

November 26, 2009

Gaurav Vasisht
Assistant Counsel to the Governor
Executive Chamber
State Capitol
Albany, NY 12224

in re: FOIL REQUEST

Dear Sir:

Pursuant to Public Officers Law, Article 6, Section 89(4)(a), I am, by this letter, providing your office with a written appeal in response to a FOIL request denial received from Mr. Jeffery Pearlman, Records Access Officer, Assistant Counsel to the Governor, dated October 29, 2008.

On October 27, 2008, I filed a FOIL request that the Executive Chamber Records Access Officer provide me with a "...full, unexpurgated bill jacket for S7899/A10750...relating to S7899/A10750 (2008) and Governor Patterson's Veto Memo 128..." Subsequently, I received Mr. Pearlman's letter denying my FOIL request.

In his reply letter, Mr. Pearlman states that "...all of these [above cited bill jacket] documents are currently exempt from disclosure pursuant to Public Officers Law 87(2)(g) because these materials, or portions of materials, are inter-agency or intra-agency [materials] which are not final agency policy or determinations." Legal precedent appears to dispute this finding.

In his Veto Memo, Governor Patterson states "Because of these insufficient safety standards, a number of State Agencies...have objected to this bill." It is evident from the Governor's Veto Memo discussion preceding this statement that presumably factual observations relating to safety standards were supplied by said "...State Agencies...". Such factual observations are not exempt from disclosure, even in documents issued before final decision. Mothers on the Move, Inc. V. Messer (2 Dept. 1997) 236 A.D.2d 408, 652 N.Y.S.2d 773. Records 57.

Bill jacket materials are not exempt from disclosure. Agencies supplying such materials to the Governor's staff for consideration and eventual inclusion in a bill jacket file should have understood or reasonably have understood that these materials are destined for public disclosure. The New York Times Co. v. City of New York Fire Dept., 2005, 4 N.Y.3d 477, 796, N.Y.S.2d 302, 829 N.E.2d 266. Records 57; Records 58.

A significant percentage of the S7899/A10750 bill jacket materials are known to consist of comments supplied by professional users, officers of affected businesses and the general public. Such bill jacket materials are records not exempted under §87(2)(g), and any associated materials which may be exempted from disclosure under this section cannot be exempted in any event except as "...portions thereof...", §87(2).

Finally, the documents specified in the FOIL request formed a determinative basis of the Governor's veto, which is in itself constitutes a final public policy decision and is not exempted by §87(2)(g).

Legislative intent in formulating the NYS FOIL is clearly revealed (§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 Governor has already rendered a public policy decision in this matter. Yet, the factual basis for his policy decision remains hidden from view. The Governor's memo advances a claim that the public safety is served by his veto of S7899/A10750. The NYS FOIL is intended to permit public examination of claims such as this, and the decision-making process behind them.

Substantial question exists as to the validity of the public safety information which the Governor received as the basis for this veto decision, and also regarding his failure to fully consider public comments discussing the substantial negative impact to NYS businesses. Therefore, I look forward to timely personal review of these materials and, consequently, to a positive response from your office and prompt release of the full S7899/A10750 bill jacket materials.

Sincerely,

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cc: B. Lifton R. Destito S. John
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