

KATHY HOCHUL
Governor



ADRIENNE A. HARRIS
Superintendent

SENT VIA EMAIL

(G@xny.io)

January 19, 2023

Gunnar D. Larson
xNY.io – Bank.org
406 West 25th Street
New York, NY 10001

Re: Freedom of Information Law (“FOIL”) Tracking No. 2022-092267

Dear Gunnar D. Larson:

I write in response to the FOIL request that you submitted to the New York State Department of Financial Services (“Department”) on September 12, 2022, which states as follows:

“Dear Madam or Sir: On May 18, 2022 xNY.io - Bank.org received a copy of a financial disclosure form for Mr. Richard Weber (General Counsel, NY-DFS) noting an advisory council role at the Las Vegas Museum of Organized Crime and Law Enforcement. No address was provided:
<https://drive.google.com/file/d/1CCih9CQiwXVILSv86B54kEcipVRnx1YQ/view?usp=drivesdk> We would like to receive any and all records NY-DFS and Human Rights hold for this appointment approval for a state associated representative.
Warm regards, Gunnar Gunnar Larson xNY.io - Bank.org 646-454-9107.”

Public Officers Law (“POL”) § 89(3) 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. See Matter of Farbman & Sons v New York City Health & Hosps. Corp., 62 NY2d 75 (1984); Matter of Wright v Hippolyte, 2014 N.Y. Misc. LEXIS 1247, 2014 NY Slip Op 30705(U) (Sup. Ct. N.Y. County March 20, 2014). The Committee on Open Government, which is responsible for, inter alia, issuing advisory opinions regarding FOIL, has opined that “[w]hether a request reasonably describes the records sought . . . may be dependent upon the terms of a request, as well as the nature of an agency’s filing or record-keeping system.” Committee on Open Government (“Committee”) Opinion No. FOIL-AO-16073 (July 17, 2006). In the Committee’s Opinion No. FOIL-AO-11960

(February 17, 2000), it opined that a FOIL request that sought records “‘tending to support’ a particular statement, or ‘utilized’, ‘used’ or ‘relating to’ various activities of the Department of Environmental Conservation” was not a reasonably described request for records under Public Officers Law Article 6. The Committee stated that a response to such a request “would involve making 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 held 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 [agency] to locate and identify the records in the manner envisioned by that statute.”

Your FOIL request fails to meet the “reasonably describe” requirement in POL § 89(3) because it includes vague and imprecise phrases such as “any and all records,” and does not clearly describe the records that you are seeking. Such vague phrases are imprecise terms that require Department staff to make subjective judgments as to whether a document is responsive to your FOIL request. When such subjective judgments are required of staff, the FOIL request may be denied for failure to meet the reasonably describe requirement in POL § 89(3). Additionally, the Department does not have an indexing system that allows it to search all of its records by terms that may appear in such records. Accordingly, the Department is denying your FOIL request on the basis that the request is not reasonably described.

Even if your FOIL request was reasonably described, to the extent that your request can be interpreted as seeking internal Department records, your request would be denied pursuant to POL § 87(2)(g) (the “inter/intra-agency exemption”), which exempts from disclosure 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[.]” Such internal records contain opinions, recommendations, evaluations, and other subjective commentary by government employees, and do not contain information that fall within any of the four exceptions to non-disclosure under POL § 87(2)(g).

Additionally, those records are simultaneously exempt from disclosure pursuant to POL § 87(2)(b) (the “personal privacy exemption”), which exempts records, or portions thereof, that “if disclosed would constitute an unwarranted invasion of personal privacy under the provisions of subdivision two of section eighty-nine of the [Public Officers Law].” Determining whether disclosure would constitute an unwarranted invasion of personal privacy requires balancing the competing interests of public access and individual privacy. See Dobranski v. Houper, 154 A.D.2d 736 (3d Dep’t 1989).

Here, the Department is withholding the personal information mentioned above because the interest of keeping that information private outweighs the competing interest of providing public access to that information. Such information about private citizens is of a personal nature and disclosure of the information would not serve any governmental purpose consistent with the intent of FOIL. See Goyer v. New York State Dep’t of Env’tl. Conservation, 12 Misc.3d 261 (Sup. Ct. N.Y. County 2005). Consequently, the Department is not disclosing that information pursuant to Public Officers Law § 87(2)(b).

In accordance with POL § 89(4), you may appeal this determination within 30 days by sending an email to FOIL.Appeals@dfs.ny.gov.

Very truly yours,

Pascale Jean-Baptiste

Pascale Jean-Baptiste
FOIL Officer