

Yvonne E. Hennessey
Partner

October 11, 2016

VIA ELECTRONIC MAIL

Hon. Kathleen H. Burgess
Secretary to the Commission
New York State Public Service Commission
3 Empire State Plaza
Albany, NY 12223-1350
secretary@dps.ny.gov

Re: Appeal of Decision Denying Freedom of Information Law (“FOIL”) Request for Records Regarding the Zero-Emission Credit Program

Dear Secretary Burgess:

Pursuant to Section 89(4)(a) of the Public Officers Law (“POL”) and 16 NYCRR 6-1.1¹, we hereby appeal the decision of the Records Access Officer for the New York State Department of Public Service (“Department”) denying our request for records regarding the zero-emission credit program (the “Denial Letter”). The Denial Letter, which is attached hereto, summarily denies access to information contained on agency-issued and personal electronic devices that is potentially relevant to the request, claiming that the Department lacks the “ability” or “authority” to retrieve such information. This result is contrary to FOIL because it would allow the Department (or any governmental body) to circumvent disclosure under FOIL simply by conducting official agency business on tablets, iPads, cellular phones, or other devices and then declaring that records on those devices are not retrievable with “reasonable effort.”

Records Requested

On August 24, 2016, a FOIL letter request was submitted to the Department requesting “[a]ll communications and correspondence” since January 1, 2016 through the date of the request between (1) the New York State Public Service Commission (“PSC”), including the Chair, the Commissioners, and the Department, and (2) the Roffe Group, P.C. regarding seven specific categories of information related to, *inter alia*, the zero-emission credit program and its

¹ 16 NYCRR 6-1.1(d) states that “[a]ppeals pursuant to the procedure set forth in 21 NYCRR section 1401.7 may be submitted in electronic form or by mail to the secretary.” 21 NYCRR 1401.7(e) provides that the written appeal must identify the date and location of requests for records, provide a description of the records that were denied to the extent possible, and include the name and return address of the appellant.

application to certain nuclear power facilities in New York, as well as the sale of the James A. FitzPatrick Nuclear Power Plant to Exelon Generation Company, LLC. A copy of the full request is attached hereto. With respect to the Department, the letter request clarified that it applied to communications from or to staff involved in the proceedings 15-E-0302 and 14-E-0270, as well as six specific individuals.

In particular, the letter identified the scope of the request as including e-mail and text communications “containing notes and/or summaries sent or received on all official and/or personal accounts, computers, tablets, iPads, and/or cellular phones.”

Records Denied

On September 12, 2016, the Department’s Records Access Officer issued the Denial Letter stating that no records could be found responsive to the request. The Denial Letter indicates that although the Department undertook a limited e-mail search, it did not include a search of: (1) agency-issued tablets, iPads, and/or cellular phones; or (2) personal accounts, computers, tablets, iPads, and/or cellular phones. According to the Denial Letter, the Department lacks the “ability” to retrieve information on agency-issued devices with “reasonable effort,” or the “authority” to access personal devices.

Impropriety of Denial

The Department’s denial inappropriately limits the scope of records subject to FOIL by summarily excluding those contained on agency-issued and personal electronic devices, even when those devices are used for official agency business and may contain information relevant to the request.

FOIL Section 86(4) broadly defines “record” to mean “any information kept, held, filed, produced or reproduced by, with or for an agency . . . in any physical form whatsoever.” There are no exceptions from disclosure merely because records are located on agency-issued or personal electronic devices. POL §87(2) (identifying exceptions to disclosure). The Department cannot now create its own categorical exclusion under FOIL for information simply because it is contained on such devices.

Although it is accurate that a request for records must be “reasonably described” under FOIL Section 89(3), that does not mean an agency can deny a request asking for information because it is kept on agency-issued or personal electronic devices, particular here, where the subject matter, time period, and relevant individuals are clearly and narrowly defined. In the Denial Letter, the Department refers to several Advisory Opinions (“AOs”) that are inapt to the particular request here, but presumably are cited for the position that whether a record is reasonably described depends not only on the nature of the request, but also the nature of an agency’s filing, indexing or records retrieval system and whether the record can be obtained through “reasonable effort.”

Here, however, it does not appear that the Department exerted any effort at all. Rather, records kept on certain electronic devices were categorically excluded from any search by claiming a lack of ability or authority to access those devices.² An agency cannot deny a request on the basis that it requires the agency to transfer stored electronic records to a different medium, or because the request is too burdensome if it could be satisfied by engaging an outside service. *See Matter of County of Suffolk v. Long Is. Power Auth.*, 989 N.Y.S.2d 888 (2d Dep't 2014) (citing POL § 89(3)(a)); *Matter of New York Comm. for Occupational Safety & Health v. Bloomberg*, 892 N.Y.S.2d 377 (1st Dep't 2010) (requiring a hearing regarding what would be required to retrieve requested documents from electronic databases). The denial not only creates an exclusion that does not exist in the statute, it impermissibly turns FOIL on its head by allowing agency officials and employees to use agency-issued or personal electronic devices to avoid public disclosure of agency business, thereby fashioning a pre-fabricated public record casting the agency's decisions in the most favorable light to the public. *See* POL § 84 ("The people's right to know the process of governmental decision-making and to review the documents and statistics leading to determinations is basic to our society. Access to such information should not be thwarted by shrouding it with the cloak of secrecy or confidentiality.").

The decision is also wrong on the basis of previously rendered AOs by the Committee on Open Government ("Committee"). In one instance where a request was made for text messages received on a Village-owned device, the Committee confirmed that they were subject to FOIL. AO19429. The AO states: "[T]his office has long advised that electronic communications, such as e-mails or text messages that involve Village business, *whether stored on a government or personal device*, constitute 'records' that fall within the coverage of FOIL." *Id.* (emphasis added). Similarly, an AO involving the availability of text messages from town officials sent during board meetings stated that the text messages related to town business were subject to FOIL regardless of whether they were sent during a public meeting or not. AO18923.

The Department's denial of the request effectively allows government employees receiving and transmitting information on matters of public policy to privately hold and prevent such information from being made available to the public in violation of both FOIL and the weight of AOs rendered by the Committee. First, such records would not be in the possession of an individual but for their status as a government official or employee. Second, if information

² The Department cryptically references its lack of "authority" to search personal electronic devices. To the extent it is referring to personal privacy concerns under Section 89(2)(b) of the POL, the Department bears the burden of supporting the denial of access on that basis. AO17992. Additionally, the request here does not encompass the types of information associated with personal privacy (e.g. medical records, credit history). A request for agency records on an individual's phone or other electronic device is not an unwarranted invasion of personal privacy. AO17992; AO8740. Indeed "public officers and employees enjoy a lesser degree of privacy than others [because] those individuals are required to be more accountable than others." AO17992; AO16407. This is particularly true where, upon information and belief, official public business was being conducted on personal electronic devices. *Accord* Public Officials, Secret Emails, Brendan J. Lyons, TIMES UNION, Oct. 2, 2016 (available at <http://www.timesunion.com/tuplus-local/article/Public-officials-secret-emails-9525996.php>) (discussing the use of personal e-mail accounts outside the reach of FOIL by New York State officials to conduct illicit activities).

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held privately was not subject to FOIL, agencies could simply conduct all of their business on private devices or label documents as "private" to prevent the application of FOIL in direct violation of the Legislature's stated intent. See POL § 84. Third, records that are kept privately are presumably unknown to others in the agency, thereby preventing the Records Access Officer from carrying out his or her duty under FOIL to make records available for public inspection. POL §87; see also AO15072 (records kept at home by Town Supervisor were subject to FOIL).

Conclusion

We respectfully request that the decision of the Department's Records Access Officer be reversed and that the Department be directed to search for and disclose documents and records on agency-issued and personal devices relevant to the request as described above and in the copy of the request attached hereto.

Very truly yours,

A handwritten signature in black ink, appearing to read "Yvonne E. Hennessey". The signature is fluid and cursive, with a large loop at the end.

Yvonne E. Hennessey

YEH:tjp
Enclosures

FOIL Request, August 24, 2016

Yvonne E. Hennessey
Partner

August 24, 2016

Donna Giliberto
Records Access Officer
NYS Department of Public Service
Three Empire State Plaza
Albany, New York 12223

Re: Freedom of Information Law (“FOIL”) Request Application for Access to Public Records Regarding the Zero-Emission Credit Program

Dear Ms. Giliberto:

Pursuant to the provisions of FOIL, Article 6 of the New York Public Officers Law, we hereby request copies of the following records:

All communications and correspondence, including but not limited to notes of meetings, whether in writing or electronic means such as email and/or text messages, from the period of January 1, 2016 to date as between (1) the New York State Public Service Commission (“PSC”), including but not limited to the Chair and/or any Commissioners, and/or the Department of Public Service, and (2) the Roffe Group, P.C., including but not limited to Andrew Roffe, concerning the following:

1. Exelon Generation Company, LLC and/or Constellation Energy Group (collectively, “Exelon”), including any other Exelon corporate entity or subsidiary including but not limited to Ginna Nuclear Power Plant, LLC and Nine Mile Nuclear Station, LLC.
2. The Zero-Emission Credit (“ZEC”) program established by the PSC's August 1, 2016 Clean Energy Standard Order (“Order”), including the development of the eligibility criteria for ZECs.
3. ZECs for the James A. FitzPatrick Nuclear Power Plant (“FitzPatrick”), R.E. Ginna Nuclear Power Plant and/or Nine Mile Point Nuclear Station.
4. ZECs for Exelon.
5. Any grants, subsidies and/or other financial incentives for nuclear facilities in upstate New York, whether pursued or not.

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yhennessey@barclaydamon.com Direct: 518.429.4293 Fax: 518.427.3472
Also Admitted In: Massachusetts and Pennsylvania

6. The sale of the FitzPatrick to Exelon, including but not limited to the need for financial or other assistance to make Exelon's purchase economical.
7. The proposed transfer of funds from the New York Power Authority ("NYPA") and/or a NYPA trust fund to Exelon for the eventual decommissioning of FitzPatrick.

With respect to email and text communications, this request is intended to cover notes and/or summaries sent or received on all official and/or personal accounts, computers, tablets, iPads, and/or cellular telephones.

Regarding the request as it relates to the Department of Public Service, this request is intended to cover staff in the following proceedings, 15-E-0302 and 14-E-0270, as well as Raj Addepalli, Paul Agresta, Thomas Congdon, James Denn, Christina Palmero and Scott Weiner.

In addition, please note that if the subject matter in any of these documents or records is responsive to this request, but other subject matter in the same document is subject to any legal privilege, the document or record should nevertheless be provided in redacted form, with only such privileged information subject to the redaction.

If any documents and/or records are withheld from production pursuant to this request under a claim of privilege and/or business confidentiality or trade secret, please provide a list of such documents and/or records along with clear descriptions of their contents.

I thank you in advance for your cooperation in this matter and look forward to hearing from you. If you have any questions, please feel free to contact me.

Very truly yours,

A handwritten signature in black ink, appearing to read "Yvonne E. Hennessey". The signature is fluid and cursive, with a large, sweeping flourish at the end.

Yvonne E. Hennessey

YEH/srm

Denial Letter, September 12, 2016



**Department of
Public Service**

Public Service Commission

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Chair

Patricia L. Acampora

Gregg C. Sayre

Diane X. Burman

Commissioners

Paul Agresta

Acting General Counsel

Kathleen H. Burgess

Secretary

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www.dps.ny.gov

September 12, 2016

Via E-Mail

Yvonne Hennessey

Barclay Damon

80 State Street

Albany, NY 12207

yhennessey@barclaydamon.com

RE: Request for Records – All communications and correspondence, including but not limited to notes of meetings, whether in writing or electronic means such as email and/or text messages, from the period of January 1, 2016 to date as between (1) the New York State Public Service Commission (“PSC”), including but not limited to the Chair and/or any Commissioners, and/or the Department of Public Service, and (2) the Roffe Group, P.C., including but not limited to Andrew Roffe (with seven categories of documents). Request 2/3.

Dear Ms. Hennessey:

This is our final response to your request received August 24, 2016 asking for the record(s) described above. I certify, pursuant to Public Officers Law §89(3), that to the extent you have reasonably described the records you seek, no record(s) responsive to your request could be found after diligent search.

Please be advised that while email searches were undertaken and yielded no responsive documents, we do not have the ability to extract, retrieve, or locate with reasonable effort records of official accounts on agency-issued tablets, iPads, and/or cellular phones. Such an effort is above and beyond that which is contemplated by the Public Officers Law and amounts to “a search for a needle in a haystack.”¹ Further it is not within our authority to search personal accounts, computers, tablets, iPads, and/or cellular phones.

To the extent you believe this response denies you access to any records, you may seek a review of this decision pursuant to Public Officers Law §89(4)(a) by filing a written appeal within 30 days of the date of this letter with Kathleen H. Burgess, Secretary to the Commission, at the above address.

¹ See FOIL-AO-10468; 10727; 15048; 15751; 15771; 16340; 17989; 18045; and 18748.

Sincerely,

Donna Giliberto
Assistant Counsel
Records Access Officer