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January 17, 2019

VIA ELECTRONIC AND US MAIL

Linda Shaw, Esq.
Knauf Shaw LLP
1400 Crossroads Building
2 State Street
Rochester, NY 14614-1365

Re: Town of Perinton FOIL Request & Response

Dear Linda:

We are in receipt of your January 15, 2019 correspondence. The Town of Perinton (the "Town") did not deny access to those documents that are the subject of the Freedom of Information Law ("FOIL") request received by the Town on December 20, 2018. Rather, the Town advised that it does not have any responsive documents because Town staff has yet to complete its internal evaluation of its legal counsel's draft Host Community Agreement ("HCA"). Thus, the Town has not provided a proposed HCA to Waste Management of New York LLC ("WMNY") or any other third party for its review.

Materials "specifically exempted from disclosure by state or federal statute" are not within FOIL's purview. *See* Public Officers' Law §87(2)(a). The CPLR creates privileges for communications between attorneys and their clients exchanged in the course of obtaining legal advice or services (*see* CPLR 4503(a)) and for attorney work product (*see* CPLR 3101(c)). *See also Matter of Shooters Comm. V. Cuomo*, 147 AD3d 1244 (3d Dept. 2017); *Matter of Loudon House LLC v. Town of Colonie*, 123 AD3d 1409 (3d Dept. 2014). As stated above, the Town has not provided copies of the proposed HCA that has been drafted by its legal counsel to WMNY or any other third party. As such, internal HCA drafts are exempted from FOIL as attorney-client communications and attorney work product. *See e.g. Netherby Ltd. v. G.V. Trademark Invs.* 261 AD2d 161 (1st Dept. 1999); *Matter of Morgan v. New York State Dept. of Environmental Conservation*, 9 AD3d 586 (3d Dept. 2004).

The Public Officer Law §87(2)(g) intra-agency exemption applies to records that are "deliberative, i.e., communications exchanged for discussion purposes not constituting final

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policy decisions.” *Matter of Miller v. New York State Dept. of Transportation*, 58 AD3d 981 (3d Dept. 2009), *lv denied* 12 NY3d 712 (2009), *quoting Matter of Russo v. Nassau County Community Coll.*, 81 NY2d 960 (1993). Similarly, “predecisional, nonfinal discussions and recommendations by employees within [an] agency used to assist decision makers in formulating a determination” are exempt from FOIL’s disclosure requirements. *See Matter of Bass Pro, Inc. v. Megna*, 69 AD3d 1040 (3d Dept. 2010). *Accord Matter of Xerox Corp. v. Town of Webster*, 65 NY2d 131 (1985). Thus, any internal drafts of the proposed HCA that have been generated by the Town’s legal counsel, are being or have been reviewed or commented upon by the Town’s staff and have not yet been authorized by the appropriate Town officials as a final version to be provided to WMNY for negotiation are also exempt from FOIL’s disclosure requirements as intra-agency communications.

Very truly yours,

Harter Secrest & Emery LLP



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