

FOIL Appeals Office
c/o Office of General Counsel
The State University of New York
H. Carl McCall SUNY Building
353 Broadway
Albany, NY 12246

Dear Records Appeals Officer,

We write to appeal the partial denial by SUNY Potsdam of a request made of SUNY Potsdam pursuant to the New York Freedom of Information Law, Article 6 of the Public Officers Law ("FOIL"). A copy of the original FOIL request, which was sent via electronic mail to the SUNY Potsdam Appeals Officer on November 4, 2023 is included in this correspondence (Document A). A copy of SUNY Potsdam's response is also included in this correspondence (Document B).

Although we appreciate SUNY Potsdam's response to the FOIL request, the records production was incomplete since some records which certainly exist were not released, and others were unjustifiably redacted.

More specifically, we would like to appeal the following decisions:

- 1) We requested complete copies of any and all Documents issued by or on behalf of the rpk GROUP, received by or on behalf of SUNY and/or SUNY Potsdam from the rpk GROUP and/or any documents on the possession, custody, or control of SUNY or SUNY Potsdam referencing rpk GROUP.

SUNY Potsdam claims that "after a diligent search, SUNY Potsdam does not possess responsive records to this request", but we doubt that is true. While it is possible that SUNY Potsdam currently has no records *on its campus* directly issued by or on behalf of rpk GROUP, it cannot be true both that SUNY is an rpk client, as it was until recently, and that there are no documents "issued by or on behalf of (etc.) rpk GROUP to SUNY and/or SUNY Potsdam".

Further, we know as an indisputable fact that some of our own intra-campus correspondence mentioned rpk GROUP, and yet none of that correspondence was included in the released tranche of materials. Therefore, we request that requests 1-3 be granted in full after a search to include SUNY System Administration.

- 2) In response to our requests 4 and 5 for any and all Documents relating to, arising out of, or in connection with any deactivation or discontinuation of any academic program at SUNY Potsdam and any and all Documents relating to, arising out of, or in connection with any plan or program for financial or fiscal stability or recovery, or any substantially similar plan or program, at or for SUNY Potsdam (whether actual or proposed, and whether past, present, or future), we would like to appeal the redactions in the released materials, specifically the redactions in the attached Documents C through J.

SUNY Potsdam's response does not give a specific reason for the redactions, stating only that the materials might amount to a) an unwanted invasion of personal privacy (under POL §87(2)(b)); b) interagency materials under §87(2)(g), which are not statistical or factual tabulations or data, and/or c) are a part of the deliberative process, not final agency policy or determinations.

We submit that none of these reasons justifies the redactions in the released material:

- a) Document L lists metrics to be used in discontinuing programs, but nowhere in the released documents is the data for each examined program associated with these metrics. Where, for example, is the data comparing Program A to Program B in accord with these metrics? Is there no such data?

Nor are there any documents showing how those metrics relate to the fiscal health of the institution. Thus, among the included documents, there is no actual cost benefit analysis of any program. It is implausible to suppose that over the course of more than 5 years no such documents were produced, or that those documents are not matters of public concern at a publicly funded State institution. To emphasize - in the

released documents there is literally no data to support such the financial plan. This suggests, implausibly, that such data does not exist, and the college has no reason to believe that the plan will actually generate savings for the college, or SUNY Potsdam is willfully obstructing the Freedom of Information request.

b) Documents A-E are the closest things in the released documentation to amounting to a financial stability plan, but are so heavily redacted as to be indecipherable. As a general matter, the Freedom of Information Law is grounded in a presumption of access. The redactions in these documents fall into one of three categories, none of which are adequate to justify an exception to that presumption of access.

- i) Financial data, both actual and projected;
- ii) Projected number of faculty and staff positions needing to be cut and the savings from those cuts;
- iii) Names of programs and departments (and perhaps individuals) that are to be cut.

With regard to i), budgeting information for a State funded institution is information critical to the public. SUNY Potsdam is funded by the State of New York and by the tuition dollars paid by the citizens of New York. Surely those citizens have a right to review those budgets, actual and projected that are used to guide decision making on these public campuses. Releasing these figures is not an invasion of privacy, the data is clearly presented as factual data, and also reflect final agency policy, as evidenced by the implementation of the plan at the College since these documents were produced.

With regard to ii) and iii), all the same reasoning applies. Nor does the concern that personnel information will be released apply to the majority, at least, of these redactions. While it is true that one might be able to deduce the identity of certain individuals from the data, that will always be the case with any data set for those with sufficient background information (for example, if a program has only two faculty and a document indicates that the program will be reduced by one faculty member, then one can deduce who

the affected individual is). But surely this doesn't allow for it to be kept a secret how many positions or which programs are being targeted. While individuals' names need to be redacted for personnel reasons, it cannot be the case that **any** data from which an individual's identity can be deduced is justified in being redacted.

The NY State Committee on Open Government argues that even the release of the names and titles of employees targeted for layoff should be made accessible under FOIL. They argue, "[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)." (Memo, Camille S. Jobin-Davis, Assistant Director, Committee on Open Government, *re* FOIL-AO-18760, December 23rd, 2011 – attached as Document L)¹

They argue further that releasing the names and titles of those being laid off is actually required under FOIL. "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)."

We are not requesting that individuals names be unredacted, if present in the documents – our less demanding request is for all financial data, figures

¹ <https://opengovernment.ny.gov/freedom-information-law-foil-advisory-opinions>. Lay-offs.

both actual and projected, along with projections of the number of positions to be cut in which programs and departments and how that affects the financial health of the institution be unredacted. It is clearly in the public interest to be able to review the financial decision-making of a State institution like SUNY Potsdam.

- 3) Finally, we appeal SUNY Potsdam's response to our request 6, for a complete copy of the Document from which a table titled "General Overview of Recovery Plan" was originally extracted before it was later inserted into: (a) a presentation by SUNY Potsdam Interim Provost Alan L. Hersker to the faculty of SUNY Potsdam during a SUNY Potsdam Faculty Senate Q&A Session held online on October 5, 2023 (video and transcript of presentation; document referenced at 47:35s); and/or (b) a handout titled "Fiscal Stability Plan: General Information" distributed to SUNY Potsdam faculty and staff by email by President Suzanne Smith on 10/05/2023."

SUNY Potsdam claims that "after a diligent search, SUNY Potsdam does not possess responsive records to this request", but they offer no explanation for Provost Hersker's remarks, nor do they provide an account of the origin of the table. At the minimum, we request an explanation of Provost Hersker's remarks and an account of the origin of the table – how, where, when was it created, since no other documents in the released tranche include that table. Upon what data was it based? Surely such data would be covered by our original FOIL.

For the reasons discussed above, we respectfully appeal SUNY Potsdam's response to our original requests #1-6.

Please respond within ten business days of receiving this appeal in writing, stating whether the request is granted or denied (in full or in part). Please notify us of any additional costs that may be associated with fulfilling this records request on appeal. If the appeal is granted, please state a date certain by which the records requested will be produced. If it is denied, please name the records being withheld and state with particularity the reasons for each record being withheld, as well as the specific reasons for redactions.

Respectfully,

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Documents Included:

Document A - Original FOIL request

Document B - SUNY Potsdam Response to FOIL Request

Document C - SUNY Potsdam Memo to the Chancellor August 2023_Redacted

Document D - SUNY Potsdam \$9M Deficit Reduction Proposal Draft.xlsx - Group Redacted

Document E - 5m FINANCIAL STABILITY PLAN SPREADSHEET FINAL.xlsx - Group Redacted

Document F - Academic Affairs Faculty and Staff Reduction Redacted

Document G - Faculty Student Ratio by Department Redacted

Document H - Deactivated Programs Course Demand Redacted

Document I - Financial Stability Plan presentation Redacted

Document J - Minors Redacted

Document K - Memo from Committee on Open Government

Document L - Program Deactivation and Discontinuation Process

*Given the indecipherable formatting of some of these documents as supplied, they are unable to be printed. E-versions of all documents can be acquired here: