

EXHIBIT 5



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

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February 5, 2016

FOIL-AO-19372

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, except as otherwise indicated.

Dear :

We are in receipt of a copy of a Freedom of Information Law (FOIL) appeal determination rendered by your agency in response to an October 28, 2015 FOIL request submitted by Dina Sforza of Newsday. In our opinion, your agency's denial of Ms. Sforza's appeal as untimely is inconsistent with the law.

By way of background, FOIL provides direction concerning the time and manner in which agencies must respond to requests. Specifically, §89(3)(a) 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, which shall be reasonable under the circumstances of the request, when such request will be granted or denied.... If an agency determines to grant a request in whole or in part, and if circumstances prevent disclosure to the person requesting the record or records within twenty business days from the date of the acknowledgement of the receipt of the request, the agency shall state, in writing, both the reason for the inability to grant the request within twenty business days and a date certain within a reasonable period, depending on the circumstances, when the request will be granted in whole or in part."

Accordingly, it has long been advised that when an agency is unable to deny or provide access to records within five business days, it must provide a written response indicating either that it will respond within the next twenty business days, or that it is unable to respond until a certain date, providing both the date and the reasons for requiring additional time. Although we recognize that there are occasions when an agency will require an extension of time beyond that which it initially predicted, there is no provision in the statute for repeated extensions. The agency must, however, indicate the date by which it will respond, based on what is reasonable in consideration of attendant circumstances.

When an agency fails to comply with the time limits for response as described in §89(3)(a), or denies access to records in writing, FOIL permits the applicant to file an administrative appeal, and, if the agency denies the appeal, that person may seek judicial review pursuant to Article 78 of the Civil Practice Law and Rules. We note that the Legislature chose to distinguish the two types of denials in §89(4)(a), as follows:

"...any person denied access to a record may within thirty days appeal in writing such denial to the head, chief executive or governing body of the entity, or the person therefor designated by such 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"

and further,

"Failure by an agency to conform to the provisions of subdivision three of this section shall constitute a denial."

Because it distinguishes between the two types of denials, one in writing and the other due to a failure to respond in a timely manner, it is our opinion that the Legislature intended that there may be two types of appeals: one, from a denial of access in writing based on an exception to rights of access, and the other, from a constructive denial of access as a result of the agency's failure to comply with the time limits for response required by §89(3)(a).

It is my understanding, based on the language of agency's appeal determination, that on October 28, 2015 Ms. Sforza submitted FOIL requests to Suffolk County for records pertaining to two specific Suffolk County employees. On November 2, 2015, the records access officer for the Suffolk County Police Department acknowledged one of the requests and advised that there "may be a delay of approximately (30) days associated with the satisfaction of your request." Thirty days from November 2, 2015 passed and the agency failed to grant or deny access to the requested records and failed to notify Ms. Sforza that it required an extension of time in order to respond. On January 22, 2016, Ms. Sforza appealed the agency's constructive denial. In your agency's February 3, 2016 appeal determination, you assert that Ms. Sforza's appeal was untimely and thus denied because she did not appeal within 30 days of the date your agency indicated it would respond in its November 2, 2015 acknowledgement letter. As mentioned above, it is our opinion that this denial of the appeal as untimely is inconsistent with the law.

In situations where an agency constructively denies a FOIL request by failing to respond within the time limits set forth in §89(3)(a) of FOIL, it follows that the agency also failed to inform the person denied access to records of their right to appeal. The state's highest court has held that a failure to inform a person denied access to records of the right to appeal enables that person to seek judicial review of a denial. Citing the Committee's regulations and FOIL, the Court of Appeals in Barrett v. Morgenthau, 74 NY 2d 907 (1989) held that:

"[i]nasmuch as the District Attorney failed to advise petitioner of the availability of an administrative appeal in the office (see, 21 NYCRR 1401.7(b)) and failed to demonstrate in the proceeding that the procedures for such an appeal had, in fact, even been established (see, Public Officers Law §87(1)(b)), he cannot be heard to complain that petitioner failed to exhaust his administrative remedies." (74 NY 2d 907, 909 (1989))

In the same vein, when an agency fails to grant or deny access to requested records within FOIL's statutory time limits and as such, failed to advise requestor of the availability of an administrative appeal, it "cannot be heard to complain" that requestor failed to submit an appeal of the constructive denial within 30 days. In our view, Ms. Sforza should not be penalized for her patience in affording the agency additional time to respond to her request.

It is my understanding that the agency, as of the date of the appeal determination, still had not rendered a determination on rights of access to the requested records. It is contrary to the intent of FOIL, as set forth in the legislative declaration, ("... it is incumbent upon the state and its localities to extend public accountability wherever and whenever feasible.") to permit an agency to disregard the time limits set forth in §89(3)(a) of FOIL and to then deny an applicant's appeal of its constructive denial as untimely. Such interpretation could lead to the untenable result of incentivizing agency delays in responding to FOIL requests.

This advisory opinion is offered in an effort to encourage the County to reconsider the matter and respond to Ms. Sforza's original FOIL requests as expeditiously as possible.

Sincerely,

Kristin O'Neill
Assistant Director

cc: Newsday

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