



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

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FOIL AO 19862

May 10, 2024

By e-mail:

The Committee on Open Government is authorized to issue advisory opinions. The ensuing advisory opinion is based solely upon the information presented in your correspondence.

Dear:

The Committee on Open Government received your April 30, 2024, request for an advisory opinion addressing the denial by the City of Syracuse ("City") of your FOIL request seeking investigation, disciplinary and other related records regarding a particular employee.

The City denied a portion of your request seeking investigatory and disciplinary records citing Public Officers Law (POL) § 87(2)(a), which requires that agencies withhold from disclosure records which "are specifically exempted from disclosure by state or federal statute." As you know, the Committee contacted the City for clarification regarding which state or federal statute required the City to withhold the records pursuant to POL § 87(2)(a). The City responded with: "[i]n reviewing records responsive to the FOIL request, we determined that some of the material in the responsive records was obtained following the issuance by the City of the employee's Garrity rights (*See Garrity v. New Jersey*, 385 U.S. 493 (1967)) and therefore was not subject to disclosure." In *Garrity*, the U.S. Supreme Court held that "the protection of the individual under the Fourteenth Amendment against coerced statements prohibits use in subsequent criminal proceedings of statements obtained under threat of removal from office, and that it extends to all, whether they are policemen or other members of our body politic." *Id.* at 500.

Section 87(2)(a) applies to records rendered confidential by "state or federal statute." Courts have held that other laws, such as regulations or local laws, are not state or federal statutes and for that reason do not supersede the disclosure requirements of FOIL. *See, e.g., Zuckerman v. NYS Board of Parole*, 385 N.Y.S. 2d 811, 813 (3d Dep't 1976) ("exemptions can only be controlled by other Statutes, not by Regulations which go beyond the scope of specific statutory language"); *Sheehan v. City of Syracuse*, 521 N.Y.S. 2d 207, 208 (Supr. Ct. Onon. Co. 1987) ("the Syracuse Revised General Ordinances is an ordinance, not a statute, and therefore a fee greater than that stated in the Public Officers Law cannot be charged"). We believe that these precedents provide ample support for the proposition that case law such as *Garrity* is – like a local law or regulation – not a legislatively-enacted "state or federal statute" for FOIL exemption purposes. As such, we believe that it is unlikely that a court would agree that case

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law, if applicable to the content of an agency record, would supersede the disclosure requirements of FOIL.¹

Considering the other exemptions to disclosure and responses in the City's appeal determination, we can offer some additional comments.

First, some of the responsive disciplinary letters produced by the City contained redactions of all "charges" against the subject employee. In justification for the redactions, the City cites § 87(2)(a), which, as discussed above, is likely not consistent with the requirements of FOIL. Generally, an agency may withhold an unsubstantiated charge where they have determined that disclosure would constitute an unwarranted invasion of personal privacy. See FOIL-AO-[17195](#). In our opinion, if any of the charges contained in the charging letter were determined to be unsubstantiated, the City could withhold them if they determine that disclosure could constitute an unwarranted invasion of personal privacy. However, the substantiated charges, in our opinion, should be released as courts have found that disclosure constitutes a warranted rather than unwarranted invasion of personal privacy as a matter of law. Here, it appears to us that the City tries to distinguish the most recent disciplinary charges from the older substantiated charges that were released on the theory that *Garrity* applies to the withheld content.

The City has also withheld records – "communications" – on the ground that they contain intra- and inter-agency material subject to POL § 87(2)(g). While it is likely that the City's internal communications and those with the Office of the Comptroller contain some, if not primarily, content that would appropriately fall within the intra/inter-agency exemption to disclosure, to the extent that those records contain factual statements as opposed to opinion, those portions likely should have been available as exceptions to the applicable exemption.

Finally, the City withheld certain GPS vehicle data pursuant to your request, citing POL §§ 87(2)(b) and (f). With regard to such data, whether the content should have been available likely depends on additional facts about the vehicle and its use. If the vehicle was marked and readily identifiable as an agency vehicle such that anyone could observe it on the road, in our opinion grounds for withholding the data would likely be unavailable. However, if the vehicle was not marked or easily identifiable as an agency vehicle, the GPS data could be withheld to the extent that it identifies information that could endanger safety pursuant to § 87(2)(f). For example, disclosure of times and routes of travel could reveal personal address(es) or information about which school the employee's child attends; the City could reasonably conclude that release of such information would endanger the safety of both the employee and his or her family members, as well as constitute an unwarranted invasion of personal privacy pursuant to POL § 87(2)(b).

Thank you for your inquiry.

Sincerely,

s/Christen L. Smith
Senior Attorney

¹ While FOIL does not separately enumerate court orders, case law, or other sources of law in the context of identifying exemptions to disclosure, court orders can be legally binding *on a party to a particular action* and the Committee will not advise a party to violate *an applicable court order*.