



Office of Counsel
Tel. 518-474-6400
Fax 518-474-1940

October 12, 2022

Abdullah Ar Rafee
Empire Center for Public Policy
30 South Pearl St, Suite 1210
Albany, NY 12207

Re: FOIL Appeal of Ar Rafee, Abdullah

Dear Mr. Rafee:

Enclosed is a duplicate original of the decision of the
Commissioner of Education in the above-entitled matter.

Sincerely,


Bonnie J. Edwards

Enclosure

c: NYS Committee on Open Government
Department of State
One Commerce Plaza
99 Washington Avenue, Suite 650
Albany, NY 12231

The
University of the
Education  State of New York
Department

IN THE MATTER

of the

Appeal of ABDULLAH AR RAFEE from a determination of the New York State Education Department denying a request for access to records.

Petitioner appeals a September 23, 2022 response by the Office of Information and Reporting Services (“IRS”) of the New York State Education Department (“SED” or “Department”) to a Freedom of Information Law (“FOIL”) request for access to records. The appeal must be sustained in part.

By emailed letter dated September 8, 2022, petitioner, on behalf of the Empire Center for Public Policy (“ECPP”), requested access to a “complete copy of the full statewide test results for grades 3-8 in English Language Acquisition (ELA) and mathematics for the 2021-22 school year.” Specifically, petitioner requested as an “electronic database document (preferably Excel) electronically or on a portable storage medium,” the following: BEDSCODE; Institution Name; Subject Area; Grade (3-8); Subgroup (By Race, Gender, Migration Status, Parental Status); Total Enrolled; Total Tested; and “Number of students at each proficiency level.”

By email dated September 15, 2022 the Records Access Office acknowledged petitioner’s FOIL request and stated that by approximately October 14, 2022 petitioner would be informed as to whether the request would be granted or denied in whole or in part. Subsequently, in a September 23, 2022 response, IRS informed petitioner that:

Due to the scope and nature of your request, and the effort required to identify and collate the

appropriate records, it will take the Department additional time to complete your request. You will hear from the Department by approximately January 31, 2023, as to whether your request will be granted or denied in whole or in part. If your request is granted, we will provide you with the documents or advise you of the page count and duplication costs.

IRS also provided petitioner with information on how to administratively appeal its determination. By emailed letter, dated September 26, 2022, Peter Warren, ECPP's Director of Research administratively appealed on petitioner's behalf.

Petitioner, through Mr. Warren, asserts that IRS's delay was improper because it did not provide an "adequate" basis for the delay. Petitioner alleges that in prior years SED provided statewide data in August or "usually" no later than mid-September. Petitioner further suggests that "in a memo dated June 30, 2022, Deputy Commissioner Jason Harmon advised the information [ECPP] has requested will be available this fall." Petitioner claims that a new distinction between "preliminary" and "final" test data has been created by Mr. Harmon, and that "no distinction was made in prior years." Petitioner recites that ECPP is seeking "the same information that NYSED made public most years by this time." Petitioner argues that this data regarding "student learning during the Covid-19 pandemic [is] of great public interest and concern."

FOIL is based upon a presumption of access. Thus, records held by an agency, such as SED, are presumed to be available for public inspection, unless the records or portions thereof fall within the enumerated exemptions of POL § 87 (2) (*Matter of Gould v New York City Police Dept.*, 89 NY2d 267, 274-275 [1996]). "[E]xemptions are to be narrowly construed, with the burden resting on the agency to demonstrate that the requested material indeed qualifies for exemption" (*Matter of Hanig v State of N.Y. Dept. of Motor Vehs.*, 79 NY2d 106, 109 [1992]; see POL § 89 [4] [b]). In order to invoke one of the exemptions of POL § 87 (2), the agency must "articulate particularized and specific justification" for not disclosing the requested documents; "[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 NY2d 567, 571 [1979]).

To the extent that petitioner appeals the date provided for a response to his FOIL request, by the IRS, petitioner's appeal must be sustained in part. Petitioner's FOIL request involves the review of numerous records and

files by IRS. I note that POL § 89 (3) (a) states, in part, that “[a]n agency shall not deny a request on the basis that the request is voluminous or that locating or reviewing the requested records or providing the requested copies is burdensome” However, while FOIL does not allow an agency to deny a request on the basis of volume and/or burden, an agency may determine whether a period of time is reasonable to respond to a FOIL request (see POL § 89 [3] [a]). The Court of Appeals has stated that “there is no specific time period in which the agency must grant access to the records. Indeed, the time needed to comply with the request may be dependent on a number of factors, including the volume of the request and the retrieval methods” (*Data Tree, LLC v. Romaine*, 9 NY3d 454, 465 [2007]).

The Committee on Open Government (“Committee”) has opined that, to determine whether a period of time is reasonable, a judgment must be made on a case-by-case basis taking into account the volume of documents requested, the time involved in locating the material, and the complexity of the issues involved in determining whether the materials fall within one of the exceptions to disclosure (see NYS Comm. on Open Govt. FOIL-AO-15895; NYS Comm. on Open Govt. FOIL-AO-19034; and 21 NYCRR § 1401.5 [d]). The Committee has also opined that so long as the date given was reasonable in view of the attendant circumstances, the agency would have acted in compliance with the law (see NYS Comm. on Open Govt. FOIL-AO-15462), and that “there is no obligation to ‘drop everything’ in order to respond quickly to a request; rather, the law provides the flexibility necessary to carry out duties in a reasonable manner” (see NYS Comm. on Open Govt. FOIL-AO-18365).

Pursuant to the instant appeal, IRS, which is the main office involved in searching for and compiling the data for the alleged responsive records requested and for responding to petitioner’s September 8, 2022 FOIL request, informed my Office of Counsel (“O.C.”) that efforts to respond to petitioner’s FOIL request continue and have not presently been completed. Having considered factors such as the stated importance of the data, the duties of the offices involved in responding to the FOIL request; the staff time available for this purpose; the necessity of legal, technical, and executive review at various times; the need to prepare records in a format agreeable to petitioner; the fact that there are other large FOIL requests assigned to this office; and the overall scope of the request, I find that a “date certain” of January 23, 2023 is unreasonable for the completion of SED’s response to the request. However, a delay beyond the 20 business days granted by POL § 89 (3) (a) is appropriate. I find that a date of no later than November 4, 2022, is “reasonable under the circumstances of the request” (POL § 89 [3] [a]) for release of the data in question.¹

¹ If the information can be provided sooner, even in part, I encourage IRS to respond on a rolling basis.

In light of this disposition, I need not address the remaining contentions raised in petitioner's appeal.

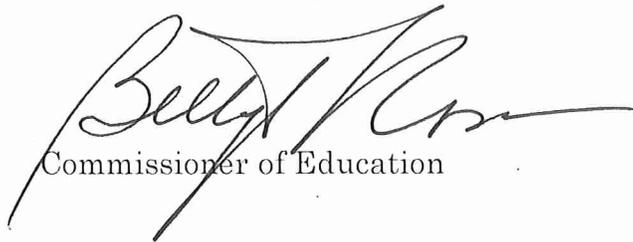
THE APPEAL IS SUSTAINED TO THE EXTENT INDICATED.

IT IS ORDERED that the date given by IRS in its September 23, 2022 response to petitioner for a response to the instant FOIL request is modified to reflect a date of November 4, 2022; and

IT IS FURTHER ORDERED that nothing in this determination shall relieve petitioner of the responsibility to pay the statutory fee(s), if any, associated with the completion of the instant FOIL request.



IN WITNESS WHEREOF, I, Betty A. Rosa, Commissioner of Education of the State of New York, for and on behalf of the State Education Department, do hereunto set my hand and affix the seal of the State Education Department, at the City of Albany, this 12th day of October 2022.


Commissioner of Education