

Patrick O'Hara

From: dos.sm.Coog.InetCoog <dosCOOG@dos.ny.gov>
Sent: Tuesday, 13 September 2016 8:14 am
To: Patrick O'Hara
Cc: Lund, Marilyn
Subject: RE:

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 Mr. O'Hara:

We are in receipt of your request for an advisory opinion regarding the manner in which the Long Island Rail Road responded to your Freedom of Information Law (FOIL) request.

You requested, among other records, a copy of the "LIRR Crew Book, and ADL-205 Manual of Instructions to Train Personnel." The agency denied access to the record in its entirety, advising that the record contains "security-sensitive information" and that "[p]ursuant to Public Officers Law §87(2)(f), an agency may deny access to records that 'if disclosed could endanger the life and safety of any person.'"

FOIL is based upon a presumption of access. Stated differently, 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 (l) of the Law. In your e-mail, you assert your belief that since §87(2)(g)(ii) of FOIL "states that intra-agency materials that are 'instructions to staff that affect the public' are not exempt from disclosure under the law," that the records at issue must be disclosed. If the agency had asserted the "intra-agency" exemption as the lone ground for denial, I would tend to agree with your assertion. However, even if a record constitutes "instructions to staff that affect the public," an agency may still assert one of the other grounds for denial. The agency may still deny access to records which "if disclosed could endanger the life or safety of any person" (§87(2)(f) of FOIL).

There are few judicial decisions concerning the assertion of §87(2)(f). The focus of the courts in those decisions involves the likelihood that particular individuals or locations could be placed in jeopardy by means of disclosure. In numerous situations in which the application of §87(2)(f) is at issue, a primary consideration involves the degree of detail contained in the records. For instance, it was determined in American Broadcasting Companies, Inc. v. Siebert that disclosure of the home addresses of applicants for check cashing licenses would "expose applicants and their families to danger to life or safety" (110 Misc.2d 744, 442 NYS2d 855, 859 (1981)). Also notable is the holding by the Appellate Division in Flowers v. Sullivan (149 AD2d 287, 545 NYS2d 289 (1989)) in which it was held that "the information sought to be disclosed, namely, specifications and other data relating to the electrical and security transmission systems of Sing Sing Correctional Facility, falls within one of the exceptions." (Id. at 295.) In citing §87(2)(f), the Court stated that:

"It seems clear that disclosure of details regarding the electrical, security and transmission systems of Sing Sing Correctional Facility might impair the effectiveness of these systems and compromise the safe and successful operation of the prison. These risks are magnified when we consider the fact that disclosure is sought by inmates. Suppression of the documentation sought by the petitioners, to the extent that it exists, was, therefore, consonant with the statutory exemption which shelters from disclosure information which could endanger the life or safety of another." (Id.)

As we view the decisions cited above, the detail within the records justified the assertion of the exception. In one case, the detail involved names and addresses of specific individuals at their homes; in the other, it involved "specifications" relating to electrical and security transmission systems. In the context of your request, if details concerning the placement of particular cameras or security devices, or the model number of a particular security product were made public, it might be appropriately contended that disclosure could endanger life or safety. On the other hand, disclosure of the general nature or purpose of a security system, for example, or perhaps the location of cameras that are visible to the public, in our opinion, would be unlikely to endanger the life or safety of persons attending school and/or working in the building.

We emphasize that the introductory language of §87(2) refers to the authority to withhold "records or portions thereof" that fall within the scope of the exceptions that follow. In my view, the phrase quoted in the preceding sentence evidences a

recognition on the part of the Legislature that a single record or report, for example, might include portions that are available under the statute, as well as portions that might justifiably be withheld. That being so, I believe that it also imposes an obligation on an agency to review records sought, in their entirety, to determine which portions, if any, might properly be withheld or deleted prior to disclosing the remainder. In our view, the blanket denial of access to the manual in its entirety is likely overbroad. In our opinion, it is not likely that the agency could demonstrate that there is a reasonable likelihood that disclosure of all of the information contained in the requested records could endanger life or safety.

I hope that I have been of assistance.

Sincerely,

Kristin O'Neill
Assistant Director