



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

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FOIL AO 19816

By Electronic Mail Only

October 4, 2021

Adam Atkinson

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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 Adam Atkinson:

I am writing in response to your request for an advisory opinion regarding the manner in which the Village of Potsdam has responded to your Freedom of Information Law (FOIL) request for a copy of a settlement agreement between the Village and a resident which resulted from litigation.

On August 31, 2021, you submitted a FOIL request to the Village for “the final settlement amount of the Hank Robar lawsuit against the village concerning his ‘toilet gardens.’” In response, the Village Clerk/Registrar advised you that “[t]he Settlement Agreement is marked ‘Confidential’ therefore I can not release it.” The denial from the Clerk did not assert any of the statutorily permissible grounds for denial, nor did it advise you of your right to file an administrative appeal as required by regulations promulgated by the Committee on Open Government:

Denial of access shall be in writing stating the reason therefor and advising the person 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 appealed the denial of access and, in response, the Mayor wrote: “In regards to your appeal of our previous FOIL denial, I am officially denying the appeal regarding the requested information.”

Section 89(4)(a) of FOIL states, in part, that:

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.

In our view, the response you received from the Mayor neither “fully explained” the reason for further denial nor provided access to the records sought as required by Law.

Substantively, FOIL is based upon a presumption of access. 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 (q) of the Law. As mentioned above, neither the Village’s records access officer nor its FOIL appeal officer has asserted in writing any of the permissible statutory grounds for denying access. The records access officer merely stated that the record was marked “confidential” and therefore it was her belief that she could not release it.

The courts have consistently interpreted FOIL in a manner that fosters maximum access. The Court of Appeals stated in a 1979 decision:

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. 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 court for in camera inspection, to exempt its records from disclosure. Only where the material requested falls squarely within the ambit of one of these statutory exemptions may disclosure be withheld.

Fink v. Lefkowitz, 47 N.Y.2d 567, 571 (1979) (internal citations omitted). In another decision, the Court of Appeals found that:

The Freedom of Information Law expresses this State’s strong commitment to open government and public accountability and imposes a broad standard of disclosure upon the State and its agencies. The statute, enacted in furtherance of the public’s vested and inherent “right to know,” affords all citizens the means to obtain information concerning the day-to-day functioning of State and local government thus providing the electorate with sufficient information “to make intelligent, informed choices with respect to both the direction and scope of governmental activities” and with an effective tool for exposing waste, negligence and abuse on the part of government officers.

Capital Newspapers v. Burns, 67 N.Y.2d 562, 565-66 (1986) (internal citations omitted).

On several occasions, the courts have addressed situations in which agreements or settlements have included provisions requiring confidentiality. Those kinds of agreements have uniformly been struck down and found to be inconsistent with FOIL. In short, it has been held that a promise or assertion of confidentiality cannot be upheld unless a statute specifically confers confidentiality. In *Gannett News Service v. Office of Alcoholism and Substance Abuse Services*, 415 N.Y.S.2d 780 (1979), a state agency guaranteed confidentiality to school districts participating in a statistical survey concerning drug abuse. The court determined that the promise of confidentiality could not be sustained, and that the records were

Adam Atkinson
October 4, 2021
Page 3 of 3

available, for none of the grounds for denial appearing in FOIL could justifiably be asserted. In another decision rendered by the Court of Appeals, it was held that a state agency's:

long-standing promise of confidentiality to the intervenors is irrelevant to whether the requested documents fit within the Legislature's definition of 'record' under FOIL. The definition does not exclude or make any reference to information labeled as 'confidential' by the agency; confidentiality is relevant only when determining whether the record or a portion of it is exempt. . . .

Washington Post v. Insurance Department, 61 N.Y.2d 557, 565 (1984).

As you have been unable to obtain a copy of the settlement agreement and the Village did not respond to the Committee's request for additional information, we have no way of knowing what, if any, confidentiality language was included in the agreement. However, any language which compromises the public's right to inspect and or copy public records would, in our opinion, be contrary to FOIL. In our opinion, unless a specific statutory exemption from disclosure applies, the settlement agreement should be made available.

I hope this is responsive to your inquiry.

Sincerely,

/Kristin O'Neill

Kristin O'Neill
Assistant Director

cc: Mayor Ron Tischler