



STATE OF NEW YORK  
DEPARTMENT OF STATE  
COMMITTEE ON OPEN GOVERNMENT

rec'd 5/31/95

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May 24, 1995

Executive Director

Robert J. Freeman

Ms. Elena Ruth Sassower  
Center for Judicial Accountability, Inc.  
Box 69 - Gedney Station  
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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, unless otherwise indicated.

Dear Ms. Sassower:

I have received your letter of April 26 and the materials appended to it.

On March 20, you transmitted a request under the Freedom of Information Law to the Commission on Judicial Conduct "for all information regarding promulgation of 22 NYCRR §7000 et seq., including any rulemaking history relative thereto." You also sought captions and index numbers pertaining to actions in which the Commission has been sued "by reason of its failure to investigate and/or prosecute complaints of judicial misconduct filed by members of the public", as well as "the legal files of such actions." Your request concerning the promulgation of rules was denied pursuant to §45 of the Judiciary Law and because the request "would require research which [the Commission is] not obligated to do." The request concerning actions in which the Commission has been sued was denied on the ground that the "Commission's litigation files are not available to the public." You were also told that some information involving such litigation may be available in a library or public court files."

You later requested a "subject matter list" and contended that "the public is entitled to some explanation" concerning what you view as a "discrepancy" between a regulation and a statute by the Commission's Administrator, Gerald Stern, who "presumably [has] first-hand knowledge" of the matter, since he has been employed by the Commission since its creation.

In this regard, I have spoken with Mr. Stern and received a copy of his letter to you of May 22. As I understand his response,

your request involving litigation files and a subject matter list has been resolved.

With respect to the request involving the promulgation of regulations, I offer the following comments.

First, as a general matter, the Freedom of Information Law is based upon a presumption of access. Stated differently, all records of an agency are available, except to the extent that records or portions thereof fall within one or more grounds for denial appearing in §87(2)(a) through (i) of the Law.

Relevant is the initial ground for denial, §87(2)(a), which pertains to records that "are specifically exempted from disclosure by state or federal statute". One such statute, §45 of the Judiciary Law, pertains to the Commission on Judicial Conduct and provides in relevant part that "...all complaints, correspondence, commission proceedings and transcripts thereof, other papers and data and records of the Commission shall be confidential and shall not be made available to any person..." In view of the breadth of the language of §45, it might be contended that records falling within your request are exempted from disclosure.

Even if §45 does not apply and the issue is determined under the Freedom of Information Law, it is likely that the records, if they can be found, could be withheld at least in part. I direct your attention to §87(2)(g), which authorizes an agency to withhold records that:

"are inter-agency or intra-agency materials which are not:

i. statistical or factual tabulations or data;

ii. instructions to staff that affect the public;

iii. final agency policy or determinations;  
or

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

It is noted that 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 or external audits must be made available, unless a different ground for denial could appropriately be asserted. Concurrently, those portions of inter-agency or intra-agency materials that are reflective of opinion, advice, recommendation and the like could in

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my view be withheld. It is likely in my view that commentary and communications regarding the matter would have been predecisional expressions of opinion that could be withheld.

Second, based on the response to your request and a conversation with Mr. Stern, it is unclear where or whether the records in question exist. As such, an issue in terms of the Freedom of Information Law is whether the request "reasonably describes" the records sought as required by §89(3) of the Law. It has been held that a request reasonably describes the records when the agency can locate and identify the records based on the terms of a request, and that to deny a request on the ground that it fails to reasonably describe the records, an agency must establish that "the descriptions were insufficient for purposes of locating and identifying the documents sought" [Konigsberg v. Coughlin, 68 NY 2d 245, 249 (1986)].

Although it was found in the decision cited above that the agency could not reject the request due to its breadth, it was also stated that:

"respondents have failed to supply any proof whatsoever as to the nature - or even the existence - of their indexing system: whether the Department's files were indexed in a manner that would enable the identification and location of documents in their possession (cf. National Cable Tel. Assn. v Federal Communications Commn., 479 F2d 183, 192 [Bazelon, J.] [plausible claim of nonidentifiability under Federal Freedom of Information Act, 5 USC section 552 (a) (3), may be presented where agency's indexing system was such that 'the requested documents could not be identified by retracing a path already trodden. It would have required a wholly new enterprise, potentially requiring a search of every file in the possession of the agency']" (id. at 250).

In my view, whether a request reasonably describes the records sought, as suggested by the Court of Appeals, may be dependent upon the terms of a request, as well as the nature of an agency's filing or record-keeping system. In Konigsberg, it appears that the agency was able to locate the records on the basis of an inmate's name and identification number.

It appears that the records sought, if they exist, are not kept or filed in a manner in which they can be retrieved, except by reviewing numerous records that may or may not include those of your interest. If that is so, the request might not have reasonably described the records.

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Lastly, since you referred to an entitlement to an explanation, I note that the title of the Freedom of Information Law may be somewhat misleading, for it is not a vehicle that requires agencies to provide information per se; rather, it requires agencies to disclose records to the extent provided by law. As such, while an agency official may choose to answer questions or to provide information by responding to questions, those steps would represent actions beyond the scope of the requirements of the Freedom of Information Law. Moreover, the Freedom of Information pertains to existing records. Section 89(3) of that statute states in part that an agency need not create a record in response to a request.

I hope that I have been of some assistance.

Sincerely,

A handwritten signature in cursive script that reads "Robert J. Freeman". The signature is written in black ink and is followed by a horizontal line.

Robert J. Freeman  
Executive Director

RJF:jm

cc: Gerald Stern