



Services News Government



**State of New York
Department of State
Committee on Open Government**

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FOIL-AO-13697

November 12, 2002

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

Dear

I have received your letter in which you asked how your facility can be "properly required to disclose videotapes through FOIL." You wrote that the tapes are recycled after fourteen days and "facility staff are automatically denying all FOIL requests for video-recordings because by the time an appeal is responded to it'll be past 14 days of the date of the video-recording."

In this regard, I point out that the Committee on Open Government is authorized to provide advice concerning the Freedom of Information Law. The Committee is not empowered to enforce that statute or to compel an agency to grant or deny access to records. However, I offer the following comments.

The Freedom of Information Law provides direction concerning the time and manner in which agencies must respond to requests. Specifically, 89(3) of the Freedom of Information Law states in part that:

"Each entity subject to the provisions of this article, within five business days of the receipt of a written request for a record reasonably described, shall make such record available to the person requesting it, deny such request in writing or furnish a written acknowledgement of the receipt of such request and a statement of the approximate date when such request will be granted or denied..."

If neither a response to a request nor an acknowledgement of the receipt of a request is given within five business days, or if an agency delays responding for an unreasonable time after it acknowledges that a request has been received, a request may, in my opinion, be considered to have been constructively denied [see *DeCorse v. City of Buffalo*, 239 AD2d 949, 950 (1997)]. In such a circumstance, I believe that the denial may be appealed in accordance with 89(4)(a) of the Freedom of Information Law. That provision states in relevant part that:

"...any person denied access to a record may within thirty days appeal in writing such denial to the head, chief executive, or governing body, who shall within ten business days of the receipt of such appeal fully explain in writing to the person requesting the record the reasons for further denial, or provide access to the record sought."

In addition, it has been held that when an appeal is made but a determination is not rendered within ten business days of the receipt of the appeal as required under 89(4)(a) of the Freedom of Information Law, the appellant has exhausted his or her administrative remedies and may initiate a challenge to a constructive denial of access under Article 78 of the Civil Practice Law and Rules [*Floyd v. McGuire*, 87 AD2d 388, appeal dismissed 57 NY2d 774 (1982)].

I do not believe that an agency can destroy or dispose of a record that has been requested pursuant to the Freedom of Information Law. The record must, in my view, be preserved during the pendency of any request or appeal.

With respect to the videotapes, 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 (i) of the Law.

From my perspective, two of the grounds for denial are pertinent to an analysis of rights of access. The extent to which they may properly be asserted is, in my opinion, dependent on the nature of the depictions on the videotapes.

Relevant are 87(2)(b), which authorizes an agency to withhold records when disclosure would constitute "an unwarranted invasion of personal privacy", and 87(2)(f), which enables an agency to withhold records to the extent that disclosure "would endanger the life or safety of any person."

In a case involving a request for videotapes made under the Freedom of Information Law, it was unanimously found by the Appellate Division that:

"...an inmate in a State correctional facility has no legitimate expectation of privacy from any and all public portrayal of his person in the facility...As Supreme Court noted, inmates are well aware that their movements are monitored by video recording in the institution.

Moreover, respondents' regulations require disclosure to news media of an inmate's 'name *** city of previous residence, physical description, commitment information, present facility in which housed, departmental actions regarding confinement and release' (7 NYCRR 5.21 [a]). Visual depiction, alone, of an inmate's person in a correctional facility hardly adds to such disclosure" [Buffalo Broadcasting Company, Inc. v. NYS Department of Correctional Services, 155 AD 2d 106, 111-112 (1990)].

Nevertheless, the Court stated that "portions of the tapes showing inmates in states of undress, engaged in acts of personal hygiene or being subjected to strip frisks" could be withheld as an unwarranted invasion of personal privacy (id., 112), and that "[t]here may be additional portrayals on the tapes of inmates in situations which would be otherwise unduly degrading or humiliating, disclosure of which 'would result in *** personal hardship to the subject party' (Public Officers Law 89 [2] [b] [iv])" (id.). The court also found that some aspects of videotapes might be withheld on the ground that disclosure would endanger the lives or safety of inmates or correctional staff under 87(2)(f).

Further, in a case involving videotapes of events occurring at a correctional facility, in the initial series of decisions relating to a request for videotapes of uprisings at a correctional facility, it was determined that a blanket denial of access was inconsistent with law [Buffalo Broadcasting Co. v. NYS Department of Correctional Services, 155 AD2d 106]. Following the agency's review of the videotapes and the making of a series of redactions, a second Appellate Division decision affirmed the lower court's determination to disclose various portions of the tapes that depicted scenes that could have been seen by the general inmate population. However, other portions, such as those showing "strip frisks" and the "security system switchboard", were found to have been properly withheld on the grounds, respectively, that disclosure would constitute an unwarranted invasion of personal privacy and endanger life and safety [see 174 AD2d 212 (1992)].

In sum, based on the language of the Freedom of Information Law and its judicial interpretation, I believe that the Department is required to review each videotape falling within the scope of your request to attempt to ascertain the extent to which their contents fall within the grounds for denial appearing in the statute.

I hope that I have been of assistance.

Sincerely,

David Treacy
Assistant Director

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