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Mr. Casey Seiler
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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 Mr. Seiler:

I have received your letter and the correspondence relating to it. You have sought an advisory opinion concerning requests made by you and your colleague, Chris Bragg, pursuant to the Freedom of Information Law (FOIL).

In a request dated June 15, 2016 you sought "records or portions thereof pertaining to the background job application and financial disclosure forms filed by Mr. Joseph Percoco upon his return to the Executive Chamber in the fall of 2014." In response to the request, FOIL Counsel for the Executive Chamber "advised that to the extent that records responsive to your request may exist, given the publicly-disclosed ongoing law enforcement investigation with which we have offered our cooperation, we would be unable to comply with your request at this time under Public Officers Law 87(2)(e).

Mr. Bragg's request of May 5, 2016 involved "The time sheets showing the work hours for Housing Trust Fund employee Aiello between August 1, 2012 and May 31, 2014." Although the request was sent to a different agency, Homes and Community Renewal, the response used exactly the same language: "To the extent that records responsive to your request may exist, given the publicly-disclosed ongoing law enforcement investigation with which we have offered our cooperation, we are unable to comply with your request at this time under Public Officers Law 87(2)(e)."

The provision upon which both agencies have relied, §87(2)(e) of FOIL, is one of the exceptions to rights of access. It states that an agency may withhold records or portions of records that: "are compiled for law enforcement purposes and which, if disclosed, would:

i. interfere with law enforcement investigations or judicial proceedings;
ii. deprive a person of a right to a fair trial or impartial adjudication;
iii. identify a confidential source or disclose confidential information relating to a criminal investigation; or
iv. reveal criminal investigative techniques or procedures, except routine techniques and procedures…"

The issue, in short, involves the meaning of the term "compiled" as it is used in the first clause of the provision quoted above, and according to your letter, a spokesperson for the Governor indicated that "the lawyers" for the Executive Chamber indicated that:

> "Courts have interpreted 'compiled' to mean the time when the reply to a FOIL request has to be performed, not when the documents are originally collected and assembled by the government agency (*N.Y. Times Co. v. City of New York Fire Dep't*, 195 Misc.2d 119, 123-124 (N.Y. Co. 2003), citing *John Doe Agency v. John Doe Corp.*, 493 U.S. 146, 153 (1989)). The important point in time as to 'compiling' of documents is not when they are created or initially received, but when they would be gathered for disclosure under FOIL."

You raise the following question: "Do these denials comport with a proper interpretation of state Freedom of Information Law and applicable case law?"

In this regard, first, as you may be aware, separate from the NY FOIL is the federal Freedom of Information Act (FOIA). The structure of the two statutes is essentially the same. Both are based on a presumption of access and require that agency records be disclosed, unless an exception to rights of access enables an agency to withhold records or portions of records. Both also require an agency to prove that an exception was justifiably asserted in the event of a challenge to a denial of access in the context of a judicial proceeding. Further, the language of exception in the federal FOIA, 5 U.S.C§552(b)(7), is analogous to §87(2)(e) of FOIL, for it provides that a federal agency may deny access to:

> "records or information compiled for law enforcement purposes, but only to the extent that production of such law enforcement records or information:
>
> (A) could reasonably be expected to interfere with enforcement proceedings,
> (B) would deprive a person of a right to a fair trial or impartial adjudication,
> (C) could reasonably be expected to constitute an unwarranted invasion of personal privacy,
> (D) could reasonably be expected to disclose the identity of a confidential source, including a State, local, or foreign agency or authority or any private institution which furnished information on a confidential basis, and, in the case of a record or information compiled by criminal law enforcement authority in the course of a criminal investigation or by an agency conducting a lawful national security intelligence investigation, information furnished by a confidential source,
> (E) would disclose techniques and procedures for law enforcement investigation or prosecutions, or would disclose guidelines for law enforcement investigations or prosecutions if such disclosure could reasonably be expected to risk circumvention of the law, or
> (F) could reasonably be expected to endanger the life or physical safety of any individual…"

The New York FOIL does not contain exactly the same language as the federal FOIA. However, the thrust of the "law enforcement purposes" exception is similar. Further, FOIL includes exceptions involving unwarranted invasions of personal privacy [§87(2)(b)] and disclosures that could "endanger the life or safety of any person" [§87(2)(f)].

In good faith and in the interest of transparency and full disclosure, the leading federal judicial decision relating to the law enforcement purposes exception, *John Doe Agency*, which was cited earlier, reflects the conclusion by the U.S. Supreme Court that the term "compiled" refers to the time that records are collected and assembled, not the time when they are created. It is noted that the Supreme Court reversed the holding of the U.S. Court of Appeals, which construed "compiled" to mean "originally compiled" (850 F.2d, at 109). Despite the holding of the lower court, the U.S. Supreme Court asserted that:

> "As is customary, we look initially at the language of the statute itself. The wording of the phrase under scrutiny is simple and direct: 'compiled for law enforcement purposes.' The plain words contain no requirement that compilation be effected at a specific time. The objects sought merely must have been 'compiled' when the Government invokes the Exemption. A compilation, in its ordinary meaning, is something composed of materials collected and assembled from various

> sources or other documents. See Webster's Third New International Dictionary 268 (1983). This definition seems readily to cover documents already collected by Government originally for non-law-enforcement purposes…" (*John Doe Agency, supra*, 154).

Significantly, three Supreme Court Justices dissented, and they did not consider the meaning of the term "compiled" as "simple and direct." On the contrary, those Justice wrote that:

> "The word 'compiled' is ambiguous – not -, as the Court suggests (and readily dismisses), because one does not know whether it means 'originally compiled' or 'ever compiled,' see ante, at 154-155. Rather, it is ambiguous because 'compiled' does not always refer simply to 'the process of gathering,' or 'the assembling,' ante, at 154, but often has the connotation of a more creative activity. When we say that a statesman has 'compiled an enviable record of achievement,' or that a baseball pitcher has 'compiled a 1.87 earned run average,' we do not mean that those individuals have pulled together papers that show those results. Thus, Roget's Thesaurus of Synonyms and Antonyms includes 'compile' in the following listing of synonyms: 'compose, constitute, form, make; make up, fill up, build up; weave, construct, fabricate; compile; write, draw, set up (printing); enter in the composition of etc. (be a component).' Roget's Thesaurus 13 (S.Roget rev.1972).
>
> "If used in this more generative sense, the phrase 'records or information compiled for law enforcement purposes' would mean material that the Government has acquired or produced for those purposes – and not material acquired or produced [493 U.S. 146,162] for other reasons, which it later shuffles into a law enforcement file. The former meaning is not only entirely possible; several considerations suggest that it is the preferable one. First of all, the word 'record' (unlike the word 'file', which used to be the subject of this provision, see Freedom of Information Act Amendments of 1974, Pub. L. 93-502, 2(b), 88 Stat. 1563-1564) can refer to a single document containing a single item of information. There is no apparent reason to deprive such an item of Exemption 7 protection simply because at the time of the request it happens to be the only item in the file. It is unnatural, however, to refer to a single item has having been 'compiled' in the Court's sense of 'assembled' or 'gathered' – though quite natural to refer to it as having been 'compiled in the generative or acquisitive sense I have described' (*id.*, 161,162).

In short, the dissenters expressed the belief that the term "compiled" ***is*** ambiguous, and I concur with that contention.

The dissenting opinion referred to the language of the exception and the "harms" sought to be avoided by Congress delineated in paragraphs (A) through (F) quoted above, stating that:

> "Congress did not extend protection to all documents that produced one of the six specified harm, but only to such documents 'compiled for law enforcement purposes.' The latter requirement is readily evaded (or illusory) if it requires nothing more than gathering up documents the government does not wish to disclose, with a plausible law enforcement purpose in mind. That is a hole one can drive a truck through" (*John Doe Agency, supra*, 164-165).

In construing §87(2)(e) of FOIL, there is no New York appellate court decision focusing on the term "compiled," and lower court decisions have reached opposite conclusions. The New York lower court decision consistent with the majority in the U.S. Supreme Court, is *N.Y. Times Co.*, but the issue at hand was not considered in the ensuing Appellate Division and Court of Appeals decisions. Two decisions have reached a different conclusion regarding the assertion of §87(2)(e). In my opinion, the latter, which considered the exception narrowly, are, with due respect to the U.S. Supreme Court, more sensible and consistent with the intent of both FOIL and its federal counterpart.

Both the U.S. Supreme Court and this state's highest court have asserted time and again that the exceptions to rights of access must be "narrowly construed." As suggested in the dissenting opinion in *John Doe Agency*: "Narrow construction of an exemption means, if anything, construing ambiguous language of the exemption in such fashion that the exemption does not apply" (*id.*,161).

For decades, the Court of Appeals has also referred to construing exceptions to right of access narrowly. In a decision rendered more than thirty-five years ago, it was stated:

> "To be sure, the balance is presumptively struck in favor of disclosure, but in eight specific, narrowly constructed instances where the governmental agency convincingly demonstrates its need, disclosure will not be ordered (Public Officers Law, section 87, subd 2). Thus, the agency does not have carte blanche to withhold any information it pleases. Rather, it is required to articulate particularized and specific justification and, if necessary, submit the requested materials to the courts for in camera inspection, to exempt its records from disclosure (see *Church of Scientology of N.Y. v. State of New York*, 46 NY 2d 906, 908). Only where the material requested falls squarely within the ambit

> of one of these statutory exemptions may disclosure be withheld" [*Fink v. Lefkowitz*, 47 NY 2d 567, 571 (1979)]."

In another decision rendered by the Court of Appeals, it was reiterated that:

> "Exemptions are to be narrowly construed to provide maximum access, and the agency seeking to prevent disclosure carries the burden of demonstrating that the requested material falls squarely within a FOIL exemption by articulating a particularized and specific justification for denying access" [*Capital Newspapers v. Burns*, 67 NY 2d 562, 566 (1986); see also, *Farbman & Sons v. New York City*, 62 NY 2d 75, 80 (1984); and *Fink v. Lefkowitz*, 47 NY 2d 567, 571 (1979)].

In a decision that demonstrates that an expansive interpretation of the "law enforcement purposes" exception may create an anomalous result, *King v. Dillon* (Supreme Court, Nassau County, December 19, 1984), the District Attorney was engaged in an investigation of the petitioner, who had served as a village clerk. In conjunction with the investigation, the District Attorney obtained minutes of meetings of the village board of trustees. Those minutes, which were prepared by the petitioner, were requested from the District Attorney pursuant to FOIL. In granting access to the minutes, the decision indicated that "the party resisting disclosure has the burden of proof in establishing entitlement to the exemption," and the judge wrote that he:

> must note in the first instance that the records sought were not compiled for law enforcement purposes (P.O.L. 87[2]e). Minutes of Village Board meetings serve quite a different function...These were public records, ostensibly prepared by the petitioner, so there can be little question of the disclosure of confidential material."

Often records prepared in the ordinary course of business, which might already have been disclosed under FOIL, become relevant to or used in a law enforcement investigation or perhaps in litigation. In my view, when that occurs, the records would not be transformed into records compiled for law enforcement purposes. If they would have been available prior to their use in a law enforcement context, I believe that they would remain available, notwithstanding their use in that context for a purpose inconsistent with the reason for which they were prepared.

Although more than thirty years have passed since the *King v.Dillon* decision, the same reasoning was expressed last month in *Newsday, LLC v Town of Oyster Bay* (Supreme Court, Nassau County, July 8, 2016). Among the items requested were financial disclosure forms filed by a former Town official, Frederick Ippolito. In its consideration of the matter, the Court referred to the basis for the denial of access to the form and wrote that:

> "…the Town states that the request for Ippolito's financial disclosure forms is 'unique' because the documents 'were the subject of activities by law enforcement agencies.' Presumably, the Town was making reference to the fact that Ippolito was the subject of a federal indictment (the indictment was unsealed in March 2015) and charged

> with six counts of tax evasion based on his receipt, from 2008 through 2013, of over $2 million from Lizza and a principal of Lizza that he failed to report. Ippolito eventually pleaded guilty to one count of tax evasion in January 2016. The Town argues that 'as materials that are the subject of law enforcement investigations and/or proceedings are generally kept secret…it would have been improper for the Town to disclose those documents to Newsday, which undoubtedly would have published a story…' In support of this argument the Town cites to Fed. R. Crim Proc. 6 and CPL §190.25(4)(a). Both of these provisions relate, among other things, to the secrecy of grand jury proceedings.
>
> "The argument of the Town is wholly without merit. The Newsday requests have nothing to do with grand jury proceedings nor any criminal investigation. Instead, they ask for government contracts and financial disclosure forms required to be in the Town's possession – documents that undoubtedly are proper subjects of a FOIL request. They were not compiled for law enforcement purposes and therefore cannot possibly be subject to the law enforcement purposes exemption. Whether the contents of these made-in-the-ordinary-course Town documents reveal or establish nefarious or criminal conduct and as such may be used as evidence in a criminal proceeding is material only to the extent that Newsday, as the public's representative, is able to bring such conduct to public light—precisely part of Newsday's mission, as well as that of the FOIL statutes. The Town's argument to the contrary reveals a misunderstanding (or perhaps contempt) of the purpose of the FOIL statutes, and the materials must be produced."

From my perspective, the requested records, by their nature, indicate that the exception concerning records "compiled for law enforcement purposes" is inapplicable. Notwithstanding the holding of the majority in *John Doe* Agency, to contend that records which were generated for purposes wholly unrelated to any law enforcement investigation may now be withheld due to their use in an investigation would, in my opinion, be unreasonable and tend to subvert the purposes of FOIL.

Should a denial of access be challenged in a judicial proceeding brought under FOIL, the agency has the burden of defending secrecy. The obligation to meet the burden of proof relates to much of the commentary offered in the preceding paragraphs. Construing exceptions to rights of access narrowly is consistent with an agency's obligation to demonstrate why and how disclosure would result in the harm described in an exception.

In this regard, the Court of Appeals expressed its general view of the intent of FOIL in *Gould v. New York City Police Department* [89 NY2d 267 (1996)], stating that:

> "To ensure maximum access to government records, the 'exemptions are to be narrowly construed, with the burden resting on the agency to demonstrate that the requested material indeed qualifies for exemption' (*Matter of Hanig v. State of New York Dept. of Motor*

> *Vehicles*, 79 N.Y.2d 106, 109, 580 N.Y.S.2d 715, 588 N.E.2d 750 see, Public Officers Law § 89[4][b]). As this Court has stated, '[o]nly where the material requested falls squarely within the ambit of one of these statutory exemptions may disclosure be withheld' (*Matter of Fink v. Lefkowitz*, 47 N.Y.2d, 567, 571, 419 N.Y.S.2d 467, 393 N.E.2d 463)" (id., 275).

In the same decision, it was determined that "...to invoke one of the exemptions of section 87(2), the agency must articulate 'particularized and specific justification' for not disclosing requested documents" (*id.*).

It is not the intent of this opinion to focus on the particular records that precipitated your request for an opinion. However, it is clear that the records were prepared and received in the ordinary course of business and that records equivalent to those sought in one of the requests were found by the Court of Appeals to be public. *Capital Newspapers v. Burns* [67 NY2d 562 (1986)], involved a request for records reflective of the days and dates of sick leave claimed by a particular municipal police officer, and in granting access, the Court of Appeals found that the public has both economic and safety reasons for knowing when public employees perform their duties and whether they carry out those duties when scheduled to do so. As such, attendance records, including those involving overtime work, are in my opinion clearly available, for they are relevant to the performance of public employees' official duties.

In sum, for the reasons expressed in the preceding remarks, the records sought, in my opinion, cannot be withheld on the ground that they were compiled for law enforcement purposes.

In an effort to encourage the agencies involved to accept this point of view, copies will be forwarded to the Executive Chamber and Homes and Community Renewal.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

cc: Mongthu Zago, Records Access Officer, Executive Chamber
Nadine Fontaine, FOIL Appeals Officer, Executive Chamber
Linda Manley, Appeals Officer, Homes and Community Renewal