



February 28, 2020

Via Certified Mail

Peter Stuto, Chair
Planning Board
Town of Colonie
534 New Loudon Road
Latham, NY 12110

Re: Board Failure to Comply with New York Law

Dear Mr. Stuto:

I am writing on behalf of SAVE Colonie, a group of taxpayers who contacted the Government Justice Center with concerns regarding the Board's practices.¹ Specifically, the group raised the Board's compliance with New York's Open Meetings Law and New York's legal requirements for public records disclosure.

As SAVE Colonie explained to me, the Board frequently discusses Town Designated Engineer letters and reports at its meetings. I understand it's the practice to provide such TDE letters and reports to applicants prior to meetings to obtain applicant written responses to the TDE, copied to the Town Planner, or applicant oral responses at public meetings. TDE letters and written responses may also be included in Board member meeting packets.

¹ Government Justice Center is a non-profit, pro bono public interest law firm dedicated to protecting New Yorkers from improper government action.

First, the Board fails to make the TDE correspondence available to the public in violation of the Open Meetings Law. Those records should be made available upon request prior to or at the meeting they are discussed. SAVE Colonie should not be required to make Freedom of Information Law (FOIL) requests for those records after the meeting takes place. The reference to FOIL in section 103 of the Open Meetings Law only addresses the types of records the Board should provide on request. It does not require someone to make a FOIL request for those records.

Moreover, the records SAVE Colonie seeks should be posted online prior to meetings. The Town and Board have the technology necessary to comply with section 103(2)(e) of the Open Meetings Law. The Board maintains a website and online agendas used to post project site plans and narratives prior to meetings. The same technology should be used to post TDE letters and applicant responses throughout the Board's review process.

The defect in the process is apparent right now. The Town's records access officer is informing persons requesting development project applicant documents that fallout from a ransomware attack is delaying FOIL responses made this week two months. This is inexcusable. Especially because, as I understand it, the requested records reside electronically in the Town's CityWorks platform.

Second, I understand the Board takes the position that TDE-related records shared with the applicants are exempt from disclosure under FOIL as "pre-decisional materials." I assume this means the Board is claiming the exception for "inter-agency or intra-agency materials" under FOIL § 87(2)(g). However, written communications between the Board or the TDE and persons or entities outside of government are not inter-agency or intra-agency materials.

FOIL § 86(3) defines "agency" to mean:

“...any state or municipal department, board, bureau, division, commission, committee, public authority, public corporation, council, office or other governmental entity performing a governmental or proprietary function for the state or any one or more municipalities thereof, except the judiciary or the state legislature.”

An agency is a New York state or local government entity. Communications with anyone appearing before a government agency are neither inter-agency nor intra-agency materials. As such, the Board cannot assert a FOIL § 87(2)(g) exception from disclosure for records exchanged with or received from an applicant.

As stated by the Court of Appeals, the deliberative materials exception pertains to an “internal government exchange” reflective of “opinions, ideas, or advice exchanged as part of the consultative or deliberative process of government decision making.”²

Third, even if the Board could establish that records shared with applicants are subject to the ‘inter-agency or intra-agency materials’ disclosure exception, FOIL obliges the Board to disclose factual or statistical tabulations or data in redacted records.³ The engineering reports by their nature must have factual information that can be disclosed. For example, a traffic study represents observable facts and not pure opinions.

² *Matter of Gould v. New York City Police Dept.*, 89 N.Y.2d 267, 277 (1986).

³ *See Matter of Humane Soc. of U.S. v Empire State Dev. Corp.*, 53 A.D.3d 1013, 1018 (3d Dept. 2008).

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Finally, TDE letters and records used to compile TDE letters cannot be proprietary materials that can be exempted from disclosure under FOIL. The Town and Board cannot outsource functions to a TDE and then hide the records as proprietary.⁴

Last year, the Town adopted a Comprehensive Plan Update including a goal to “[e]nsure an efficient and fair development approval process that is predictable, *transparent*, and protective of the Town’s environment and the residential character of its neighborhoods.” The Board can help reach that goal by providing early and unrestricted access to records like TDE letters, review, and applicant responses, among other things.

Please contact me at your earliest convenience to discuss the Board’s plan to address the issues that we have identified.

Yours truly,



Cameron Macdonald

cc: Kathleen Marinelli
Michael C. Magguilli
Julie Gansle
SAVE Colonie
Committee on Open Government

⁴ See, e.g., Committee on Open Government, 2017 Report to the Governor and State Legislature (December 2017) (addressing private contractor algorithms).