



June 12, 2020

Nathaniel Kuzma
General Counsel
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Buffalo, New York
Email: [njkuuzma@buffaloschools.org](mailto:njkuzma@buffaloschools.org)

Re: FOIL BPS File #20-017

Dear Mr. Kuzma:

The University at Buffalo Civil Rights and Transparency Clinic represents Investigative Post, in association with Finnerty Osterreicher & Abdulla, in the above referenced Freedom of Information Law, Public Officers Law Article 6, §§ 84-90 (“FOIL”) matter. I am writing to request the production of the documents described in the FOIL request of Investigative Post Editor Jim Heaney by Friday June 19, 2020.

On April 22, 2020, Mr. Heaney, submitted a FOIL requesting records of data related to distance learning in Buffalo Public Schools (BPS). The request sought information documenting the district’s use of online learning during the COVID-19 pandemic. In this regard, Investigative Post’s request included but was not limited to documents which showed: participation rates of students and teachers; the number of hours students and teachers engage online for distance learning; student access to learning devices; efforts by the district to provide internet connection to students lacking it; and any and all methods the district uses to track student performance.

Darren Brown-Hall acknowledged receipt of the request that same day, advising it could take up to twenty (20) business days (*i.e.*, no later than May 20, 2020) to respond to the request. May 20 came and went, however, with no records being produced.

On May 21, Mr. Heaney followed up with your office. You advised that you would be speaking with your Information Technology personnel later that day about the FOIL request (begging the questions of whether IT previously had been consulted, and, if not, why) and that you intended to have a response out “soon.” Despite these representations and your assurances that you would expedite the request, and despite Investigative Post’s willingness to accept documents as they became available, BPS did not produce any records, explain the continued delay, or set a date certain to produce the documents.

On May 21, 2020 Mr. Heaney formally appealed the agency’s failure to produce any records within the statutory time limits as a constructive denial of the FOIL request. Pursuant to Public Officers Law § 89(4)(a), BPS was required to respond to that appeal within ten (10)



business days (*i.e.*, by June 5). To date, BPS has not responded to Mr. Heaney's FOIL appeal and has still failed to provide access to responsive records.

As I am sure you are aware, FOIL is based on the policy that *all government records are presumptively open* for public inspection and copying unless they specifically fall within one of nine enumerated exemptions. *See* Public Officers Law § 87(2). As the Court of Appeals has stated, “[o]nly where the material requested falls squarely within the ambit of one of these statutory exemptions may disclosure be withheld.” *Matter of Fink v. Lefkowitz*, 47 N.Y.2d 567, 571 (1979). Moreover, in order to ensure maximum access to government documents, the law is clear that the “exemptions are to be narrowly construed, with the burden resting on the agency to demonstrate that the requested material indeed qualifies for exemption.” *Gould v. New York City Police Dep’t*, 89 N.Y.2d 267, 274-275 (1996); *Matter of Farbman & Sons v. New York City Health & Hosps. Corp.*, 62 N.Y.2d 75, 80 (1984) (agency seeking to prevent disclosure carries the burden of demonstrating that the requested material falls squarely within a FOIL exemption by articulating a particularized and specific justification for denying access). Thus, when an agency determines to restrict access to public records, it has the burden of not only identifying those provisions of FOIL on which it is relying to justify its position, but also to establish how, on the facts of the case, the exemption applies. *See e.g.*, New York State Department of State Committee on Open Government FOIL Advisory Opinion (“FOIL-AO”) 12027. In this case, your office has not established a basis to restrict access to the records.

The effectiveness and adequacy of online learning is a matter of great public concern, and the likelihood of continued online learning requires you to release this information in order for the public to evaluate your past efforts and engage with you to make improvements.

If the documents requested are not produced by June 19, or by another mutually agreeable date, we intend to file an Article 78 to compel the production of the above stated documents. Please be advised that in that event, we will seek attorney's fees and other litigation costs pursuant to Public Officers Law § 89(4)(c). We would be happy to discuss this matter further. You can reach staff attorney Michael Higgins at 585-217-1268.

Sincerely,

Elias Schmidt
Student Attorney



University at Buffalo

Clinical Legal Education

School of Law

A handwritten signature in black ink that reads "Michael F. Higgins".

Michael F. Higgins
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CC: Jim Heaney