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June 10, 2013

E-Mail

TO: Robert LoScalzo

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 Mr. LoScalzo:

This is in response to your request for an advisory opinion regarding application of the Freedom of Information Law to records requested from a New York City agency. Specifically, you seek advice concerning an agency's authority to deny access to records that are sent between a City agency and a private cemetery, those sent between a City agency and contractors hired to perform certain services, and records that may be protected pursuant to an attorney-client privilege.

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.

From our perspective, communications in writing, irrespective of their form, between City officers or employees and private entities, such as a private cemetery or a vendor, would not constitute either "inter-agency" or "intra-agency materials" that may be withheld under §87(2)(g). 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."

In short, an agency is an entity of state or local government in New York. Communications with those outside of government agencies would be neither inter-agency nor intra-agency materials. Because that is so, the exception pertaining to those materials, §87(2)(g), could not properly be asserted as a basis for denying access to communications between City officers or employees and a private entity or its employees. As stated by the Court of Appeals, that exception pertains to an "internal government exchange" reflective of "opinions, ideas, or advice exchanged as part of the consultative or deliberative process of government decision making" (Gould v. New York City Police Department, 89 NY2d 267, 277 [1986]).

In good faith, we note that the intra-agency and inter-agency provision has been extended to records prepared by a consultant retained by an agency. In Xerox Corporation v Town of Webster, the Court of Appeals held as follows:

> "Opinions and recommendations prepared by agency personnel may be exempt from disclosure under FOIL as 'predecisional materials, prepared to assist an agency decision maker***in arriving at his decision' (McAulay v. Board of Educ., 61 AD2d 1048, aff'd 48 NY2d 659). Such material is exempt 'to protect the deliberative process of government by ensuring that persons in an advisory role would be able to express their opinions freely to agency decision makers (Matter of Sea Crest Const. Corp. v. Stubing, 82 AD2d 546, 549).
> "In connection with their deliberative process, agencies may at times require opinions and recommendations from outside consultants. It would make little sense to protect the deliberative process when such reports are prepared by agency employees yet deny this protection when reports are prepared for the same purpose by outside consultants retained by agencies. Accordingly, we hold that records may be considered 'intra-agency material' even though prepared by an outside consultant at the behest of an agency as part of the agency's deliberative process (see, Matter of Sea Crest Constr. Corp. v. Stubing, 82 AD2d 546, 549, supra; Matter of 124 Ferry St. Realty Corp. v. Hennessy, 82 AD2d 981, 983)" (Xerox Corporation v. Town of Webster, 65 NY2d 131, 132-133 [1985]).

Based upon the foregoing, records prepared by a consultant for an agency may be withheld or must be disclosed based upon the same standards as in cases in which records are prepared by the staff of an agency.

When there is no consultant relationship, when an entity is hired to perform a service, and not in a consultative capacity, the exception does not apply. See Town of Waterford v NYS Dept. of Environmental Conservation (18 NY3d 65, 944 NYS2d 429 [2012]).

Next, with respect to the attorney-client privilege, we direct your attention to §87(2)(a), which pertains to records that "are specifically exempted from disclosure by state or federal statute." One such statute, §4503 of the Civil Practice Law and Rules (CPLR), serves as a codification of the attorney-client privilege. From our perspective, when a municipal official or body seeks legal advice from its attorney and the attorney renders legal advice, communications of that nature would fall within the coverage of the attorney- client privilege and would, therefore, be exempt from disclosure under §87(2)(a) of the Freedom of Information Law.

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 AD2d 307, 399 NYS2d 539, 540 (1977)].

In our view, communications between a government attorney and a third party that is not the client, would not be subject to the attorney-client privilege and would ordinarily be accessible. Any disclosure made to or received from a person other than a client would constitute a waiver of the authority to rely upon those exceptions to rights of access. See Morgan v. NYS Dept. of Environmental Conservation, 9 AD3d 586, 779 NYS2d 643 (3d Dept 2004). A communication, for example, between a City attorney and a private citizen, or a representative of a private entity, such as a private cemetery or a vendor, could not in our opinion be withheld under the attorney-client privilege.

We hope that this is helpful.

CSJ:mm