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April 25, 2011

Mr. Douglas DiCeglio
Urac Corp.
156 Scranton Avenue
Lynbrook, New York 11563

Re: Case 03-G-0743-In the Matter of the Rules and Regulations of the Public Service Commission, Contained in 16NYCRR in Relation to Complaint Procedures -- Cross Appeals by the Ciampa Organization, et. al., and by Consolidated Edison Company of New York, Inc., of the Informal Decision Rendered Partially in Favor of the Ciampa Organization, et. al., filed in C 26358.

Dear Mr. DiCeglio:

Attached is your appeal determination in the above referenced case.

Sincerely,

Jaclyn A. Brillling
Secretary

Enc.

STATE OF NEW YORK
PUBLIC SERVICE COMMISSION

CASE 03-G-0743 - Ciampa et al. v. Consolidated Edison Company of New York, Inc., Request for Copy of Inter-Office Memorandum dated March 21, 2011 and Inter-Office Memorandum dated November 1, 2010

DETERMINATION OF APPEAL OF FOIL DETERMINATION

(Issued April 25, 2011)

This is a Determination of Appeal of a determination of the Records Access Officer (RAO), whereby the appellant alleges denial of access to records under the Freedom of Information Law (FOIL), Article 6 of the Public Officers Law (POL).¹ Mr. Douglas DiCeglio (hereinafter referred to as “the appellant”) appeals² the denial of access to certain information contained in the above-entitled documents, which was redacted by the RAO, and provided to the appellant via electronic mail on April 13, 2011.

BACKGROUND AND INTRODUCTION

On April 7, 2011, the appellant sent an electronic mail request to the RAO for a copy of two separate intra-office³ memoranda (IOM), dated March 21, 2011 and November 1, 2010, respectively. On April 13, 2011, the RAO provided the appellant with redacted copies of the requested records in PDF format, and explained that text was “redacted pursuant to POL §87(2)(g) inasmuch as such contents are FOIL exempt, consisting of intra-agency materials that are not (i) statistical or factual tabulations or data; (ii) instructions to staff that affect the public; or (iii) final agency policy or determinations. The text concerning cases other than 03-G-0743 in the November 1, 2010 record was redacted as not responsive to your request.”

¹ Pursuant to 16 NYCRR §6-1.1(d), appeals pursuant to 21 NYCRR §1401.7 shall be heard by the secretary to the Public Service Commission.

² In accordance with 21 NYCRR §1401.7. The appeal was filed electronically with the Secretary on April 14, 2011.

³ The Department uses the terms “intra-office” and “inter-office” interchangeably when referring to memoranda (IOM) prepared by staff and provided to other staff or the Commission.

The letter included a statement by the RAO regarding the requester's right to appeal the determination to the Secretary pursuant to 16 NYCRR §6-1.1(d), as well as a certification pursuant to POL §89(3) that no other records responsive to the request could be found after diligent search of records maintained by the Department.

Mr. DiCeglio filed an appeal of the RAO's determination by electronic mail on April 14, 2011.

ARGUMENTS OF THE PARTIES

The appellant offers no legal arguments and states, to the extent that "the information being withheld contains the recommendations of the Office of Consumer Services to the Public Service Commission, such information is not considered exempt from disclosure because it instructs the Commission on a case that affects the public." To this effect, the appellant states that recommended decisions of ALJ's are routinely available to the public.

The appellant states that the Department of Public Service and the Public Service Commission are two separate entities and questions whether the records in issue can properly be labeled "Inter-Office Memorandum".

The RAO explained the redactions in the two IOMs as authorized by POL §87(2)(g), which allows agencies to deny access to records or portions thereof that are intra-agency materials which are not (i) statistical or factual tabulations or data; (ii) instructions to staff that affect the public; or (iii) final agency policy or determinations. The RAO also noted that text concerning cases other than 03-G-0743 in the November 1, 2010 record was redacted as being unresponsive to the request.

DISCUSSION

Here, the appellant sought two IOMs concerning a particular case before the Commission. The RAO responded within the statutory timeframe with a response which included the two requested documents with certain information redacted therefrom and an explanation, pursuant to the applicable statute.

Public Officers Law §87(2)(g) provides that an agency may deny access to inter- or intra-agency records that are not “statistical or factual tabulations or data.” Factual data is identified as objective information, rather than “opinions, ideas, or advice exchanged as part of the consultative or deliberative process of government decision making”.⁴ The Freedom of Information Law has been interpreted to allow for the exception from public disclosure of deliberative documents only to the extent they do not include statistical or factual tabulations or data. Factual data simply means objective information, in contrast to opinions, ideas, or advice exchanged as part of the consultative or deliberative process of government decision making.

Any statistical or factual tabulations or data must be released to the public.⁵ Opinions and recommendations are prepared by agency personnel, and, to the extent they consist of pre-decisional materials, prepared to assist an agency decision maker in arriving at a decision, may be exempt from disclosure under FOIL.⁶ Such material is exempt from public disclosure to protect the deliberative process of government by ensuring that persons in an advisory role may express their opinions freely to agency decision makers.⁷ The point of the intra-agency exception is to permit the internal exchange of candid advice and opinions between agency employees.⁸

Although the RAO did not specifically explain to the requester that the redacted information consisted of opinions, ideas, or advice exchanged as part of the consultative or deliberative process of government decision making, the RAO is not required to do so as part of the response to the FOIL request.

The appellant’s analogy to Recommended Decisions (RD) of ALJ’s that are routinely available to the public is inapt. An ALJ’s RD to the Commission is not the same as an IOM. An RD is a document prepared by an ALJ, following a public hearing process, which contains recommendations to the Commission for evaluation. The RD allows

⁴ Matter of Gould v New York City Police Dept., 89 NY2d 267, 277 (1996); Gannett Co. v. Rochester City Sch. Dist., 179 Misc. 2d 502 (1998).

⁵ N.Y. Times Co. v. City of New York Fire Dep’t, 4 N.Y.3d 477 (2005).

⁶ McAulay v. Board of Educ., 61 AD 2d 1048 (1979).

⁷ Matter of Sea Crest Const. Corp. v. Stubing, 82 AD 2d 546, 549 (1981).

⁸ N.Y. Times Co. v. City of New York Fire Dep’t, *supra*.

Commissioners to evaluate a proceeding without having to conduct hearings themselves.⁹ Further, the RD process allows for and invites public comment following the ALJ's evaluation and prior to a decision by the Commission. Specifically, litigants are invited to submit initial and reply briefs in response to the RD, which together with all other comments, testimony, exhibits, correspondence and comments entered into the record, are summarized and presented to the Commission as part of the public case file. In sum, an RD is designed to be a public document. An IOM, as its name connotes, is designed to be a document that is shared between persons or offices within the agency or offices of an agency, except where FOIL provisions apply.

The appellant states that the Department of Public Service and the Public Service Commission are two separate entities and as such, questions whether the records in issue can properly be labeled "Inter-Office Memorandum". The appellant's assertions are incorrect. First, Public Service Law §§3 and 4 specifically state the relationship between the Department and the Commission. The Commission is an administrative body established by the Legislature to regulate utilities.¹⁰ The Department is the staff arm of the Commission.¹¹ Second, even if the Department and Commission were separate entities, as agencies of the State of New York they could properly share advice, opinion, etc. via inter-office memoranda.¹²

CONCLUSION

I have reviewed the requested documents in this case in both their redacted and unredacted forms. I find that the RAO responded properly to the FOIL request of the appellant and that the material redacted from the aforementioned records of the agency was done properly and consistently in accordance with POL §(2)(g) which provides that an agency may deny access to inter- or intra-agency records that are not "statistical or factual

⁹ The Role of Department of Public Service Staff in Utility Regulation, CLE – February 27, 2007.

¹⁰ Rochester Gas & Elect. Corp. v. Public Service Commission of the State of New York, 51 NY2d 823 (1980).

¹¹ See DPS/PSC website: www.dps.state.ny.us.

¹² Records prepared by employees of an agency and communicated within that agency or to another agency fall within scope of Pub O § 87(2)(g). Comm on Open Gov't FOIL-AO-7516.

tabulations or data,” and that the redacted material consists of opinions, ideas, or advice exchanged as part of the consultative or deliberative process of government decision making. For the reasons set forth above, the Determination of the RAO is affirmed.

(SIGNED)

JACLYN A. BRILLING
Secretary

Dated: April 25, 2011