

FOIL 19305

November 30, 2015

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.:

We are in receipt of your request for an advisory opinion regarding the manner in which the New York State Office of Children and Family Services (OCFS) responded to your Freedom Information Law request. Please accept our apologies for the delay in response.

By way of background, the Freedom of Information Law provides direction concerning the time and manner in which agencies must respond to requests. Specifically, §89(3)(a) of the Freedom of Information Law states in part 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 acknowledgement 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.... If an agency determines to grant a request in whole or in part, and if circumstances prevent disclosure to the person requesting the record or records within twenty business days from the date of the acknowledgement of the receipt of the request, the agency shall state, in writing, both the reason for the inability to grant the request within twenty business days and a date certain within a reasonable period, depending on the circumstances, when the request will be granted in whole or in part.”

Accordingly, it has long been advised that when an agency is unable to deny or provide access to records within five business days, it must provide a written response indicating either that it will respond within the next twenty business days, or that it is unable to respond until a certain date, providing both the date and the reasons for requiring additional time. Although we recognize that there are occasions when an agency will require an extension of time beyond that which it initially predicted, there is no provision in the statute for repeated extensions. The agency must, however, indicate the date by which it will respond, based on what is reasonable in consideration of attendant circumstances.

When an agency fails to comply with the time limits, or denies access to records, the Freedom of Information Law permits the applicant to file an administrative appeal, and, if the agency fails to comply with the law on

appeal, judicial review pursuant to Article 78 of the Civil Practice Law and Rules. We note how the legislature chose to distinguish the two types of denials in §89(4)(a), as follows:

“...any person denied access to a record may within thirty days appeal in writing such denial to the head, chief executive or governing body of the entity, or the person therefor designated by such head, chief executive, or governing body, who shall within ten business days of the receipt of such appeal fully explain in writing to the person requesting the record the reasons for further denial, or provide access to the record sought”

and further,

“Failure by an agency to conform to the provisions of subdivision three of this section shall constitute a denial.”

Because it distinguished between the two types of denials, one in writing and the other due to a failure to respond in a timely manner, it is our opinion that the Legislature intended that there may be two types of appeals. One, from a denial of access in writing based on an exception to rights of access, and another, from a constructive denial of access as a result of the agency's failure to comply with the time limits for response required by §89(3)(a).

As stated above, there is no provision in the statute for repeated extensions. As the agency notified you on four separate occasions that they would need additional time to respond to your FOIL request, we believe it was reasonable for you, upon receipt of the fourth extension notice, to construe this failure to respond as a constructive denial on the part of the agency. While we do not know the volume or complexity of the records which the agency withheld pursuant to their April 21, 2015 determination, it seems likely that the length of time (approximately nine months) that it took to respond to your request was not reasonable. We note, however, that OCFS appropriately afforded you the right to appeal its April 21, 2015 substantive denial of access to records.

In an effort to enhance understanding of and compliance with FOIL, copies of this response will be sent to the agency Records Access Officer.

I hope that I have been of assistance.

Sincerely,

Kristin O'Neill
Assistant Director

cc: OCFS Records Access Officer