

November 10, 2009

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.

Dear

As you are aware, I have received a copy of your letter of appeal addressed to Michael Best, General Counsel to the New York City Department of Education, concerning the denial by the Department's records access officer of a request made pursuant to the Freedom of Information Law by Daily News writer, Juan Gonzalez. In the letter you indicated that, through its receipt by this office, you are seeking an advisory opinion concerning the propriety of the Department's response.

In his request, Mr. Gonzalez sought the following:

"• copies of any correspondence, including email and blackberry messages, between Eva Moskowitz, CEO of both Harlem Success Academy and Success Charter Network, and Schools Chancellor Joel Klein, that specifically relate to requests from Moskowitz for DOE approval of or assistance to Harlem Success in expanding the number of students and/or schools operated by her organizations, and in promoting and marketing her schools to the general public, any and all written requests and/or proposals made by Moskowitz between January 1, 2006 and July 1, 2009 for additional physical space in public school buildings for her charter program.

- copies of any correspondence on the same subject matters, including email and blackberry messages, between Moskowitz and Michael Duffy, executive director of the office of charter schools, for the period of January 1, 2006 to July 1, 2009.

- copies of any correspondence on the same subject matters, including email and blackberry messages, between Moskowitz and John White, chief operating officer of Portfolio Development, for the period of January 1, 2006 to July 1, 2009."

The records access officer, Mr. Joseph A. Baranello, denied the request in its entirety, offering several grounds for denial appearing in §87(2) of the Freedom of Information Law. He referred first to §87(2)(a), which pertains to records that "are specifically exempted from disclosure by state or federal statute." In that regard, he cited the Family Educational Rights and Privacy Act, 20 USC §1232g ("FERPA") concerning records identifiable to students and §§4503 and 3101 of the CPLR, which deal respectively with the attorney-client privilege and attorney work product. Next, reference was made to §§87(2)(b) and 89(2), both of which permit an agency to deny access insofar as disclosure would constitute "an unwarranted invasion of personal privacy." And third, he cited §87(2)(g) concerning inter-agency and intra-agency materials.

In consideration of the grounds for denial referenced by Mr. Baranello and my understanding of the nature of the records at issue, I offer the following comments.

First, and significantly in consideration of the absence of any disclosure by the Department in response to the request, and as you know, the Freedom of Information Law 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 (j) of the Law. It is emphasized 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.

The Court of Appeals confirmed its general view of the intent of the Freedom of Information Law in Gould v. New York City Police Department, stating that:

"To ensure maximum access to government records, the 'exemptions are to be narrowly construed, with the burden resting on the agency to demonstrate that the requested material indeed qualifies for exemption' (*Matter of Hanig v. State of New York Dept. of Motor Vehicles*, 79 N.Y.2d 106, 109, 580 N.Y.S.2d 715, 588 N.E.2d 750 see, Public Officers Law § 89[4][b]). As this Court has stated, '[o]nly where the material requested falls squarely within the ambit of one of these statutory exemptions may disclosure be withheld' (*Matter of Fink v. Lefkowitz*, 47 N.Y.2d, 567, 571, 419 N.Y.S.2d 467, 393 N.E.2d 463)" [89 NY2d 267, 275 (1996)].

Just as significant, the Court in Gould repeatedly specified that a blanket denial of access to records is inconsistent with the requirements of the Freedom of Information Law. In that case, the New York City Police Department contended that complaint follow up reports could be withheld in their entirety on the ground that they fall within the exception regarding intra-agency materials, §87(2)(g), one of the exceptions cited in response to your columnist's request. The Court, however, wrote that: "Petitioners contend that because the complaint follow-up reports contain factual data, the exemption does not justify complete nondisclosure of the reports. We agree" (*id.*, 276), and stated as a general principle that "blanket exemptions for particular types of documents are inimical to FOIL's policy of open government" (*id.*, 275). The Court also offered guidance to agencies and lower courts in determining rights of access and referred to several decisions it had previously rendered, stating that:

"...to invoke one of the exemptions of section 87(2), the agency must articulate 'particularized and specific justification' for not disclosing requested documents (*Matter of Fink v. Lefkowitz, supra*, 47 N.Y.2d, at 571, 419 N.Y.S.2d 467, 393 N.E.2d 463). If the court is unable to determine whether withheld documents fall entirely within the scope of the asserted exemption, it should conduct an in camera inspection of representative documents and order disclosure of all nonexempt, appropriately redacted material (see, *Matter of Xerox Corp. v. Town of Webster*, 65 N.Y.2d 131, 133, 490 N.Y.S.2d, 488, 480 N.E.2d 74; *Matter of Farbman & Sons v. New York City Health & Hosps. Corp., supra*, 62 N.Y.2d, at 83, 476 N.Y.S.2d 69, 464 N.E.2d 437)" (*id.*).

In the context of the request, the Department engaged in a blanket denial of access in a manner which, in my view, is equally inappropriate. I am not suggesting that the records sought must be disclosed in full. Rather, based on the direction given by the Court of Appeals in several decisions, the records must be reviewed by that agency for the purpose of identifying those portions of the records that might fall within the scope of one or more of the grounds for denial of access. As the Court stated later in the decision: "Indeed, the Police Department is entitled to withhold complaint follow-up reports, or *specific portions thereof*, under any other applicable exemption, such as the law-enforcement exemption or the public-safety exemption, as long as the requisite particularized showing is made" (*id.*, 277; emphasis added).

Second, I agree that those portions of the records sought that include information that is personally identifiable to a student must be redacted to comply with FERPA. I do not believe, however, that the provisions of the CPLR cited in the response are applicable or, therefore, that they may properly be asserted.

In brief, FERPA applies to all educational agencies or institutions in the United States that participate in federal funding or loan programs. It generally provides parents of minor students rights of access to education records, a term broadly defined in federal regulations, 34 CFR §99.3, to parents of the students. Concurrently, it generally prohibits disclosure of personally identifiable information

pertaining to a student to the public, unless a parent consents to disclosure. If portions of the records at issue include information that is personally identifiable to a student, those portions must, in my view, be withheld. As emphasized earlier, only those portions of the records subject to FERPA may be redacted; the remainder must be disclosed, or conversely, may be withheld, in accordance with the provisions of the Freedom of Information Law.

As you are aware, §4503 of the CPLR is a codification of the attorney-client privilege, and §3101 creates an exemption from discovery regarding the work product of an attorney. Section 3101 pertains disclosure in a context related to litigation, and subdivision (a) reflects the general principle that "[t]here shall be full disclosure of all matter material and necessary in the prosecution or defense of an action..." It is intended to shield from an adversary records that would result in a strategic advantage or disadvantage, as the case may be. In a decision in which it was determined that records could justifiably be withheld as attorney work product, the "disputed documents" were "clearly work product documents which contain the opinions, reflections and thought process of partners and associates" of a law firm "which have not been communicated or shown to individuals outside of that law firm" [*Estate of Johnson*, 538 NYS 2d 173 (1989)]. It does not appear that the records at issue relate to litigation or that the intent of §3101(c) is pertinent in the context of your request.

In another decision in which the ability to withhold records based on the assertion of the attorney-client privilege or that records reflect the work product of an attorney was discussed, it was found that:

"The attorney-client privilege requires some showing that the subject information was disclosed in a confidential communication to an attorney for the purpose of obtaining legal advice (*Matter of Priest v. Hennessy*, 51 N.Y.2d 62, 68-69, 431 N.Y.S.2d 511, 409 N.E.2d 983). The work-product privilege requires an attorney affidavit showing that the information was generated by an attorney for the purpose of litigation (see, *Warren v. New York City Tr. Auth.*, 34 A.D.2d 749, 310 N.Y.S.2d 277). The burden of satisfying each element of the privilege falls on the party asserting it (*Priest v. Hennessy*, *supra*, 51 N.Y.2d at 69, 431 N.Y.S. 2d 511, 409 N.E.2d 983), and conclusory assertions will not suffice (*Witt v. Triangle Steel Prods. Corp.*, 103 A.D.2d 742, 477 N.Y.S.2d 210)" [*Coastal Oil New York, Inc. v. Peck*, [184 AD 2d 241 (1992)]].

In a discussion of the parameters of the attorney-client relationship and the conditions precedent to its initiation, it has been held that:

"In general, 'the privilege applies only if (1) the asserted holder of the privilege is or sought to become a client; (2) the person to whom the communication was made (a) is a member of the bar of a court, or his subordinate and (b) in connection with this communication relates to a fact of which the attorney was informed (a) by his client (b) without the presence of strangers (c) for the purpose of securing primarily either (i) an opinion on law or (ii) legal services (iii) assistance in some legal proceeding, and not (d) for the purpose of committing a crime or tort; and (4) the privilege has been (a) claimed and (b) not waived by the client'" [*People v. Belge*, 59 AD 2d 307, 399 NYS 2d 539, 540 (1977)].

In short, based on the foregoing and in consideration of the nature of the content of the records at issue, I do not believe that they could be characterized as attorney work product. Further, since it serves as a barrier to disclosure, it is emphasized that the courts have narrowly construed the exemption concerning attorney work product. It has been held that only the work product that involves the learning and professional skills possessed only by an attorney is exempt from disclosure [see *Soper v. Wilkinson Match*, 176 Ad2d 1025 (1991); *Hoffman v. Ro-San Manor*, 73 AD2d 207 (1980)]. Assuming that the records sought do not reflect the specialized skill that can be offered only by an attorney, I do not believe that they can be withheld based on a contention that they consist of attorney work product. Similarly, based on their content, I do not believe that the records fall within the scope of the attorney-client privilege. Ms. Moskowitz is not an officer or employee of the Department. She is not the client of the Department's attorneys, and to the best of my knowledge, the Department officials with whom she communicated are not attorneys or were not functioning as

attorneys. For the foregoing reasons, the records sought, in my opinion, would not be subject to the exemptions from disclosure conferred by §§3101 or 4503 of the CPLR.

Next, with respect to the assertion of §§87(2)(b) and 89(2)(b) of the Freedom of the Freedom of Information Law concerning unwarranted invasions of personal privacy, I point out that several judicial decisions, both New York state and federal, pertain to records about individuals in those capacities and indicate that the records are not of a "personal nature." For instance, one involved a request for the names and addresses of mink and ranch fox farmers from a state agency (ASPCA v. NYS Department of Agriculture and Markets, Supreme Court, Albany County, May 10, 1989). In granting access, the court relied in part and quoted from an opinion rendered by this office in which it was advised that "the provisions concerning privacy in the Freedom of Information Law are intended to be asserted only with respect to 'personal' information relating to natural persons". The court held that:

"...the names and business addresses of individuals or entities engaged in animal farming for profit do not constitute information of a private nature, and this conclusion is not changed by the fact that a person's business address may also be the address of his or her residence. In interpreting the Federal Freedom of Information Law Act (5 USC 552), the Federal Courts have already drawn a distinction between information of a 'private' nature which may not be disclosed, and information of a 'business' nature which may be disclosed (see e.g., Cohen v. Environmental Protection Agency, 575 F Supp. 425 (D.C.D.C. 1983))."

In another decision, Newsday, Inc. v. New York State Department of Health (Supreme Court, Albany County, October 15, 1991)], data acquired by the State Department of Health concerning the performance of open heart surgery by hospitals and individual surgeons was requested. Although the Department provided statistics relating to surgeons, it withheld their identities. In response to a request for an advisory opinion, it was advised by this office, based upon the New York Freedom of Information Law and judicial interpretations of the federal Freedom of Information Act, that the names should be disclosed. The court agreed and cited the opinion rendered by this office.

Like the New York Freedom of Information Law, the federal Act includes an exception to rights of access designed to protect personal privacy. Specifically, 5 U.S.C. 552(b)(6) states that rights conferred by the Act do not apply to "personnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy." In construing that provision, federal courts have held that the exception:

"was intended by Congress to protect individuals from public disclosure of 'intimate details of their lives, whether the disclosure be of personnel files, medical files or other similar files'. Board of Trade of City of Chicago v. Commodity Futures Trading Com'n *supra*, 627 F.2d at 399, quoting Rural Housing Alliance v. U.S. Dep't of Agriculture, 498 F.2d 73, 77 (D.C. Cir. 1974); see Robles v. EOA, 484 F.2d 843, 845 (4th Cir. 1973). Although the opinion in Rural Housing stated that the exemption 'is phrased broadly to protect individuals from a wide range of embarrassing disclosures', 498 F.2d at 77, the context makes clear the court's recognition that the disclosures with which the statute is concerned are those involving matters of an intimate personal nature. Because of its intimate personal nature, information regarding 'marital status, legitimacy of children, identity of fathers of children, medical condition, welfare payment, alcoholic consumption, family fights, reputation, and so on' falls within the ambit of Exemption 4. *Id.* By contrast, as Judge Robinson stated in the Chicago Board of Trade case, 627 F.2d at 399, the decisions of this court have established that information connected with professional relationships does not qualify for the exemption" [Sims v. Central Intelligence Agency, 642 F.2d 562, 573-573 (1980)].

In Cohen, the decision cited in ASPCA v. Department of Agriculture and Markets, *supra*, it was stated pointedly that: "The privacy exemption does not apply to information regarding professional or business activities.." (*supra*, 429). Similarly in a case involving disclosure of the identities of those whose grant proposals were rejected, it was held that:

"The adverse effect of a rejection of a grant proposal, if it exists at all, is limited to the professional rather than personal qualities of the applicant. The district court spoke of the possibility of injury explicitly in terms of the applicants' 'professional reputation' and 'professional qualifications'. 'Professional' in such a context refers to the possible negative reflection of an applicant's performance in 'grantsmanship' - the professional competition among research scientists for grants; it obviously is not a reference to more serious 'professional' deficiencies such as unethical behavior. While protection of professional reputation, even in this strict sense, is not beyond the purview of exemption 6, it is not at its core" [Kurzon v. Department of Health and Human Services, 649 F.2d 65, 69 (1981)].

In short, in my opinion and as indicated in the decisions cited above, the exception concerning privacy does not apply to records identifying or pertaining to entities or individuals in relation to their business or professional capacities. It does not appear, therefore, that either §87(2)(b) or §89(2)(b) may validly be asserted as a means of denying access to the records requested by Mr. Gonzalez.

Lastly, the response referred to §87(2)(g), which may, depending on their content, permit an agency to withhold "inter-agency" or "intra-agency" materials. It is my understanding that Ms. Moskowitz is the CEO of a corporation, the Success Charter Network, that operates a charter school in New York City. That entity, in my view, is not an agency, and if that is so, §87(2)(g) does not serve as a basis for denying access.

Section 86(3) of the Freedom of Information Law defines the term "agency" to mean:

"any state or municipal department, board, bureau, division, commission, committee, public authority, public corporation, council, office or other governmental entity performing a governmental or proprietary function for the state or any one or more municipalities thereof, except the judiciary or the state legislature."

Based on the definition of "agency", "inter-agency" materials consist of communications between or among entities of state and local government in New York; "intra-agency" consist of communications within an agency, such as transmissions between the Chancellor and employees of the Department. Because the communications at issue involved those between or among Ms. Moskowitz, the CEO of a corporation, which is not an agency, and officials at the Department, they could not, in my opinion, be characterized as either inter-agency or intra-agency materials. If that is so, §87(2)(g) does not apply as a ground for denial.

Even when that provision is applicable, it does not authorize a blanket denial of access. Specifically, §87(2)(g) states that an agency may withhold records that:

"are 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; or
- iv. external audits, including but not limited to audits performed by the comptroller and the federal government..."

It is noted that the language quoted above contains what in effect is a double negative. While inter-agency or intra-agency materials may be withheld, portions of such materials consisting of statistical or factual information, instructions to staff that affect the public, final agency policy or determinations or external audits must be made available, unless a different ground for denial could

appropriately be asserted. Concurrently, those portions of inter-agency or intra-agency materials that are reflective of opinion, advice, recommendation and the like could in my view be withheld.

I note that in a case that reached the Court of Appeals, one of the contentions was that certain reports could be withheld because they were not final and because they related to incidents for which no final determination had been made. The Court rejected that finding and stated that:

"...we note that one court has suggested that complaint follow-up reports are exempt from disclosure because they constitute nonfinal intra-agency material, irrespective of whether the information contained in the reports is 'factual data' (see, Matter of Scott v. Chief Medical Examiner, 179 AD2d 443, 444, supra [citing Public Officers Law §87(2)(g)] [111]). However, under a plain reading of §87(2)(g), the exemption for intra-agency material does not apply as long as the material falls within any one of the provision's four enumerated exceptions. Thus, intra-agency documents that contain 'statistical or factual tabulations or data' are subject to FOIL disclosure, whether or not embodied in a final agency policy or determination (see, Matter of Farbman & Sons v. New York City Health & Hosp. Corp., 62 NY2d 75, 83, supra; Matter of MacRae v. Dolce, 130 AD2d 577)... [Gould et al. v. New York City Police Department, 87 NY2d 267, 276 (1996)].

The Court also dealt with the issue of what constitutes "factual data" that must be disclosed under §87(2)(g)(i). In its consideration of the matter, the Court found that:

"...Although the term 'factual data' is not defined by statute, the meaning of the term can be discerned from the purpose underlying the intra-agency exemption, which is 'to protect the deliberative process of the government by ensuring that persons in an advisory role [will] be able to express their opinions freely to agency decision makers' (Matter of Xerox Corp. v. Town of Webster, 65 NY2d 131, 132 [quoting Matter of Sea Crest Constr. Corp. v. Stubing, 82 AD2d 546, 549]). Consistent with this limited aim to safeguard internal government consultations and deliberations, the exemption does not apply when the requested material consists of 'statistical or factual tabulations or data' (Public Officers Law §87(2)(g)(i)). Factual data, therefore, simply means objective information, in contrast to opinions, ideas, or advice exchanged as part of the consultative or deliberative process of government decision making (see, Matter of Johnson Newspaper Corp. v. Stainkamp, 94 AD2d 825, 827, affd on op below, 61 NY2d 958; Matter of Miracle Mile Assocs. v. Yudelson, 68 AD2d 176, 181-182) (id., 276-277).

In sum, with the exception of portions of the records sought that may be withheld pursuant to FERPA and, therefore, §87(2)(a), it appears that the records must be disclosed, for none of the remaining grounds for denial of access may justifiably be asserted.

In an effort to enhance understanding of and compliance with the Freedom of Information Law, and to obviate the need for costly litigation, copies of this opinion will be sent to Department officials.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Michael Best
Joseph A. Baranello
Juan Gonzalez

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