



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

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FOIL AO 19861

May 6, 2024

By Electronic Mail 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:

Thank you for contacting us regarding access to records provided by the Metropolitan Transportation Authority (“MTA”) to bidders in an active, ongoing, competitive procurement. In denying your requests and appeals, MTA relied upon the ground for denial contained in § 87(2)(c) of the Freedom of Information Law (“FOIL”) for records which “if disclosed would impair present or imminent contract awards or collective bargaining negotiations.” Additionally, MTA notified you that it considered your April appeal duplicative of your initial, February appeal.

FOIL presumes access to all agency records. An agency must assert one of the exceptions to this presumption listed in FOIL §87(2) (a) through (t) to withhold a record, or a portion thereof. The Law also requires that 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.”

Regarding the FOIL appeal determinations issued on both February 27, 2024, and April 29, 2024, MTA has concluded that, because the underlying procurement process is ongoing, § 87(2)(c) applies. In its April 29, 2024, letter, MTA stated:

Due to the active status of this procurement, and the relevance of the requested records to the procurement process, the release of these records would inhibit “the interests of [the agency] in achieving the optimum result in awarding a contract to a supplier of goods or services or in reaching a collective bargaining agreement.” See, [sic] *Matter of Verizon N.Y., Inc. v. Bradbury*, 40 A.D.3d 1113, 1115 (2d Dept 2007).

This blanket denial of access does not, in our view, comply with the agency’s obligations under the law to particularize the harm from disclosure of the requested materials. The MTA has not provided sufficient information in its appeal determination to reflect how harm would occur by disclosure, but rather has merely offered conclusory statements regarding potential harm. Further, the agency did not provide a

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particularized and specific justification for the denial of the records you requested. As you have specifically requested records that have been provided to “all bidders,” it is unclear how disclosure of the requested records “could result in an inequality of knowledge amongst the bidders, depriving the agency of the benefits of the competitive bidding process, and depriving the bidder with the resulting lesser knowledge of a fair opportunity to be awarded the contract.” *Verizon*, 40 A.D.3d at 1115. While there may be additional factors relating to incomplete status of the affected procurement of which we are unaware that factored into the MTA’s decision to withhold records pursuant to the cited exemption, in our view those factors, and an explanation of how harm could accrue should disclosure occur, should have been clearly stated as part of a particularized and specific justification for the denial of your request.

Regarding your inquiry relating to the obligation of an agency to respond to a second request for records that had initially been denied in response to a preceding request and appeal, we have advised that agencies are “not required to respond, unless there is a change in circumstances that would alter the authority of the [agency] to deny access” to such requests. [FOIL-AO-15964](#). The MTA advised that the circumstances that led to its initial appeal denial in February had remained unchanged as of April and it appears that circumstances will not change until the contract is finalized. Even though your second request was an attempt to narrow the scope of your first, in our opinion the courts would determine this to be a duplicate request. *See, e.g., Cobb v. New York City Police Dep’t*, 108 N.Y.S.3d 691, 693 (NY Co. 2018) (“A subsequent FOIL request that is more specific than a prior request is considered duplicative.”).

Thank you for your inquiry.

Sincerely,

s/ Miguel-Carlo Bautista
Excelsior Fellow