

Exhibit D

The State University
of New York

State University Plaza
Albany, New York 12246

www.suny.edu

January 13, 2021

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VIA CERTIFIED MAIL:
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VIA CERTIFIED MAIL:
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Re: Freedom of Information Law Appeal – SUNY Upstate Medical University

Dear Mr. Jacobson and Ms. Johnson:

I write in response to your appeal from the decision of the Records Access Officer (“RAO”) for the State University of New York Upstate Medical University (“SUNY Upstate”) on your Freedom of Information Law (“FOIL”) request (the “Request”) dated December 4, 2020. The Request, which sought 13 categories of records, is appended for reference.

In a decision dated December 11, 2020, the RAO denied the Request on the ground that it was not reasonably described, as required by Public Officers Law § 89(3)(a). For each of the 13 subparts of the Request, the RAO identified the reason why he determined it was not reasonably described. He asked you to “assess the request and resubmit if necessary.” You chose not to seek the RAO’s further assistance under 8 N.Y.C.R.R. § 311.1(b)(2) and this appeal followed.

On appeal, you argued that the RAO’s decision is improper, because he concluded that portions of the Request were too broad. You drew a parallel from breadth to volume, and linked it to the Public Officers Law proscription that a request shall not be denied because it is voluminous or burdensome. You said the RAO, “refuses even to search for records or to explain why or how its records system would not permit locating such

To Learn
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William A. Jacobson, Esq.
Eliana Johnson
January 13, 2021
Page 2

records.” You contended that the Request is analogous to the request in Konigsberg v. Coughlin, 68 N.Y.2d 245 (NY 1986), which sought “all files or records kept on me and my number of identification of the New York State Department of Correctional Service.” You concluded that the Request was “sufficient to put Upstate Medical on notice of what is requested.”

Taking the last point first, I agree that the Request is sufficient to put SUNY Upstate on notice, in a general way, of the records sought by the Request. However, your conflation of the breadth of the Request, to volume and burdensomeness, truncates the RAO’s decision in a way that obscures its main ground: reasonable description. Although this conflation may bring the facts of this case into conformity with the facts in Jewish Press, Inc. v. New York City Dep’t of Educ. 183 A.D.3d 731 (2d Dep’t 2020), in which the court specifically noted such conflation,¹ that did not occur here. The breadth or narrowness of a request does not constitute the measure of reasonable description, and volume or burdensomeness are irrelevant. (Public Officers Law § 89(3)(a).)

As to the reasonableness of the description provided in the Request, by way of example, subparts 2, 3, 4 and 5 sought “all records received, reviewed or created by” These subparts, coupled with the statutory definition of “record,”² bear no resemblance to the Konigsberg request. The Konigsberg request contained two, finite, tangible identifiers: name and ID number. The above-enumerated subparts, on the contrary, do not describe records using tangible identifiers. Instead, verbs are used as identifiers. These subparts seek records identified by the actions taken upon them, i.e., whether they were “received, reviewed, or created by.” Thus, for any of these subparts, if the named individual maintained such a record, it would not be responsive unless the RAO could determine, based on its receptacle, that the individual “received” it. I do not believe the RAO could determine whether the record was “reviewed” by the individual. As to whether the record was “created by” the individual, the RAO could only make that determination if the record bore sufficient identification to

¹ “The respondent has conflated the requirement of reasonable description with the related, but separate, consideration as to whether it would be unduly burdensome for the respondent to comply with the petitioner’s request.” (Id. at 733).

² “Record” means any information kept, held, filed, produced or reproduced by, with or for an agency or the state legislature, in any physical form whatsoever including, but not limited to, reports, statements, examinations, memoranda, opinions, folders, files, books, manuals, pamphlets, forms, papers, designs, drawings, maps, photos, letters, microfilms, computer tapes or discs, rules, regulations of codes. (Public Officers Law § 86(4))

William A. Jacobson, Esq.
Eliana Johnson
January 13, 2021
Page 3

indicate the individual's authorship. I concur with the RAO that subparts 2, 3, 4, and 5 of the Request were not "reasonably described."

Similarly, subparts 1 and 7 of the Request bear no resemblance to the Konigsberg request. Subpart 1 seeks "*all records of the Diversity Task Force and Implement and Oversight Tiger Teams*" (emphasis added). The Task Force and the Teams are comprised of many people, all of whom may have responsive and nonresponsive electronic and physical records. By supplying only a generic description – "all records of" – it is unclear what subpart 1 seeks. In an apparent effort to clarify, subpart 1 contained three links to SUNY Upstate's website:

<https://www.upstate.edu/diversityinclusion/index.php>;
<https://www.upstate.edu/diversityinclusion/pdf/task-force-report.pdf>, and
<https://www.upstate.edu/diversityinclusion/initiatives/task-force/index.php>

The first and third links open websites containing documents, statements, initiatives, policies, procedures, reports and data. Subpart 7 of the Request seeks "all records. . . regarding . . . Report of the 2020 Diversity Task Force. . ." and provides the second website link above.

The records at these website links are the "records of" sought in subpart 1. They are also the "records regarding" sought in subpart 7. Yet, standing in the shoes of the RAO, I would assume that the website records are *not* the records sought in subparts 1 and 7, since they are already available on a public website, and the requester supplied the website links.³ It must logically follow then, that if the records at the websites identified in subparts 1 and 7 of the Request are not responsive to subparts 1 and 7, more is needed to reasonably describe the records requested. Therefore, I concur with the RAO that subparts 1 and 7 of the Request are not reasonably described.

Konigsberg v. Coughlin, 68 N.Y.2d 245 (NY 1986), instructed that a reasonably described records request does not require "a wholly new enterprise, potentially requiring a search of every file in the possession of the agency." *Id.* at 250. Eight years ago, the Committee on Open Government addressed the then 26-year-old Konigsberg case in FOIL Advisory Opinion No. 18863 (April 5, 2012). Excerpts from that Opinion, relevant to

³ Where it is known that a requester "previously received a copy of the agency record pursuant to an alternative discovery device and currently possesses the copy, a court may uphold an agency's denial of the petitioner's request under the FOIL for a duplicate copy as academic." Moore v. Santucci, 151 A.D.2d 677, 678 (2d Dep't 1989).

William A. Jacobson, Esq.

Eliana Johnson

January 13, 2021

Page 4

the issue of reasonable description in this electronic age, are relevant here and I hope will serve to provide you additional guidance on what is, and what is not, a reasonable description.

A primary issue, in my view and as you suggested, involves the standard appearing in section 89(3)(a) of FOIL, that a request must 'reasonably describe' the records sought. That standard was considered by the Court of Appeals more than twenty-five years ago. In consideration of the advances in information technology that have occurred since that decision was rendered, we believe that standard should be reconsidered.

* * *

Konigsberg was rendered in an era in which most records were maintained on paper, and the ability to locate, identify and retrieve records often involved paper based systems in which records were generally filed alphabetically, chronologically, or perhaps by geographic location. Unless a request is made in a manner consistent with a particular filing system, a request might not meet the requirement of reasonably describing the records.

By means of example, assuming that a telephone directory is an agency record and an applicant requests all the listings in the directory identifying those people whose last name is Smith. Even if there are ten thousand Smiths, the request would reasonably describe the records, because the items in a telephone directory are listed by the last name in alphabetical order. But what if the applicant then requests all of the listings for those people whose first name is John? The request would be specific, and because John is a common name, we know that there are listings of individuals with that first name. Finding them, however, would necessitate a review of thousands of listings, one by one. We have advised that in analogous situations, such a request would not reasonably describe the records sought and that FOIL does not require than an agency engage in herculean efforts in attempting to locate all those named John, or in essence, the needles in the haystack. Even though we know that the needles are there,

William A. Jacobson, Esq.
Eliana Johnson
January 13, 2021
Page 5

somewhere, FOIL would not require that an agency go through the haystack in an effort to locate the needles.

* * *

A recent inquiry involved a request by an employee of a state agency for all email communications between or among other named agency staff that include the name of that employee. Due to advances in information technology, the agency has the ability to locate, identify and retrieve those communications with reasonable effort. Through the use of a search engine, the agency was able to locate and retrieve thousands of email communications containing the applicant's name.

Unlike a request for telephone listings, the content of email communications differs in each such communication. Many of those communications include the names of persons other than the employee who made the request, and it is likely that some aspects of those records may or must be redacted on the ground that disclosure would constitute 'an unwarranted invasion of personal privacy' in accordance with sections 87(2)(b) and 89(2)(b) of FOIL. Virtually all of the communications would constitute 'intra-agency material' falling within the scope of section 87(2)(g). Under that provision, some aspects of those communications may be withheld, but others must be disclosed.

The point is that, to give effect to FOIL, and to respond to a request that identifies thousands of email communications, each email must be read and reviewed individually in order to determine rights of access. The time and effort needed to do so is more than substantial. Nevertheless, based on the standard prescribed by Konigsberg, it is possible, if not likely, that a court would determine that an agency is required to engage in an effort of that magnitude.

You alluded to a request for all records contained within a file cabinet and suggested that, with modern search capacities, some records involve the content of a 'virtual' file cabinet. I agree, and your suggestion brings to mind an opinion rendered several years ago involving a request for all records contained in several file

William A. Jacobson, Esq.

Eliana Johnson

January 13, 2021

Page 6

cabinets located in or near the office of a certain agency employee. It was advised in that situation that the request did not reasonably describe the records, and that the guidance offered in Fisher & Fisher v. Davidson (Supreme Court, New York County, September 27, 1988) was applicable. The court referred to and rejected a voluminous request finding that:

‘Petitioner’s actual demand transcends a normal or routine request by a taxpayer. It . . . bring[s] in its wake an enormous administrative burden that would interfere with the day-to-day operations of an already heavily burdened bureaucracy.’

* * *

In our view, a request for email encompassing thousands of communications, each of which would require review to determine rights of access, might not be considered to have met the standard of reasonably describing records. Rather, if a request can be framed in relation to a particular issue or subject, and if a search can be made or data can be retrieved, extracted or located in conjunction with that issue or subject, the request might be found to have reasonably described the records sought. A request for ‘all’ records, without limitation, that include a certain name, for example, might not be found to reasonably describe the records when a search using that name produces thousands of email communications or other records irrespective of the content of those items.

(Committee on Open Government FOIL-AO-18863, April. 5, 2012).

A sub-issue you raised in your first argument and in several other parts of your appeal, is the statement, in effect, that the RAO “refused” to undertake a search on the Request, and did not “explain why or how its records system would not permit locating such records.” You characterized these actions as a “blanket denial.” I disagree, for the reasons that follow.

First, the RAO is under no statutory or regulatory obligation to search for records not reasonably described. Section 89 of the Public Officers Law requires a records request to be “reasonably described” in the first instance. The above-cited Committee on Open

William A. Jacobson, Esq.
Eliana Johnson
January 13, 2021
Page 7

Government opinion further clarifies that a failure to reasonably describe records creates an infirmity in FOIL requests that effectively results in requests for the contents of "virtual" file cabinets, involving thousands of records that must be reviewed for rights of access. I believe the Committee's colloquial example precisely fits the Request: "Even though we know that the needles are there, somewhere, FOIL would not require that an agency go through the haystack in an effort to locate the needles." (FOIL AO 18863, Apr. 5, 2012).

Next, there is no statutory or regulatory requirement that the RAO provide requesters an explanation of the inner workings of a state agency's data management system(s). Not only would such an explanation constitute creation of a new record, which is not required by the Public Officers Law,⁴ but such a record would likely be exempt from disclosure under Public Officers Law § 87(2)(i).

Finally, with respect to the assertion that the RAO issued a "blanket denial," in my view, that did not occur here. The RAO gave a specific reason for the denial (failure to reasonably describe the records sought) and he identified the language in subparts of the Request that formed the basis of his decision. He invited you to re-submit the Request based on his advice. In one of the earliest cases decided by the New York Court of Appeals on exceptions to disclosure, the Court stated that an agency "is required to articulate particularized and specific justification. . . . *Fink v. Lefkowitz*, 47 N.Y. 2d 567, 571 (1979). I am satisfied that the RAO met this requirement.

With respect to the subparts of the Request numbered 8, 9, 10, and 11, which seek student, faculty and staff application forms, I believe these are sufficiently described and I direct the RAO to collect these records and to provide them to you within a reasonable time, as that phrase is defined in the Committee on Open Government regulations at 21 N.Y.C.R.R. §1401.5(d)⁵.

However, subparts 8, 9, 10 and 11 also seek records "regarding the development, purpose and necessity of these forms and questions." That portion of these subparts is

⁴ "Nothing in this article shall be construed to require any entity to prepare any record not possessed or maintained by such entity." (Public Officers Law § 89(3)(a)).

⁵ "In determining a reasonable time for granting or denying a request under the circumstances of a request, agency personnel shall consider the volume of a request, the ease or difficulty in locating, retrieving or generating records, the complexity of the request, the need to review records to determine the extent to which they must be disclosed, the number of requests received by the agency, and similar factors that bear on an agency's ability to grant access to records promptly and within a reasonable time." (21 N.Y.C.R.R. §1401.5(d))

William A. Jacobson, Esq.

Eliana Johnson

January 13, 2021

Page 8

not reasonably described. Development of a student's application for admission into a college can likely be traced back to the founding of Harvard College in 1636. The "purpose" and "necessity" of application forms and the questions they ask, for either employment or college admission, seems reasonably and generally clear – to provide information about the applicant sufficient to form the basis of an admissions or hiring decision. Thus, without more specificity as to the records that this portion of subparts 8, 9, 10 and 11 actually seek, SUNY Upstate would be required to search its massive electronic and physical files, hoping to find records that, in the sole judgment of the RAO, illuminate the "development, purpose and necessity" of college application and employment application forms. In my view, this is akin to the theoretical quest noted in Advisory Opinion 18863, "we know that the needles are there, somewhere, [but] FOIL would not require that an agency go through the haystack in an effort to locate the needles." Accordingly, I find that the portions of subparts 8, 9, 10 and 11 of the Request that seek "development, purpose and necessity" are not reasonably described.

With respect to subparts 6, 12 and 13, I have confirmed with SUNY Upstate that records responsive to these subparts exist. I am directing SUNY Upstate to provide such records, subject to applicable exemptions from disclosure under the Public Officers Law, within a reasonable time.

On the basis of the foregoing, I affirm in part and reverse in part the decision of the RAO as detailed herein. You are not precluded, of course, from working with the RAO as per his invitation and under 8 N.Y.C.R.R. § 311.1(b)(2), to clarify those portions of the Request that require a more reasonable description.

This appeal shall remain open, pending completion of the processing of the Request in accordance with this decision.

Sincerely,



Aaron Gladd
FOIL Appeals Officer

cc: Michael Jurbala
New York Committee on Open Government
Attachment

Legal Insurrection Foundation
18 Maple Avenue # 280
Barrington, RI 02806
Email: contact@legalinsurrection.com

VIA EMAIL: foil@upstate.edu

December 4, 2020

Records Access Officer
SUNY Upstate Medical University
Office of the Internal Audit and FOIL Officer
750 East Adams Street
Syracuse, NY 13210

RE: Freedom of Information Law Request

Records Access Officer:

Under the provisions of the New York Freedom of Information Law, Article 6 of the Public Officers Law, Sections 84-90, the Legal Insurrection Foundation and Free Beacon LLC hereby request the following records, as defined by Section 84(4), and also including, but not limited to, emails, text messages, electronic messages, notes, minutes, handouts, programs, and drafts, from State University of New York Upstate Medical University ("Upstate Medical"), for the date range May 1, 2020, to the present:

Request No. 1: All records of the Diversity Task Force¹ and Implement and Oversight Tiger Teams.²

Request No. 2: All records received, reviewed, or created by the Diversity Task Force Chair, **Daryll Dykes, PhD, MD, JD**, regarding the business of the Diversity Task Force and/or Implement and Oversight Tiger Teams.

¹ "Diversity Task Force" means the task force that was assembled by Chief Diversity Officer, Daryll Dykes, PhD, MD, JD, to, per Upstate Medical, accomplish "the herculean task to make *actionable* recommendations to move Upstate in a bold new direction toward greater diversity, equity, inclusion and belonging", as referenced in the following links: <https://www.upstate.edu/diversityinclusion/initiatives/task-force/index.php>; <https://www.upstate.edu/diversityinclusion/pdf/task-force-report.pdf>.

² "Implement and Oversight Tiger Teams" mean the teams, per Upstate Medical, that evaluate, prioritize, develop, and coordinate the action items proposed in the Diversity Task Force Report, including, but not limited to, the following teams: (1) Policy, Bias Reporting, and Mitigation; (2) Recruitment & Retention; (3) Patient, Community, and Alumni Services; (4) Diversity Organization, Branding, and Messaging; and (5) Education and Training, as referenced in the following links: <https://www.upstate.edu/diversityinclusion/initiatives/task-force/index.php>; <https://www.upstate.edu/diversityinclusion/pdf/task-force-report.pdf>.

Records Access Officer
SUNY Upstate Medical University
December 4, 2020
Page 2

Request No. 3: All records received, reviewed, or created by the following Implement and Oversight Tiger Team Co-Chairs, regarding the business of the Implement and Oversight Tiger Teams and/or the Diversity Task Force:

- David Amberg;
- Sipho Mbuqe;
- Jennifer Welch;
- Nancy Page;
- Janell Gage;
- Nakeia Chambers;
- Sean Patterson;
- Daryll Dykes;
- Rachel Hopkins; and
- Rebecca Greenblatt.

Request No. 4: All records received, reviewed, or created by the following persons employed in the Office of Diversity and Inclusion, regarding the Diversity Task Force and/or the Implement and Oversight Tiger Teams:

- Daryll C. Dykes, PhD, MD, JD, Chief Diversity Officer;
- Carl Thomas, Interim Affirmative Action Officer/Title IX Coordinator and Supplier Diversity Coordinator;
- Mary Meier, EEO/AA Compliance Specialist;
- Connie Gregory, Resident Engagement Specialist; and
- Sean Patterson, SPHR, SHRM-SCP, Affirmative Action Assistant/Data Analyst.

Request No. 5: All records received, reviewed, or created by the following persons on Upstate Medical's Executive Committee, regarding the Diversity Task Force and/or the Implement and Oversight Tiger Teams:

- Mantosh Dewan, MD, President;
- Lawrence Chin, MD, Dean, College of Medicine;
- Robert J. Corona, DO, CPE, MBA, FCAP, FASCP, CEO Upstate University Hospital;
- David C. Amberg, PhD, Vice President for Research;
- Mark Schmitt, PhD, Dean, College of Graduate Studies;
- Tammy Austin-Ketch, PhD, FNP, FAANP, Dean, College of Nursing;
- Katherine Beissner, PT, PhD, Dean, College of Health Professions;
- Lynn Cleary, MD, Vice President for Academic Compliance and University Accreditation;
- Eric J. Smith, CPA, MBA, Senior Vice President for Finance and Administration & Senior Associate Dean for Finance, College of Medicine;
- Eileen Pezzi, Vice President for Development;
- Linda Veit, MPH, Interim Chief of Staff & Assistant Vice President of Community Relations; and

Records Access Officer
SUNY Upstate Medical University
December 4, 2020
Page 3

• Daryll C. Dykes, PhD, MD, JD, Chief Diversity Officer.

Request No. 6: All records regarding faculty meetings, including but not limited to meeting minutes, meeting agendas, presentation material, as well as communications exchanged about such meetings, regarding the Diversity Task Force and/or the Implement and Oversight Tiger Teams.

Request No. 7: All records, including but not limited to meeting minutes, meeting agendas, presentation material, as well as communications exchanged about such meetings, emails, electronic messages, drafts, and memoranda, regarding Upstate Medical's Office of Diversity and Inclusion's Report of the 2020 Diversity Task Force, dated August 31, 2020, as referenced in the following link: <https://www.upstate.edu/diversityinclusion/pdf/task-force-report.pdf>.

Request No. 8: All copies of application forms, templates, and documents that ask questions regarding diversity, equity, inclusion, antiracism, social justice, bystander intervention for bias, race, identity, and/or belonging of *prospective students* applying to Upstate Medical, including but not limited to records regarding the development, purpose, and necessity of these forms and questions. (Note: This request does not seek documents as filled out by applicants, only the forms of such documents.)

Request No. 9: All copies of application forms, templates, and documents that ask questions regarding diversity, equity, inclusion, antiracism, social justice, bystander intervention for bias, race, identity, and/or belonging of *prospective faculty* applying to Upstate Medical, including but not limited to records regarding the development, purpose, and necessity of these forms and questions. (Note: This request does not seek documents as filled out by applicants, only the forms of such documents.)

Request No. 10: All copies of application forms, templates and documents that ask questions regarding diversity, equity, inclusion, antiracism, social justice, bystander intervention for bias, race, identity, and/or belonging of *prospective staff* applying to Upstate Medical, including but not limited to records regarding the development, purpose, and necessity of these forms and questions. (Note: This request does not seek documents as filled out by applicants, only the forms of such documents.)

Request No. 11: All copies of application forms, templates, and documents that ask questions regarding diversity, equity, inclusion, antiracism, social justice, bystander intervention for bias, race, identity, and/or belonging of *prospective managerial administrators* applying to Upstate Medical, including but not limited to records regarding the development, purpose, and necessity of these forms and questions. (Note: This request does not seek documents as filled out by applicants, only the forms of such documents.)

Request No. 12: All records, including but not limited to program materials, handouts, and videos, for all orientation sessions held for incoming students at Upstate Medical regarding diversity, equity, inclusion, antiracism, social justice, bystander intervention for bias, race,

Records Access Officer
SUNY Upstate Medical University
December 4, 2020
Page 4

identity, and/or belonging, including but not limited to as described in the following link:
https://www.upstate.edu/currentstudents/document/session_ii_schedule.pdf.

Request No. 13: All records regarding the creation and selection of the Upstate Medical "Interview Questions" for incoming students, referenced in the link below, as well as all documents that demonstrate the identities of committee(s), group(s), professor(s), administer(s), or individual(s) involved in creating this list of questions, including but not limited to as described in this link:
https://www.upstate.edu/currentstudents/document/college_of_medicine_interview_questions_2020.pdf.

Please note that this request does not seek personally identifiable information regarding any student or prospective student of Upstate Medical, and we agree that any such personally identifiable information may be redacted.

If this request appears to be too extensive or fails to reasonably describe the records, please contact me in writing.

We request that the records be produced in electronic format, on a flash drive or other means of electronic transfer.

If there are any fees for copying the records requested, please supply the records without informing me if the fees are not in excess of one hundred dollars (\$100.00).

As you know, the Freedom of Information Law requires that an agency respond to a request within five (5) business days of receipt of a request. Therefore, I would appreciate a response as soon as possible and look forward to hearing from you shortly.

If for any reason any portion of my request is denied, please inform me of the reasons for the denial in writing and provide the name and address of the person or body to whom an appeal should be directed.