October 17, 2018

Ms. Patti Singer
Health Reporter
Democrat and Chronicle
245 East Main Street
Rochester NY 14604

By email only: psinger@democratandchronicle.com

FOIL Appeal #18-05-275

Dear Ms. Singer:

This regards the administrative appeal to the New York State Department of Health ("DOH") as to your above-captioned request for certain records pursuant to the Freedom of Information Law ("FOIL"), Public Officers Law ("POL") Article 6.

On May 14, 2018, you requested records regarding "information about the Performance Monitoring Program (PMP) for nursing homes referenced in Recommendation 4 of Comptroller Thomas D. DiNapoli's audit, Nursing Home Surveillance (2015-S-26), and communicated to Dr. Zucker in a letter dated March 8, 2018." Specifically, you requested the following:

1. The date in which the PMP for skilled nursing went into effect.
2. A copy of the Dear Administrator letter or all the correspondence that was sent to nursing homes announcing the PMP.
3. The guidelines, regulations and other rules under which the PMP operates.
4. The names and locations of nursing homes that are or have been under the PMP since its inception through May 14, 2018.
5. The date that each nursing home was placed under the PMP.
6. The date that each nursing home completed the PMP.
7. The reasons each nursing home was placed on the PMP.
8. What each nursing home had to do to successfully complete its PMP.
9. Other discipline or actions taken against each nursing home while on PMP.
10. The amount of fines levied against each nursing home that was on PMP.
11. When the nursing home paid the fine.

The RAO responded to you on September 25, 2018 and denied certain records pursuant to POL § 87(2)(g) as "inter-agency or intra-agency materials." You appealed on October 2, 2018, with the basis for each element of your appeal discussed below.

The RAO conducted a diligent search and located no records responsive to part 2 of your eleven-part request. Your appeal states that, nevertheless, you should have received records as to the remaining ten parts. I will address part 3 just below and then follow by addressing parts 1 and 4-11.
Certain documents were withheld under POL §87(2)(g), which exempts from disclosure records or portions thereof 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.

The purpose of the exemption in POL § 87(2)(g) is to “permit people within an agency to exchange opinions, advice and criticism freely and frankly, without the chilling prospect of public disclosure.” Matter of The New York Times Co. v City of New York Fire Dept., 4 NY3d 477, 488 (N.Y. 2005). In Matter of The New York Times Co., the Court recognized that POL § 87(2)(g) permits an agency to withhold from disclosure more than “formal, lengthy or profound policy discussions.” Id. The exemption extends to all “opinions, ideas, or advice exchanged as part of the consultative or deliberative process of government decision making.” Matter of Gould v New York City Police Dept., 69 NY2d 267, 277 (N.Y. 1996). The inter-agency/intra-agency exemption includes entire records that are “not factual in nature.” Matter of Tuck-It-Away Assoc. v Empire State Dev. Corp., 54 AD3d 154, 166 (N.Y. App. Div. 2008); see also, Matter of Visiting Nurse Serv. of NY Home Care v New York State Dept. of Health, 2012 NY Slip Op 32975(U) (N.Y. Sup. Ct. Nov. 28, 2012). The exception in POL § 87(2)(g) also applies to documents and records prepared by related entities or DOH contractors and in DOH possession. See, Matter of the Town of Waterford v NYS Department of Environmental Conservation, 18 NY3d 652, 657 (2012).

I have reviewed the responsive records that were withheld. They are all inter-agency. They do not contain statistical or factual tabulations or data, instructions to staff that affect the public, final agency policy or determinations, or external audits. Accordingly, they all were properly withheld under POL §87(2)(g).

As to parts 1 and 4-11, these are all questions not requests for records. The RAO properly stated that, “the Committee on Open Government has emphasized that FOIL is meant to be a tool that enables the public to seek existing records. It is not a vehicle for submitting questions to the Department. Public Officers Law § 89(3). Questions and requests for general information, as opposed to specific sets of records, should be directed to program staff or to the public relations office.” As best explained by the Committee on Open Government, “FOIL pertains to existing records and states, in general, that an agency need not create a record in response to a request for information; it may choose to do so, but is not required to do so. Similarly, nothing in FOIL requires an agency to supply information in response to questions.” (FOI-AO-18795 February 1, 2012).

I will use brackets to show that parts 1 and 4-11 are all actually questions:

1. [What was] The date in which the PMP for skilled nursing went into effect.[?]
4. [What are] The names and locations of nursing homes that are or have been under the PMP since its inception through May 14, 2018.[?]
5.[What was] The date that that each nursing home was placed under the PMP.[?]
6. [What was] The date that each nursing home completed the PMP.[?]
7. [What were] The reasons each nursing home was placed on the PMP.[?]
8. What [was it that] each nursing home had to do to successfully complete its PMP.[?]
9. [What] Other discipline or actions [were] taken against each nursing home while on PMP.[?]
10. [What was] The amount of fines levied against each nursing home that was on PMP.[?]
11. When [did] the nursing home paid [sic pay] the fine.[?]

For the reasons stated above, your appeal is denied in its entirety. Judicial review of this decision may be obtained pursuant to CPLR Article 78.

Sincerely,

[Signature]

David J. Spellman
DOH Records Access Appeals Officer

cc: Robert J. Freeman, Executive Director, NYS Committee on Open Government