



KATHY HOCHUL
Governor

ADRIENNE A. HARRIS
Superintendent

January 26, 2023

Transmitted by Email to

Mr. Gunnar Larson
406 West 25th Street
New York, New York 10001

g@xny.io

Re: Freedom of Information Law request No. 2022-092039: Appeal dated November 3, 2022 of the Department of Financial Services' November 3, 2022 response

Dear Mr. Larson:

By email dated November 3, 2022, you are appealing pursuant to New York State Public Officers Law Section 89, the Department of Financial Services' (the "Department") November 3, 2022 response (the "Determination") to your Freedom of Information Law ("FOIL") request No. 2022-092039¹ which the Department construed as

"Any and all documents concerning the Superintendent's said role with Brex (Declaration on said disclosure form)"

In your appeal, you state "[p]lease find a copy of the corresponding financial disclosure form, that was also included in the FOIL request: <https://drive.google.com/file/d/1m1ikLnjkr7lwt2pKqIxnnUKkgzBz7dh/view?usp=drivesdk>. Question 4(a), 'Positions of Authority' lists an advisory role at 'Brex, Inc.' Furthermore, the role's "State or Local Agency" is indicated as 'DFS'. Our request is not intended to be vague, however, we seek records specific to the DFS role with Brex, Inc." [Sic]

¹ The Department closed your prior FOIL request # 2022-091109 on the grounds that it sought records from the Executive Chamber, not the Department. By email dated August 1, 2022, you appealed that determination and the Department construed that appeal as a new FOIL request which was assigned tracking number 2022-092039.

The Determination informed you that your FOIL request does not meet the standard set forth in Public Officers Law (“POL”) § 89(3), which requires a FOIL request to reasonably describe the records sought. This means that the description of the documents sought must be sufficient to allow the agency to locate and identify the documents requested and that agency employees are not required to engage in unreasonable efforts to locate records.² I concur with the Determination’s conclusion that your request does not reasonably describe the records that you seek.

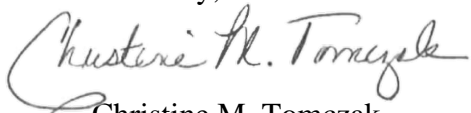
As was explained to you in the Determination, a FOIL request is not reasonably described if the agency cannot locate the requested record using its indexing or filing system, or, with respect to the agency’s electronic records, there is no single search term or combination of search terms that will result in the location of the record. See Asian American Legal Defense & Educ. Fund v. NYC Police Dep’t, 41 Misc.3d 471 (Sup. Ct. N.Y. County 2013), *aff’d* 125 A.D.3d 531 (1st Dep’t 2015). Additionally, where an agency must manually review voluminous records simply to locate responsive records, courts have held that such a request does not reasonably describe the records sought. Badar v. Bove, 273 A.D.2d Dep’t 2000), appeal den. 95 N.Y.2d 764 (2000) (finding that a request for “[a]ll notes, records, correspondence, meeting minutes and other records related to the adoption and/or revision of the Village Zoning Code’s prohibition of commercial activity” was not reasonably described).

When a FOIL request requires an agency to make subjective judgments to determine whether a record is responsive, that request may be found to have not reasonably described the records. For instance, in the Committee on Open Government (“Committee”) Opinion No. FOIL-AO-11960 (February 17, 2000), the Committee opined that a FOIL request that sought records “tending to support” a particular statement, or “utilized”, “used” or “relating to” “various activities” was not reasonably described request for records under Public Officers Law Article 6. A response to such a request “would involve making subjective judgments a series of judgments based on opinions, some of which would be subjective, mental impressions”, and require “ascertaining which records might ‘tend to support’ a statement [that] would involve an attempt to render a judgment regarding the use, utility, accuracy or value of records.” The Committee further opined that “for purposes of [FOIL], a request for such materials would not meet the standard of ‘reasonably describing’ the records sought, for such a request would not enable the Department to locate and identify the records in the manner envisioned by that statute.” See also Committee Opinion No. FOIL-AO-12012 (March 28, 2000), in which the Committee opined that a request for “documentation utilized by SED to evaluate ‘certain needs, actions and functions’ was not reasonably described request for records under FOIL.

² See, Konigsberg v. Coughlin, 68 N.Y.2d 245 (1986); In re Farbman & Sons v. NYC Health & Hosps. Corp., 62 N.Y.2d 75 (1984); Matter of Wright v. Hippolyte, 2014 N.Y. Misc. LEXIS 1247, 2014 NY Slip Op 301705 (U) (Sup. Ct. N.Y. County 2014).

Accordingly, I affirm the Department's Determination.

Sincerely,

A handwritten signature in cursive script that reads "Christine M. Tomczak". The signature is written in black ink and is positioned above the printed name.

Christine M. Tomczak

Assistant Counsel

cc: NYS Committee on Open Government
One Commerce Plaza
99 Washington Avenue, Suite 650
Albany, NY 12231;l