



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

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FOIL AO 19809

By Electronic Mail Only

June 23, 2021

Paula Lavigne, ESPN
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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 Ms. Lavigne:

I am writing in response to your request for an advisory opinion regarding the manner in which the New York State Department of Corrections and Community Supervision (DOCCS) has responded to your Freedom of Information Law (FOIL) request for "records on deceased inmate Todd Hodne . . . including records of visitor logs, cell location, and cellmates."

In response to your request and subsequent appeal, DOCCS denied access on the ground that the records "are exempt from disclosure pursuant to Public Officers Law § 87(2)(b) where, if disclosed, would constitute an unwarranted invasion of personal privacy. The requested records are exempt from disclosure without an authorization from the administrator or executor of Mr. Hodne's estate"

As you are likely aware, 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. When an agency denies access to a record, in whole or in part, § 89(4)(a) of FOIL states that the individual(s) designated by the agency to handle administrative appeals must, 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 my opinion, the March 25, 2021, response from DOCCS, which recited the statutory provision which the agency relied on for denial, did not "fully explain . . . the reasons for further denial." Given this lack of detail, upon receipt of your request for an advisory opinion, I contacted the FOIL appeals officer and asked if they wished to provide to staff of the Committee on Open Government any additional information relevant to our opinion. On June 17, 2021, we received the attached response from DOCCS.

As DOCCS indicated in its response to our inquiry, staff of the Committee have previously prepared advisory opinions relating to the availability of inmate visitor logs under FOIL. See [FOIL AO 8239](#), [FOIL AO 8321](#), [FOIL AO 8439](#), [FOIL AO 9228](#), [FOIL AO 9228](#), [FOIL AO 9771](#), [FOIL AO 14474](#), and [FOIL AO 16290](#).

Both you and the agency have confirmed that the inmate who is the subject of your request is deceased. The Court of Appeals, the state's highest court, dealt with issues involving the privacy of the deceased

and their surviving family members in *New York Times Company v. City of New York Fire Department*, 4 N.Y.3d 477 (2005). The court found, with respect to records of 911 tape recordings of persons who died during the attack on the World Trade Center on September 11, 2001:

We first reject the argument, advanced by the parties seeking disclosure here, that no privacy interest exists in the feelings and experiences of people no longer living. The privacy exception, it is argued, does not protect the dead, and their survivors cannot claim 'privacy' for experiences and feelings that are not their own. We think this argument contradicts the common understanding of the word 'privacy.'

Almost everyone, surely, wants to keep from public view some aspects not only of his or her own life, but of the lives of loved ones who have died. It is normal to be appalled if intimate moments in the life of one's deceased child, wife, husband or other close relative become publicly known, and an object of idle curiosity or a source of titillation. The desire to preserve the dignity of human existence even when life has passed is the sort of interest to which legal protection is given under the name of privacy. We thus hold that surviving relatives have an interest protected by FOIL in keeping private the affairs of the dead

New York Times Company, 4 N.Y.3d at 484-85 (internal citation omitted). Based on the foregoing, it is clear that there may be an interest in protecting privacy in consideration of deceased persons and their family members which DOCCS is recognizing.

With regard to your request for records reflecting cell location, DOCCS has asserted, in reliance on § 87(2)(f) of FOIL, that disclosure would endanger the life or safety of agency staff and incarcerated individuals. In addition to § 87(2)(f) of FOIL, is worthy of note that Public Officers Law § 95(6)(c) (known as the Personal Privacy Protection Law) states that "[n]othing in this section shall require an agency to provide a data subject with access to personal information pertaining to the incarceration of an inmate at a state correctional facility which . . . , if such access was provided, could endanger the life or safety of any person, unless such access is otherwise permitted by law or by court order." Given the agency's first-hand knowledge of the potential harm caused by disclosure of this type of information and its explanation of that harm, it is our opinion that a denial of access on this ground is consistent with both FOIL and the Personal Privacy Protection Law.

Finally, § 89(3)(a) of FOIL provides that an applicant for records has a responsibility to "reasonably describe" the records sought. With regard to your request for "records of . . . cell mates," it is not clear what records you are seeking. DOCCS indicated in its letter dated June 17, 2021, that it does not centrally track inmate cell mate history and does not possess a list of Mr. Hodne's previous cell mates. To the extent that you are seeking other records that contain information relating to specific inmates, my recommendation would be to submit a new request providing a more detailed description of the type of record sought. The agency would then be obligated to review that request to determine rights of access under FOIL.

I hope this information proves useful.

Sincerely,

/s/ Kristin O'Neill

Kristin O'Neill
Assistant Director

cc: Michael Ranieri, DOCCS