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Executive Director

Robert J. Freeman

FOIL-AO-18760

December 23, 2011

E-Mail

TO:

FROM: Camille S. Jobin-Davis, Assistant Director

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the facts presented in your correspondence.

Dear :

We are in receipt of your request for an advisory opinion regarding application of the Freedom of Information Law to records requested from the Department of Taxation and Finance. Specifically, you asked whether the Department is required to disclose “the names and titles of all employees targeted for layoff and/or impacted by layoff and the method of horizontal reassignment they planned to use in the layoff. You wrote that “Most state agencies provided PEF with this information during the June/July layoffs... and have routinely provided it during past layoffs ... including the Department of Taxation and Finance.”

In response, we note that as a general matter, 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 (l) of the Law.

In our opinion, there are likely two exceptions that an agency could consider when responding to such request.

The first, '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 our view be withheld.

A list identifying those employees who are targeted for layoff would in our view consist of factual information available under subparagraph (i) of §87(2)(g). “The mere fact that some of the data might be an estimate or a recommendation does not convert it into an expression of opinion’ subject to a FOIL exemption (Matter of Polansky v Regan, 81 AD2d 102, 104, 440 NYS2d 356 [1981]; *see also* Ingram v Axelrod, 90 AD2d 568, 456 NYS2d 146 [1982])” Mulgrew v Board of Education of the City School District, 87 AD2d 506, 507, 928 NYS2d 701 (1st Dep’t, 2011). We believe that it would also represent a final agency determination available under subparagraph (iii).

The other exception that may be applicable is §87(2)(b), which provides that an agency may withhold records or portions of records the disclosure of which would constitute “an unwarranted invasion of personal privacy.” This principle was expressed in a decision rendered by the Court of Appeals that focused on the exception involving unwarranted invasions of personal privacy, Hanig v. State Department of Motor Vehicles [79 NY2d 106 (1992)]. In brief, the Court found that the exception applies in situations in which records pertaining to an individual include items “that would ordinarily and reasonably be regarded as intimate, private information” (*id.*,112).

While the standards concerning unwarranted invasions of personal privacy appearing in §89(2)(b) of the Freedom of Information Law are flexible and may be subject to conflicting interpretations, the courts have provided substantial direction regarding the privacy of public officers and employees. It is clear that those persons enjoy a lesser degree of privacy than others, for it has been found in various contexts that public officers and employees are required

to be more accountable than others. They have found that, as a general rule, records that relate to the performance of their duties are available, for disclosure in such instances would result in a permissible rather than an unwarranted invasion of personal privacy [see e.g., Farrell v. Village Board of Trustees, 372 NYS 2d 905 (1975); Gannett Co. v. County of Monroe, 59 AD 2d 309 (1977), aff'd 45 NY 2d 954 (1978); Sinicropi v. County of Nassau, 76 AD 2d 838 (1980); Geneva Printing Co. and Donald C. Hadley v. Village of Lyons, Sup. Ct., Wayne Cty., March 25, 1981; Montes v. State, 406 NYS 2d 664 (Court of Claims, 1978); Powhida v. City of Albany, 147 AD 2d 236 (1989); Scaccia v. NYS Division of State Police, 530 NYS 2d 309, 138 AD 2d 50 (1988); Steinmetz v. Board of Education, East Moriches, *supra*; Capital Newspapers v. Burns, 67 NY 2d 562 (1986)]. Conversely, to the extent that records are irrelevant to the performance of one's official duties, it has been found that disclosure would indeed constitute an unwarranted invasion of personal privacy [see e.g., Seelig v. Sielaff, 607 NYS2d 300, 201 AD2d 298 (1994); Matter of Wool, Sup. Ct., Nassau Cty., NYLJ, Nov. 22, 1977].

It is our understanding that creation of a list of potential employees for layoff is purely an economic decision on an agency's part. While such a designation is clearly related to a public employee's job responsibilities, and because being named to such a list is not reflective of an agency's opinion of how well the employee fulfills such responsibilities, whether disclosure would constitute an unwarranted invasion of personal privacy, in our opinion, is doubtful. Unless it can be demonstrated that "the materials falls squarely within the ambit" of the exception, the material must be disclosed (Gould, Hanig, Fink, *supra*). Further, in view of the release of such lists from other agencies, and the publicity surrounding these issues, it is unlikely that the burden of defending the denial of access could be met.

We hope that this is helpful.

CSJ:sb

cc: Records Access Officer