be treated as a new request for records. With apparent knowledge of your willingness to narrow the scope of your request, the City Clerk issued a denial of access that encompassed not only the narrower date range, but the initial broader date range. In order for the City to know whether the communications between March 1, 2020 and April 14, 2020 were all subject to the "intra-agency material exception," it would have had to necessarily review the records encompassing the narrower date range. The Clerk denied all records, including those sent or received between April 1, 2020 and April 14, 2020, on the ground that they consisted of intra-agency material. The City's FOIL Appeal Officer's assertion that the City had not yet issued a determination regarding the records within the narrower date range is inconsistent with the facts as presented.

You pose the question "Was the City's simple statement that the records are interagency materials sufficient?" Section 89(3)(a) of FOIL simply requires that a denial of access be "in writing." In addition, regulations promulgated by the Committee on Open Government, which have the force and effect of law, require that "Denial of access shall be in writing stating the reason therefor and advising the person



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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. The records access officer shall not be the appeals officer.” (21 NYCRR 1401.7(b))

You also ask “Does Executive Order 202.8 relieve the City from responding to my request in a reasonably timely manner?” In his appeal determination, the FOIL Appeals Officer stated

“While efforts will be made to identify and produce documents within a reasonable time period, be advised that the provisions of the Executive Order apply to all deadlines set forth in the Freedom of Information Law and time limits set forth pursuant to FOIL will be deemed tolled until the Executive Order is either lifted or modified by the Governor.”

In our view, this statement is not supported by existing Executive Orders. Executive Order 202.8 tolls the statute of limitations and other time limits relating to court proceedings. None of the Executive Orders relating to the current state of emergency suspend or amend any aspect of FOIL, including time limits.

I hope this information proves useful.

Sincerely,



Kristin O'Neill
Assistant Director

cc: Daniel Gartenstein, Esq., FOIL Appeals Officer