



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

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FOIL AO 19882

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By email only

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 received your request for an advisory opinion addressing the appeal determination of the Village of Scarsdale (“Village”). The record subject to your request is a spreadsheet shared between the Village and Flock Group, Inc. (“Flock”) noting possible locations for license plate reader (“LPR”) cameras throughout the Village, none of which were ever installed as the contract with Flock was rescinded.

The Village cites §§ 87(2)(e)(iv) and 87(2)(g) as justification for withholding portions of the spreadsheet. The spreadsheet contains twelve columns of data. As produced, the spreadsheet contains four columns (street name, latitude, longitude, and why this specific location was selected) which are redacted, while the remaining columns (camera number, type of camera, direction of travel, mile marker, combined latitude/longitude, existing pole, pole type, and power type) were produced. However, the only disclosed columns that contain data are camera number, type of camera, direction of travel, and existing pole.

You pose five questions for which you seek the opinion of the Committee.

1. Whether the columns containing “factual elements,” such as street name and coordinates, should be “segregable from the ‘rationale’ column and therefore disclosable pursuant to Public Officers Law § 87(2)(g)(i)–(iii)”?
2. Whether a draft spreadsheet, which could be revised but never has been revised, “truly support[s] continued nondisclosure under § 87(2)(g)”? Or whether the fact that no “final’ deployment plan ever came into existence” impacts its availability?
3. “Does a commercial vendor such as Flock Safety, performing under a signed contract to install equipment, qualify as a “consultant” for purposes of the inter-agency exemption—particularly

where the disputed record originated with the agency itself and was transmitted to the vendor rather than by it?”

4. “Does a speculative, generalized risk—rather than a concrete showing of harm—satisfy an agency’s burden under §87(2)(e)(iv) to demonstrate that disclosure ‘would’ reveal a non-routine technique or endanger public safety?”
5. Whether “the Committee consider[s] it appropriate for the Village to have produced at least the factual portions of the spreadsheet, e.g. locations/coordinates, subject to redaction of any truly sensitive material, e.g. the ‘rationale,’” considering that *Matter of Polansky v. Regan*, 81 A.D.2d 102 (3d Dep’t 1981) and *Matter of Moore v. Santucci*, 151 A.D.2d 677 (2d Dep’t 1989), “emphasiz[e] the requirement of in-camera review and segregation of factual from deliberative content”?

Given the overlap in FOIL principles applicable to these questions, I address them within discussion of the principles rather than by individual question.

Segregability and blanket denials

Section 87(2) provides

Each agency shall, in accordance with its published rules, make available for public inspection and copying all records, except those records or portions thereof that may be withheld pursuant to the exceptions of rights of access appearing in this subdivision. A denial of access shall not be based solely on the category or type of such record and shall be valid only when there is a particularized and specific justification for such denial.

While there are circumstances when a blanket denial is consistent with FOIL, FOIL favors redaction of any exempt content over blanket denials. See FOIL-AO-[19866](#). In our view, should the requested records contain content which falls within the exemptions found in subsections (b)-(u) while other content does not, the exempt portions may be withheld but the remaining portions must be disclosed. See *Matter of Polansky*, 81 AD2d at 104.

In our opinion, the Village response does not constitute a blanket denial, but the inquiry remains as to whether all of the redacted content appropriately falls within the cited exemptions to disclosure. The agency must be able to articulate “particularized and specific justification” for all of the content it chooses to withhold. *Matter of Moore*, 151 A.D.2d at 678. For reasons further explained below, in our opinion, the rationale data within the spreadsheet may be appropriately withheld under both intra-agency and law enforcement exemptions to disclosure, but the location data may not.

Intra-agency Materials

While portions of draft documents often fall within the intra-agency exemption, the status of a record as draft does not end the inquiry. The inter-agency or intra-agency materials exemption is intended to

protect the internal deliberative process, opinions, and non-final recommendations within the agency. Section 87(2)(g) states that an agency may withhold:

- 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;
 - (iv) external audits, including but not limited to audits performed by the comptroller and the federal government[.]

The language above contains, in effect, exceptions to the exemption. Agencies may withhold inter-agency or intra-agency materials under § 87(2)(g) but must disclose any portions of those materials reflecting sub-categories (i) through (iv) unless another exemption applies. Therefore, while any opinions or recommendations which did not become the final decision of the agency may be withheld, factual information or data within the same record must be disclosed.

The Village states

The information pertaining to the locations was still subject to change based upon Flocks [sic] review, advice, and recommendations, as well as field conditions. Accordingly, release of the entire Record jeopardizes the deliberative process as disclosure would divulge the thinking and rationale of SPD behind each proposed location.

In essence, the Village argues that the location data remains part of a deliberative process because, since the cameras have not been installed, the locations are not known to the public and could change in the future. Meaning that the application of this exemption rests on a mere possibility that the spreadsheet could remain part of some future decision to place cameras. However, there is no indication that the Village is continuing to pursue installation of LPRs. If this logic follows, under almost no set of facts would records pertaining to an incomplete project be available unless the agency voluntarily waives the right to invoke the intra-agency exemption to disclosure.

There is an underlying line of inquiry required with the given set of facts: does the location information constitute facts or data, or is it opinion, advice, or reflective of deliberations? As acknowledged by the appeal officer, the Committee opines that “factual data” is any objective information. Objective information is inherently different from opinions, recommendations, ideas, or advice. In our opinion, locations data (street address, longitude, and latitude) constitutes factual data which may not be withheld as intra-agency material. The perspective of the Village discussed above suggests that the Village believes that location data is not objective information.

The appeal determination states

. . . your FOIL appeal is granted to the extent that it contains “factual tabulations or data”, and denied to the extent that nonobjective information in the Record expressing “opinions, ideas, or advice exchanged as part of the consultative or deliberative process of government decision making” shall be redacted.

The determination additionally provides

[w]hen viewing the record as a whole, there are portions of the Record which remain exempt because such information was still in the deliberative process and/or is exempt under POL § 87(2)(e)(iv) . . .

The information pertaining to the locations was still subject to change based upon Flocks [sic] review, advice, and recommendations, as well as field conditions. Accordingly, release of the entire Record jeopardizes the deliberative process as disclosure would divulge the thinking and rationale of SPD behind each proposed location.

Yet, the determination makes no distinction between which columns contain “factual tabulations or data” and which, in the opinion of the agency, represent deliberative material. It seemingly lumps all of the location data columns and the rationale column together without distinguishing how each of these data sets constitutes deliberative materials.

In our opinion, the argument that that coordinates like longitude and latitude and street names could be described as “deliberative material” and not facts or data is inconsistent with the requirements of FOIL.

When an agency contracts with a third party to provide plans, opinions, or recommendations regarding a particular matter, the third party is typically thought to be a consultant. When the third party is contracted to provide a direct service or provide a specific product, the third party is typically thought to be a vendor or contractor. Sometimes, the third-party acts as both a consultant and a contractor. The distinction within the context of FOIL is important because records shared with or from a consultant fall within the intra-agency exemption to disclosure, while records from a contractor do not. When the third-party acts as both consultant and contractor, whether the intra-agency exemption applies requires a more detailed fact specific assessment.

The Village cites to a paragraph in the contract it had with Flock. It appears from that paragraph that Flock was acting in both roles. Therefore, FOIL would permit the Village to withhold records shared between it and Flock, regardless of who drafted the document, during the consultant phase of the contract. However, for the reasons discussed above, in our opinion the only column in the spreadsheet which does fall within the intra-agency exemption is the column reflecting the reasons for selecting a particular location.

Law Enforcement Exemption

The law enforcement exemption to disclosure requires a two-pronged inquiry. First, the records must have been compiled at the time of the FOIL request for a law enforcement purpose. Second, disclosure may be restricted “only to the extent that disclosure would” either “interfere with law enforcement investigations or judicial proceedings . . . ; deprive a person of a right to a fair trial or impartial adjudication; identify a confidential source or disclose confidential information relating to a criminal investigation, or reveal criminal investigative techniques or procedures, except routine techniques and procedures.” § 87(2)(e). Given the nature of LPRs and that the spreadsheet was developed between

Flock and the police department, we will assume that the spreadsheet was generated for a law enforcement purpose, as alleged in the affidavit of the Chief of Police.

The New York State Court of Appeals found that the relevant, although not necessarily dispositive, inquiry regarding “whether investigative techniques are nonroutine is whether disclosure of those procedures would give rise to a substantial likelihood that violators could evade detection by deliberately tailoring their conduct in anticipation of avenues of inquiry to be pursued by agency personnel.” *Fink v. Lefkowitz*, 47 N.Y.2d 567, 572 (1979).

Unsurprisingly, in the more than forty years since *Fink*, there have been numerous cases applying fact patterns to this inquiry. For example, records describing “surveillance of places which petitioner was known to frequent and its establishment of roadblocks do not describe nonroutine procedures.” *Spencer v. New York State Police*, 187 A.D.2d 919, 921 (3d Dep’t 1992). On the other hand, disclosing details, including location history, regarding vans installed with x-ray technology to detect explosives would describe non-routine technology and procedures, resulting in a substantial likelihood that terrorists could use the information to evade detection. *Grabell v. New York City Police Dept.*, 139 A.D.3d 477, 479 (1st Dep’t 2016). In another case involving LPRs, the Appellate Division of the Second Department noted

. . . the LPRs are constantly gathering data and information on the public, indiscriminately and not in connection with any specific investigation or target in mind. Although the respondents contend that the disclosure of the locations of the LPRs would compromise the utility and effectiveness of the LPRs as a law enforcement tool, they have failed to offer any evidence that disclosing the number and location of the LPRs would reveal information of a specialized or unique technology. The LPRs are tantamount to speed or red light cameras, which also happen to gather surveillance on anyone that enters the Village. . . [The Village] articulated only the hope of obtaining information and has implemented a general surveillance program that indiscriminately gathers information about anyone entering [the Village]. That the information gathered in such manner may potentially be used to detect or apprehend a person who may be involved in criminal activity does not, in our view, render the information requested by the petitioner exempt under New York’s law enforcement records exemption.

Lane v. Port Washington Police District, 221 A.D.3d 698, 703, 706 (2d Dep’t 2023).

Here, the appeal determination and supporting affidavits similarly express a hope or potential that the LPR cameras could be used to apprehend those involved in criminal activity at some speculative point in the future. In *Lane*, the cameras actually existed and given the vast scope of the indiscriminate gathering of information by these cameras, the Court believed that disclosing the location data was insufficient to meet the requirements of the law enforcement exemption to disclosure. To support its assertion that “disclosure would . . . reveal criminal investigative techniques or procedures, except routine techniques and procedures,” the Village of Scarsdale asserts that “full and unredacted disclosure” of the

spreadsheet *could* “give criminals and suspects insights into SPD’s patrol patterns and would further alert wrong-doers that they should avoid these locations” and that some of the locations could be easily used to “evade detection” because those locations “yield high traffic volumes” or are “commonly utilized thoroughfares in the commission of crimes.” Again, we must note that the cameras do not exist since the contract was revoked before installation.

The Chief’s affidavit also acknowledges that “criminal vehicular traffic patterns do change over time,” which suggests, in our view, that the locations proposed in the spreadsheet but never utilized would likely not arm wrongdoers with information sufficient to constitute knowledge of present or future non-routine investigative techniques. On the other hand, disclosure of the reasons why a particular location was chosen would likely reveal non-routine criminal investigative techniques or procedures by allowing potential wrongdoers to understand the logic and methodology behind why certain locations are chosen over others.

In our opinion, the harms envisioned by disclosure of the location data in the Chief’s affidavit fall short of demonstrating that disclosure *would*, not *could*, reveal non-routine criminal investigative techniques or procedures. His affidavit includes statements that the “effectiveness of the future deployment of camera and LPR assets in the Village would be exposed with the release of the subject record as the prospective deployment locations in the record sought would likely be the first locations proposed under a subsequent deployment” and “[u]nder future deployment(s), criminals would only need to look at the disclosure of the record subject to this Appeal to be informed of areas where it would be highly likely for camera and LPR assets to be located.” Again, however, there is no indication that the Village is pursuing a “future deployment.” In our view, this concern is too speculative to claim that disclosure would reveal non-routine criminal investigative techniques or procedures.

Sincerely,

s/ Christen L. Smith

Senior Attorney