January 2, 1975

#51

Mr. B. Weinstock
Weinstock, Davis, Kressel & Rothlein, P.C.
684 Broadway
P.O. Box 448
Massapequa, New York 11758

Dear Mr. Weinstock:

Your interest in complying with the Freedom of Information Law is much appreciated.

As you may be aware, the Committee adopted regulations in October which became effective statewide on November 29, and the staff has prepared model regulations which I believe will be of greater assistance than my comments (see enclosed).

There are several areas of your regulations which in my opinion merit revision, expansion or clarification. For example, the regulations adopted by the Fire District make no reference to designation of a fiscal officer or a subject matter list; there is no specific fee schedule included; in the Committee's regulations, there is no requirement that requests be made in writing, and the seven day response period is not "prompt" pursuant to the Committee's regulations.

Also, the list of accessible records is not sufficiently extensive. With regard to municipalities (including fire districts), perhaps Section 88(1)(i) is the most important section in the Law. It preserves rights of access which existed prior to passage of the Freedom of Information Law. Section 51 of the General Municipal Law provides access to "all books...or other papers connected with or used or filed in the office of, or with any officer of" a unit of local government, including fire districts. Since these records were accessible under the General Municipal Law, they continue to be accessible pursuant to the Freedom of Information Law.

I hope that I have been of some assistance, and I am sure that the model regulations will sufficiently assist you in complying with your responsibilities under the Law.

Should any further questions arise, please feel free to call.

Very truly yours,

Robert J. Freeman
Deputy Counsel

RJF/sd

enc.

January 3, 1975

#52

Mr. Harvey S. Weingard
Certified Public Accountant
49 South Main Street
Spring Valley, New York 10977

Dear Mr. Weingard:

Aseemblyman Eugene Levy has forwarded your letter of December 12 to this Committee, which has the responsibility of implementing and interpreting the provisions of the Freedom of Information Law.

I have contacted Mrs. Helen Kehrer, Head Clerk of the Bureau of Dog Licensing at the Department of Agriculture and Markets. According to Mrs. Kehrer, with whom you communicated, you requested a list of all dog licenses in the state with the intention of using such a list for commercial purposes. She in turn asked that your request be made in writing and responded that it is Department policy to withhold such information pursuant to section 88(3)(d) of the Freedom of Information Law.

I advised Mrs. Kehrer that, under section 1401.6(a) of the regulations adopted by the Committee, a request "may be oral or in writing," and that in my opinion, a determination to disclose or deny access to the records sought is a matter of discretion that may be decided by the agency.

Section 88(3) of the Law states that an agency may act to prevent an unwarranted invasion of personal privacy, and that such an invasion includes:

> "d. the sale or release of lists of names and addresses in the possession of any agency or municipality if such lists would be used for private, commercial or fundraising purposes."

Since your intention is to use the information requested for commercial purposes, the Department of Agriculture and Markets has the authority to withhold such information in its discretion.

Moreover, during the conversation with Mrs. Kehrer, I asked whether such a list is in fact maintained by the Department of Agriculture and Markets. She replied that althought there is an individual card for each license, there has been no compilation of licenses in the form of a list. Under the Law, an agency has no duty to create a record to comply with a request. Therefore, if no list exists containing the information sought, the Department has no duty to prepare such a list or create such a record.

Finally, if you seek to appeal, you may do so to the head of the agency. If he affirms the denial, you may institute judicial proceedings.

I hope that I have been of some assistance. Should any further questions arise regarding the Freedom of Information Law, please feel free to call.

Very truly yours,

Robert J. Freeman
Deputy Counsel

RJF/sd

enc.

cc: Assemblyman Eugene Levy

Mrs. Helen Kehrer

Sent copy of law.

memo
~~Muse~~

January 9, 1975

Lou Tamson

#53

Bob Freeman

Town Clerk

Section 30 of Town Law - Powers and duties of Town Clerk

The Town Clerk of each town shall:

subdivision

(1) -have custody of all records, books, papers of the town
-attend all meetings of the town board
-keep a complete record of all proceedings at each meeting and of all propositions adopted
-enter all propositions adopted in an "ordinance book"
-act as secretary to the board of commissioners of any improvement district when such board so designates
-keep a record in his office of all proceedings of every board of commissioners of improvement districts
-file all deeds in office of county clerk in which property is located and thereafter file same in his office
-

(1-a) -enter daily in his books a record of all monies received

(2) -file certificates, oaths, papers, etc. in his office

(3) -certify to the county clerk the names, addresses, date of appointment and term of office of all appointive officers, except inspectors of election
-file the same information with the department of audit and control and state department of taxation each year by January 10

(4) -shall notify county clerk when vacancy in town office occurs
-within five days after vacancy filled, file with county clerk, audit and control and department of taxation of name and address of person filling the vacancy

subdivision

(5) -before annual meeting of board of supervisors of the county, deliver to the supervisor certified copies of all propositions adopted by the town since the last annual meeting

(6) -affix "Town Clerk's Office" near main entrance to his office

(7) -issue licenses and permits

(8) -countersignanall checks required to be signed by the supervisor, except in towns where the town comptroller has been created by the Clerk

(10) -may appoint three deputies, who shall serve without compensation unless otherwise provided by the board

(10-a) -where a town has no office of receiver of taxes and assessments, collect water rates and sewer rents unless the board has designated another employee to do so

Section 36 - Collection of Taxes by Town Clerk

subdivision

(1) -In towns where the office of tax collector or receiver of taxes has been abolished, the town clerk shall have the duty to collect and receive all state, county and town taxes and assessments

(2) -the board of supervisors of the county shall issue its warrant to the clerk for the collection of taxes in the town

fire districts

January 10, 1975

#54

Mr. Mandeville A. Frost
Law Offices
Marvin & Frost
13 Montgomery Street
Rhinebeck, New York 12572

Dear Mr. Frost:

The subject of the scope of the Freedom of Information Law in relation to volunteer fire districts has arisen on several occasions.

In my opinion, since case law holds that a volunteer fire district is a governmental entity, such districts are governed by the Law and the regulations adopted pursuant to the Law.

To elucidate more fully, I will send you a copy of a sppech that I will be presenting on January 17 before the Capital Area Fire District Association. Hopefully, its contents will answer any questions that have arisen pertaining to the Law.

Very truly yours,

Robert J. Freeman
Deputy Counsel

RJF/sd

~~enc~~.

STATE OF NEW YORK
COMMITTEE ON PUBLIC ACCESS TO RECORDS FOIL-AO-55

DEPARTMENT OF STATE, 162 WASHINGTON AVENUE, ALBANY, NEW YORK 12231
(518) 474-2518, 2791

COMMITTEE MEMBERS
ELIE ABEL - Chairman
T. ELMER BOGARDUS
MARIO M. CUOMO
PETER C. GOLDMARK, JR.
JAMES C. O'SHEA
GILBERT P. SMITH

EXECUTIVE DIRECTOR
ROBERT J. FREEMAN

January 10, 1975

Mr. Henry F. Hussing
Secretary - Treasurer
R.F.D. #3, Box 389
Hopewell Jct., New York 12533

Dear Mr. Hussing:

Your comments pertaining to the regulations adopted by the Committee are well taken.

With reference to your first point, in my opinion, records such as minutes of meetings and books of account are subject to public access. These records, although perhaps only gentially related to the business of fighting fires, are fundamental to the performance of your duties. However, there may be items included in the records which relate, for example, to social activites which bear no relation to official duties. These items, I believe, may be withheld.

In response to your second point, records dealing with possible violations of law may be considered investigatory file used for law enforcement purposes. These records, therefore, are exempt pursuant to Section 88(7) of the Freedom of Information Law.

I thank you, on behalf of Mr. Tomson for your kind invitation. In lieu of our presence at one of your meetings, I will send you a copy of a speech that I will be making on January 17 before the Capital Area Fire Districts Association. Hopefully, its contents will answer any questions that you might have.

Very truly yours,

Robert J. Freeman
Deputy Counsel

RJF/sd

PAYROLL

January 17, 1975

#56

Mr. Ron Sinzheimer
Assistant Counsel
Office of the Lieutenant Governor
The Capitol
Albany, New York

Dear Mr. Sinzheimer:

There has been some confusion regarding the requirement that a form be completed before payroll records prepared by the fiscal officer of an agency can be inspected by a member of the public.

Section 88(6) of the Freedom of Information Law provides that records should be promptly available to "any persons," and the Committee has resolved that "information accessible under the Freedom of Information Law shall be made equally accessible to any person, without regard to status or interest" (see enclosed).

When a member of the public seeks access to payroll records, "such request may be oral or in writing" pursuant to Section 1301.6(a) of the regulations adopted by the Committee. Therefore, the requirement that an application form be completed is in the discretion of the fiscal officer. However, it should be noted that the form that may be required for members of the public is different from the special form that must be completed by members of the news media pursuant to Section 88(1)(g) of the Freedom of Information Law (see enclosed forms).

I hope that I have been of some assistance. Should any further questions arise concerning the Law, please feel free to call.

Very truly yours,

Robert J. Freeman
Deputy Counsel

RJF/sd

enc.

January 21, 1975

#57

Mr. Thomas Bergin
Supervisor
Town of Carmel
Town Hall
Mahopac, New York 10541

Dear Mr. Bergin:

The Committee on Public Access to Records promulgated regulations governing access to records on October 31, 1974. As you know, these regulations have the force and effect of law.

Section 1401.8 of Committee regulations requires that, except where fees or exemptions from fees have been established by law, rule or regulation prior to September 1, 1974, the fee for copying a record shall not exceed 25 cents per page for photocopies not exceeding 8 1/2 by 14 inches.

If the dollar fee per page for official minutes of regularly scheduled Town Board Meetings, and the fee for police reports, had been established by law, rule or regulation of the Town Board prior to September 1, 1974, those fees may continue to be charged. If fees have been established by law, rule or regulation, it would be helpful to advise requesters of the law, rule, or regulation which authorizes the fee.

However, if the dollar fee for official minutes and the fee for police reports were established through administrative practice or policy and not confirmed by law, rule or regulation prior to September 1, 1974, then the Committee regulations authorizing a maximum fee of 25 cents per photocopy not exceeding 8 1/2 by 14 inches are controlling.

You may be interested to know that, of 524 counties, cities, towns and villages responding to a questionnaire mailed by the Committee on September 25, 1974, 62% charged less than 25 cents for copies of a standard 8 1/2 by 14 sheet.

Section 88(2) of the Freedom of Information Law requires each agency and municipality to make and publish regulations on public access to its records, in conformity with general rules issued by the Committee.

I am therefore enclosing a set of the Committee's regulations and model regulations governing access to records which you may find helpful.

Sincerely,

Larry Zawisza
Municipal Liaison Officer

Enclosure

lbb

January 23, 1975

#58

Mr. Gilbert P. Smith
Executive Editor
Utica Observer - Dispatch
221 Oriskany Plaza
Utica, New York 13503

Dear Mr. Smith:

Please find enclosed copies of Section 677 of the County Law and the case of Widziewicz v. Golding. I have marked the relevant portions of each.

In both instances, it is clear that coroners' records and reports are accessible only to the district attorney, except where a court orders disclosure to a party showing a substantial interest in the records.

I hope that I have been of some assistance. Should any further questions arise, I am at your service.

Very truly yours,

Robert J. Freeman
Deputy Counsel

RJF/sd

enc.

MSC.

January 27, 1975

#59

Mr. Morton G. Van Hoesen
Administrator
State Commission of Correction
A. E. Smith State Office Bldg.
P.O. Box 7034
Albany, New York 12225

Dear Mr. Van Hoesen:

Please find enclosed copies of memoranda dealing with unwarranted invasion of privacy and the amendments to the federal Freedom of Information Act.

I believe that our meeting today was both fruitful and enjoyable. Should any further questions arise, feel free to call.

Very truly yours,

Robert J. Freeman
Deputy Counsel

RJF/sd

enc.

January 29, 1975

#60

Mr. Ted Demsky
Office of the County Executive
County Center
Riverhead, New York 11901

Dear Mr. Demsky:

Section 88(1)(i) of the Freedom of Information Law provides that each agency shall make available for inspection and copying:

> "any other files, records, papers or documents required by other provision of law to be made available for public inspection and copying."

Other laws granting the public a right of access to records include the General Municipal Law (Section 51) and the Education Law (Section 2116).

To be fully aware of the kinds of records to which the public has access, one must consult Section 51 of the General Municipal Law, and Section 2116 of the Education Law, as well as the Freedom of Information Law.

Enclosed is a copy of the Freedom of Information Law, Section 51 of the General Municipal Law, Section 2116 of the Education Law, and the model regulations governing access to records.

If you have any questions, please do not hesitate to call at (518) 474-2791.

Sincerely,

Larry Zawisza
Municipal Liaison

Enclosures

lbb

February 4, 1975

#61

Mr. Alan Nucci, Secretary
Brighton Professional
Firefighters Association
P.O. Box 18083
Rochester, New York 14618

Dear Mr. Nucci:

Please accept my apologies for the delay in responding to your letter of January 10.

Under the Freedom of Information Law the definition of "municipality" includes fire districts. Therefore, it is clear that fire districts are within the scope of the Law.

Also, section 88(1)(d) of the Law provides access to "audits ...made by or for the agency." Consequently, if a fire district has in its possession records that are audits, these records should beaaccessible. If, however, there is no such record in existence, thekfire district has no obligation under this Law to prepare such a record to comply with a request.

I am enclosing a copy of the Law, the regulations adopted by the Committee, and a speech that I gave recently which deals with the duties of fire districts under the Freedom of Information Law.

I hope that I have been of some assistance. Should any further questions arise, do not hesitate to call.

Very truly yours,

Robert J. Freeman
Deputy Counsel

RJF/sd
enc.

February 4, 1975

#62

Mr. Robert Dimond
[redacted]

Dear Mr. Dimond:

Military discharge and separation papers may or may not be accessible, depending in part upon the wishes of the individuals to whom the records pertain.

First, Section 250 of the Military Law provides that a veteran may file and record a certificate of honorable discharge in the office of the county clerk.

Second, Section 79-g of the Civil Rights Law entitled, "Filing of certificates of honorable discharge with county clerks" states:

> "a. Notwithstanding the provisions of any general, special or local law to the contrary, any person filing a certificate of honorable discharge in the office of a county clerk shall have the right to direct the county clerk to keep such certificate sealed.
>
> b. Thereafter, such certificate shall be made available to the veteran, a duly authorized agent or representative of the estate of a deceased veteran but shall not be available for public inspection."

Presumably, if a veteran chooses not to direct the county clerk to seal records pertaining to him, the records may be accessible. However, in the opinion of the Attorney General [Op. Atty. Gen. (Inf.) 173, 1966], it was not envisioned that such certificates be disclosed "purely for commercial purposes." As such, in my opinion, a clerk may in his discretion deny access to the certificates, even if they are not sealed. Consequently, since you have stated that the records in question are used for commercial purposes, a decision to deny access would not be improper, and would properly be in the clerk's discretion.

Under the Freedom of Information Law, you may appeal a denial of access to the head of an agency. If he further denies access, your only recourse is in the courts.

I hope that I have been of some assistance. Should any further questions arise, do not hesitate to call.

Very truly yours,

Robert J. Freeman
Deputy Counsel

RJF/sd

cc: Office of the Attorney General
Attention: Mr. Louis Westle

COPY

STATE OF NEW YORK
DEPARTMENT OF LAW
ALBANY, N. Y. 12224

LOUIS J LEFKOWITZ
ATTORNEY GENERAL

Telephone: 474-3091

February 6, 1975

Hon. William L. Burke
County Attorney for the
County of Madison
Hamilton, New York 13346

Dear Sir:

In response to your letter of January 23, 1975, concerning section 250 of the Military Law and the new Freedom of Information Law, I am sending you a copy of a letter dated February 4, 1975, addressed to Robert Dimond, signed by Robert J. Freeman, Deputy Counsel, Committee on Pulic Access to Records.

Section 88 of the Public Officers Law established this Committee and delegated to the Committee responsibility for advising municipalities of the applicability of the statute.

I trust the Department of Law has been of assistance.

Very truly yours,

LOUIS J. LEFKOWITZ
Attorney General

By

LEWIS S. NESTLE
Deputy Assistant
Attorney General

Enclosure

FEB 7 RECD

STATE OF NEW YORK
COMMITTEE ON PUBLIC ACCESS TO RECORDS FOIL-AO-63

EMPIRE STATE PLAZA TOWER – ALBANY, NEW YORK 12223

COMMITTEE MEMBERS
[redacted]IE ABEL - Chairman
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RICHARD DUNHAM
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SAL J. PREZIOSO
GILBERT P. SMITH
ROBERT W. SWEET

EXECUTIVE DIRECTOR
LOUIS R. TOMSON

MEMORANDUM

November 18, 1974

Reference: Theodore Spatz, Counsel, Department of Audit and Control, September 30, 1974

(1) To answer your question, three issues should be considered:

a. what records are included within Section 88(1)(a);
b. what constitutes a "final opinion";
c. what constitutes an "adjudicated case"?

(a) Section 88(1)(a) provides that agencies and municipalities shall make available for public inspection and copying

> "final opinions, including concurring and dissenting opinions, as well as orders, made in the adjudication of cases..."

It is well settled in New York that, where legislative intent is uncertain, ordinary rules of grammar will be applied to interpret a statute (Universal Oil Products Co., v. Shell Development Co., 301 NY 649; 96 NYS 2d 486; 93 N.E. 922; 1950; 82 Corpus Juris Secundum 682). When the rule is applied to Section 88(1)(a), paying special attention to the placement of the commas, the following types of decisions fall within its scope: a) final opinions made in the adjudication of cases; b) concurring opinions made in the adjudication of cases; c) dissenting opinions made in the adjudication of cases; and d) orders made in the adjudication of cases.

Thus, Section 88(1)(a) is directed only toward the judicial and quasi-judicial functions of those governmental agencies described in Section 87(1).

The remaining portions of Section 88(1) require disclosure of other classes of documents, with carefully stated exceptions. No other part of Section 88(1) refers to judicial and quasi-judicial decisions, and under the rules of construction, no other section would affect such records (McKinney's Statutes Section 240, 82 Corpus Juris Secundum 666; Deth v. Castimore, 245 App. Div. 156, 281 NYS 114, 135).

Related to Section 88(1)(a) is Section 88(1)(h), which provides access to

> "final determinations and dissenting opinions of members of the governing body, if any, of the agency..."

Section 88(1)(a) deals with opinions made in the adjudication of cases, such as those made by a hearing officer or by another duly authorized official or body. Section 88(1)(h) provides for access to records of any determination made by the governing body of an agency.

(b) For purposes of §88(1)(a), what constitutes an "adjudicated case"?

The word "final" is both an ordinary word with a common usage and a term of legal art with a precise meaning.

Webster's Standard New World Dictionary defines "final" as "last, conclusive, definitive." In contrast, Black's Law Dictionary (pg. 757) says that "final" means: "not interlocutory" (Johnson v. New York, 48 Hun. 620, 1 NYS 254, 1888). Bouvier's Law Dictionary (pg. 1220) defines "final" as "something which puts an end to the immediate proceedings; that which determines a substantive or adjective point or matter." This approach has been followed by the New York courts (In Re Bailey, 291 NY 534, 40 NYS 2d 746, 50 N.E. 2d 653, 1943).

In general, words used in a statute are to be given their usual and commonly understood meaning, unless it is plain from the statute that a different meaning is intended (82 Corpus Juris Secundum 639, In Re Winter's Will, 277 App. Div. 24, 98 NYS 2d 312, 1950). One indication of intent to employ a different meaning is the use of a word with a well established technical meaning. In such circumstances, the meaning of the word which gives effect to the manifest intention of the legislature and which avoids unreasonable results should be used (Application of Carns, 181 Misc. 1047, 43 NYS 2d 497, 1943, McKinney's Statutes §233).

In this instance, using the common and ordinary meaning of "final" would produce an unreasonable result. A simple example illustrates this conclusion. Many state and municipal agencies which have judicial and quasi-judicial powers use multi-level administrative procedures. The common meaning of "final" in this context would deny access to all opinions and orders except those made in connection with the highest agency determination contrary to common agency practice. In addition, Section 88(10) expressly intends to preserve existing rights of access. Clearly, the use of the common meaning of "final" would produce an unreasonable result.

If the legal definition of "final" is used, a much more sensible result is produced. Usage of this definition allows access to opinions and orders made at each stage of the adjudicatory process. Clearly this is the meaning contemplated by the legislature. To construe the language in any other way would frustrate the overall purpose of the Freedom of Information Law.

(c) For purposes of Section 88(1)(a), what constitutes an "adjudicated case"?

Although a term of legal art, "adjudication" has no precise definition. Adjudicatory power is the power to determine the rights, duties, and obligations of specific individuals, either alone or as members of a specific class. In contrast, rulemaking powers involve decisions or determinations in the broadest sense, concerning persons generally rather than as specific individuals or members of a specific class (1 New York Jurisprudence 399).

Courts have customarily sub-divided adjudicatory powers into two categories - judicial (New York State Guernsey Breeders' Co-op. v. Noyes, 284 NY 197, 22 NYS 2d 132, 30 N.E. 2d 471, 1940) and quasi-judicial (Kopec v. Buffalo Break Beam-Acme Steel & Malleable Iron Works, 304 NY 65, 156 NYS 2d 829, 106 N.E. 2d 12, 1956). The differences between the two categories are technical and indistinct; to distinguish between the two for purposes of Section 88(1)(a) would serve no function.

Procedures effected pursuant to the exercise of adjudicatory power in judicial and quasi-judicial proceedings are characterized by requirements of due process (1 New York Jurisprudence 404) and judicial review of decisions, whether or not they are contemplated by statute (1 New York Jurisprudence 407).

Section 85 of the Law declares that the public should have unimpaired access to government records; therefore to give full effect to the intent of the legislature "adjudication" as used in 88(1)(a) should be interpreted to provide maximum access to records, including records of both judicial and quasi-judicial proceedings involving individuals, either alone or as members of a specific class. This result is consistent with case law and the rules of statutory construction (McKinney's Statutes Section 92, 92 Corpus Juris Secundum 593, Guardian Life Insurance of America v. Chapman, 302 NY 226, 97 N.E. 2d 877, 1955).

(2) Section 88(1)(b) of the Law provides that statements of policy and interpretations adopted by the agency including certain underlying materials are available for public inspection.

There is no New York case, but federal courts have dealt with the issue. Cuneo v. Schlesinger (484 F. 2d 1056 [D.C. Cir. 1973]; cert.den., ____ U.S. ____) is pertinent. A subordinate agency of the Defense Department known as the Defense Contract Audit Agency (DCAA) audits all defense contracts in accordance with the DCAA audit manual to determine whether contractors are performing pursuant to the Armed Services Procurement Regulations. At first, Cuneo sought inspection of the entire manual, but on oral argument before the circuit court the request was narrowed to include only so-called "secret law." In remanding the case to the district court to determine if any portions of the Manual were accessible, the court said (at pg. 1090):

> "There does not appear to be any disagreement between the parties regarding what the nature of

> the "secret law" being sought actually is. The portions sought by appellant, which the Government agrees should be made available if they actually exist, are those which either create or determine the extent of the substantive rights and liabilities of a person affected by those portions. Information which falls within this definition would include, for example, guidelines for what costs would be allowed under ASPR, and rules or interpretations dealing with other substantive laws."

Although the effect of Cuneo cannot be adequately measured as yet, its broad definition of "statements of policy and interpretations" in terms of their effect on a person's substantive rights and liabilities is consistent policy of maximum access adopted by the federal courts and the Committee on Public Access to Records.

In Tax Analysts and Advocates v. I.R.S. (362 F. Supp. 1298 [1973]), plaintiffs sought unpublished letter rulings, technical advice memoranda, and communications and indices relating thereto. A letter ruling is a written statement issued to a specific taxpayer by the Office of Assistant Commissioner in which interpretations of the tax laws are made and applied to a specific set of facts. A taxpayer may rely on such a statement only if it is issued specifically to him. A technical advice memorandum is similar to a letter ruling, but it is issued directly to a district director of the IRS. The taxpayer involved receives a copy of only the substantive portion of the memorandum. These letter rulings and memoranda are divided by the IRS into two separate files, a "historical" file for those which relate to only one taxpayer and a "reference" file for those which are kept for use in future determinations. The IRS argued that the words "interpretation...adopted by the agency" meant "precedent," thereby excluding those rulings and memoranda which the agency had no intention of employing in future cases. In rejecting this argument, the court said (at p. 1301):

> "Policy and interpretations adopted by the agency are to be disclosed. There is no basis in the statutory language to support Defendant's contention that this means only interpretations which will be cited and relied upon by the agency in the future. The statutory language is not so limited. All interpretations are to be disclosed. The court finds no ambiguities in the words "adopted by the agency." The ordinary meaning of these words reaches any interpretation issued by the agency or its delegates acting within the scope of their authority...It matters not that the interpretation is never again cited or relied upon by the agency or anyone else, for this cannot obliterate the fact that the interpretation was once adopted by the agency and thereby came within the express terms of the Freedom of Information Act."

Sterling Drug Inc. v. FTC (450 F 2d 698 [D.C. Cir. 1971]) involved an alleged violation of the Clayton Antitrust Act. Plaintiff sought to inspect various records pertaining to defendant's settlement of a similar case. In remanding to determine whether any of the requested records prepared or issued by the Commission were final orders, opinions or interpretations within the statute, the court stated (at p. 708):

> "These are not the ideas and theories which go into the making of the law, they are the law itself, and as such should be made available to the public. Thus, to prevent the development of secret law within the Commission, we must require it to disclose orders and interpretations which it actually applies in cases before it."

In a concurring and dissenting opinion, Chief Judge Bazelon said (at p. 714):

> "...I insist that the Act does require disclosure where the memoranda reveal opinions or policy statements which provided the basis for the administrative action in question...If these memoranda were in fact treated as having been adopted by the agency...the statute would clearly require disclosure even though the documents were never referred to in other Commission memoranda. Indeed the court recognizes that a particular document must be disclosed if it was adopted by the Commission, regardless of how that adoption is indicated."

In all three cases, by broadly defining "interpretations adopted by an agency" courts have included all interpretations of law adopted by an agency regardless of how many times they are applied, in what form they appear, or how they are adopted.

In light of federal case law and the legislative intent of the New York statute, construing "statements of policy and interpretations adopted by the agency" to include only the general "Directive Principles of Department Policy," contained in the Audit and Control General Administration Manual, is overly narrow. "Statements of policy and interpretations adopted by the agency" should be interpreted more broadly, granting access to records which contain "secret law" that is relied upon by agencies in dealing with members of the public. If this "secret law" may be used by an agency in its treatment of the public, the public should in effect be put on notice of its existence by providing an opportunity for access.

(3) Section 88(1)(e) of the Freedom of Information Law provides that "administrative staff manuals and instruction to the staff that affect members of the public" shall be made available for public inspection.

Are some administrative staff manuals, such as the Department of Audit and Control's auditing manuals, which do not directly affect members of the public unavailable?

Would effectiveness of these auditing manuals and the procedures they describe be destroyed if they are made available?

The New York courts have never considered this issue, but the federal courts have done so in construing a similar provision in the federal Freedom of Information Act (5 U.S.C.A. Section 552 [a][2][C][1967]). In Cuneo v. Laird, supra, the court held that:

> "To require the Government to make public to Defense Contractors the non-public portions of the Contract Audit Manual would be comparable to requiring one football team to give its "play-book" to the opposing team before the game.
>
> With the knowledge of the procedure set forth in the non-public part of the Manual a defense contractor, whose complete honesty left something to be desired, could claim unallowable costs in areas likely to receive little attention, remove supporting data of a damaging nature in areas subject to scrutiny and, otherwise, take steps that might well result in bilking the Government, and hence the taxpayers, of hundreds of millions of dollars on Defense Contracts."

The opinion expressed by the court has not been shared by the judges in two other major cases, Stokes v. Brennan (476 F. 2d 699 [5th Cir. 1973]) and Hawkes v. Internal Revenue Service (467 F. 2d 787 [6th Cir. 1972]). In Stokes, plaintiffs sought Occupational Safety and Health Act training manuals used to instruct O.S.H.A. compliance inspectors. In Hawkes, plaintiff had been indicted for tax fraud, and in a separate civil action, he sought certain documents under the Freedom of Information Act, including copies of documents pertaining to an audit of his tax returns and specified portions of the Internal Revenue Manual relating to the examination of returns, interrogation of taxpayers by agents of the Service and other materials which he felt would be useful in preparing a defense.

In each case, the court compared the two legislative reports describing the purpose of the applicable section. The House Report No. 1497 states (at p. 7-8):

> "[A]n agency may not be required to make available those portions of its staff manuals and instructions which set forth criteria or guidelines for the staff in auditing or inspection procedures, or in the selection and handling of cases, such as operational tactics, allowable tolerances, or criteria for defense, prosecution, or settlement of cases."

The Senate Report No. 813 states (at p. 2):

> "The limitation of the staff manuals and instructions affecting the public which must be made available to the public to those which pertain to administrative matters rather than to law enforcement matters protects the traditional confidential nature of instructions to Government personnel prosecuting violations of law in court, while permitting a public examination of the basis for administrative action."

The courts in both Stokes and Hawkes adopted the Senate interpretation and essentially concurred in their findings. In Hawkes, the court said (at p. 795):

> "It was obviously not the purpose of the Information Act to exclude from compulsory disclosure all material which might eventually affect the law enforcement process. Rather, it would seem logical to assume that the intent of the limit on (a)(2)(C) was to bar disclosure of information which, if known to the public, would significantly impede the enforcement process (emphasis added).
>
> Law enforcement is the process by which a society secures compliance with its duly adopted rules. Enforcement is adversely affected only when information is made available which allows persons simultaneously to violate the law and avoid detection. Information which merely enables an individual to conform his actions to an agency's understanding of the law applied by that agency does not impede law enforcement and is not excluded from compulsory disclosure under (a)(2)(C) (emphasis added)."

In Stokes, the court said (at p. 702):

> "Secrecy can be justified in such a case as the one at bar only to the extent that it protects policies governing enforcement methods which, if disclosed, would tend to defeat the purpose of inducing maximum voluntary compliance by revealing classes or types of violations which must be left undetected or unremedied because of limited resources."

The opinion in Tax Analysts, discussed previously, is also consistent with the thrust of the Senate Report. Furthermore, it appears that auditing manuals in question are comparable in many respects to the letter rulings and technical advice memoranda described in Tax Analysts. If the state courts interpret the new law consistently with the federal courts' interpretation of the federal act, it is probable that the manuals, or portions of them, will be accessible to the public as statements of policy.

The weight of federal case law in this area favors disclosure of the materials in question.

(4) Section 88(6) requires agencies to honor requests only to produce identifiable records. May an agency deny access to records because a person seeking access is unable to identify a record sufficiently for the agency to act?

Secondly, must an agency comply with requests for an unmanageable block of records such as all contracts or vouchers of a particular year or years held by an agency? May an agency properly limit access by precluding persons from combing through masses of unrelated records?

(a) Section 88(6) of the Freedom of Information Law provides for prompt access to records upon receipt of a "request for identifiable records made in accordance with the published rules..." In addition, Section 1401.6(d) of the regulations of the Committee on Public Access to Records states:

> "So that agency and municipal personnel can locate records within a reasonable period of time, a request for access to records should be sufficiently detailed to identify the records. Where possible, the requester should supply information regarding dates, titles, file designations or other information which may help identify the records."

If the person seeking disclosure does not know the precise contents of the records sought and has limited ability to describe the records with any high degree of particularity, it is incumbent upon agencies to provide assistance and information concerning the location and identification of records (Vaughn v. Rosen, 484 F. 2d 820, CA DC, 1973).

New York has recognized the difficulties which a requester faces and has given the agencies numerous responsibilities for furnishing assistance. Section 88(4) provides that each agency shall create and maintain a current, reasonably detailed, subject matter list of its records. This requirement is elaborated in Section 1401.6(c) of the regulations, which sets standards for updating the list and for the degree of detail which the list should have. Other sections of the statute and regulations provide additional help for the requester, regarding hours, locations, and the personnel to assist him.

Section 1401.6(c) specifies that the subject matter list "shall be sufficiently detailed to permit the requester to identify the file category of the records sought." Section 1401.6(e) provides that "a request for any or all records falling within a specific category shall conform to the standard that records be identifiable." Also, Section 1401.2(b)(2) requires that agency personnel "assist the requester in identifying requested records, if necessary." Taken as a whole, the statute and regulations attempt to give the requester as much help as possible in meeting the requirement that a request be identifiable. Presumably, with the assistance described, the request will become as specific and identifiable as possible.

Prior to passage of the Freedom of Information Law, a request had to conform to the "reasonable" regulations and rules of the officer having custody of the records. What was "reasonable" was a matter of interpretation in light of all circumstances and objectives to be achieved (Chambers v. Kent, 201 NYS 2d 439, Sup. Ct., Special Term, Nassau County, 1960). Generally, a regulation concerning requests for access to records was "reasonable" if it did not result in undue hardship on the public official (Sears Roebuck & Co. v. Hoyt, 202 Misc. 43, 107 orderly function of the office (Sorley v. Lister, 33 Misc., 2d 471, 218 NYS 2d 215, Sup. Ct., Special Term, Nassau County, 1961). The standards formulated by these cases are vague, were created before the enactment of the Freedom of Information Law, and are no longer relevant because of the radically altered statutory scheme of the new Law.

The Federal Courts have had the opportunity to consider what constitutes an "identifiable" record. Like the New York law, the Federal Act requires that a request must be for "identifiable" records [Section 552(a)(3)]. It also requires that all governmental agencies make and maintain a current subject matter index providing identifying information to the public listing records created after the effective date of the Act.

In Bristol-Myers Company v. FTC (CA DC, 1970, 424 F 2d 935), Chief Judge Bazelon stated that the statute requires a reasonable description which would enable a government employee to locate a requested record without undue hardship. The decision also held that an agency could not require a so strict degree of particularity as to result in withholding of records.

Numerous Federal cases since 1970 have clarified the policy embodied in the Bristol-Myers decision. The Circuit Court of Appeals for the District of Columbia held that the Federal Freedom of Information Act did not require that a person requesting records supply the agency with a complete and specific description. Part of the responsibility for identifying records is on the agency and the requester need only provide sufficient information to permit the agency to accomplish this duty (National Cable Television Association, Inc. v. FCC, 479 F 2d 183, CA DC, 1973).

Chief Judge Bazelon, speaking for the court offered some general guidelines regarding the issue of identifiability:

> "Once a request has been made as specific as an agency's public statements permit: (1) if the agency has previously identified the class or category of documents in the normal course of its affairs, it must produce them in response to any request phrased in terms of that class or category,

> and (2) if the agency has never segregated that class or category, production may be required where the agency may be able to identify that material with reasonable effort" [National Cable Television Association, Inc., supra].

This statement represents the most recent and direct opinion concerning request for records. Due to the similarity of the two statutes, it is probable that the opinion will be of substantial precedential value.

If a requester cannot meet the standards, an agency may properly deny his request. The requester may then utilize the appeal processes of Section 88(8) of the Law and Section 1401.7 of the regulations.

(b) May an agency limit access where the applicant's request encompasses a very large group or block of records?

New York courts have held that inconvenience is not so detrimental to the government as to preclude access (New York Post v. Moses, 12 A.D. 2d 243, 210 NYS 2d 88, Appellate Division, First Department, 1961, Rev'd on other grounds, 10 NY 2d 199, 219 NYS 2d 7, N.E. 2d 709, 1961).

There is no provision in the Law or regulations stating that access to records shall be denied because a large number of items have been requested, even though compliance may cause hardship to the agency.

At common law, under previous access statutes, and under Section 88(2), agency officials have been authorized to promulgate rules and regulations governing procedures for granting access. However, case law holds that it is proper for an official to use his rule-making authority to prevent disruption of the orderly functioning of his office (Sears Roebuck & Co. v. Hoyt, supra). The courts have generally held that examination proceed in "orderly and chronological fashion" (Sorley v. Lister, 33 Misc. 2d 471, 218 NYS 2d 215, Sup. Ct., Special Term, Nassau County, 1961).

In addition, there is case law under the federal act holding that an agency is justified, when dealing with a request for a large quantity of records, in scrutinizing the request with greater care to limit the number of records sought without denying rights to access (Irons v. Schuyler, 465 F. 2d 608, CA DC, 1972, cert. den. 93 Sup. Ct. 682, 1973). This decision has been interpreted to permit an agency to require an applicant to identify the records he sought with a greater degree of particularity than a mere description of a broad and extensive class of documents. (Sears v. Gottschalk, 357 F. Sup. 1327, DC Va., 1973). The requirement is intended to result in submission of several smaller, more manageable requests in lieu of one large request.

Under the law, an agency may not deny a request based on the quantity of records sought, and there is no restriction which forbids "fishing expeditions."

(5) Section 88 of the Act contains nine subsections which list the categories of accessible records. Only subsection (b), which relates to statements of policy and interpretations, is modified by the words "and any documents, memoranda, data, or other materials constituting statistical or factual tabulations which led to the formulation thereof." The quoted phrase does not modify any of the other sections. According to the rules of construction,

> "It is an elementary rule...that when a definite provision is made with reference to one particular subdivision of a section of the law dealing with the identical subject matter as the other subdivisions thereof, and a similar reference is omitted from the other subdivisions thereof as well as from all the rest of the section, the particular reference is intended to apply solely to the subdivision in which it is contained and to exclude its application from all of the rest [Cannon v. Towner, 70 NYS 2d 312, 313 (1947), see also, Conklin v. Jablonski, 67 Misc. 2d 286, 324 NYS 2d 264 [Sup. Ct. Nassau Cty., 1971] and McKinney's Statutes Section 254 (McKinney 1971)].

(6) Section 88(6) also requires agencies to provide one or more transcripts of records upon request, and to make certifications with respect thereto. There are certain records of the Department, particularly audit reports, which should be read in their entirety to have a full understanding of their meaning and import. It is well known that excerpts from such reports, that have been selectively extracted, have the potential of creating a picture that is at variance with the report when considered in its totality. Because of that potential, there is the danger that a person, for whatever motivation, will intentionally make such extractions from a report and present them to others as ultimate or final conclusions of the Department complete in themselves.

(a) May an agency refuse to make copies of a portion of a document to prevent the portion from appearing out of context?

There is no provision in the Law or the regulations or judicial decision which permits denial of access or copies of records because only a portion of the record is sought.

The Committee cannot "legislate" what would be a new exemption. Even if an entire document is provided, there is no guarantee that certain of its parts would not be quoted out of context. Consequently, an agency may not refuse to produce a copy of only a portion of a record.

(b) When an agency supplies a copy of only a portion of the entire record, may the agency stamp the copy with a notice to the effect that the copy does not represent a copy of the complete original record?

Section 88(6) provides that upon request for identifiable records and payment of, or offer of payment, of allowable fees, an agency shall make one or more transcripts therefrom, and certify to the correctness thereof.

Although a copy of a document may be incomplete, it is nonetheless a true copy, and therefore should be certified. An agency may certify a copy and concurrently stamp the record with a notice that the copy does not represent the record in its entirety. Inclusion of a notice of this nature would serve the dual purpose of protecting the agency in the public eye, and protecting the public from being misled.

(7) The Law recognizes no distinction between a "primary repository" and a "secondary repository" of records, and there is no case law on the matter.

If an agency is one of two or more legal custodians of a record, it has the same duties under the Law as the other agencies. There is no provision in the Law or regulations which permits public access to records in possession of one agency to be conditioned upon approval of another agency. Each legal custodian is responsible for knowing which of its records are accessible and which are not.

There is nothing in the Law to prohibit officials of one agency from consulting with those of another. Section 1410.6(b)(2) enables an agency to delay a decision to grant or deny access. Acting pursuant to this provision, an agency could obtain from another agency the added information necessary to make a decision. Perhaps consultation would be beneficial to determine the confidentiality of a record with which one official is more familiar than another. In any case, if Audit and Control denies access to a record on the recommendation of another agency, the appeal would still be taken to the person designated by Audit and Control to hear appeals. Also, since reasonable men may differ, reasonable records access officers may also differ. Although implementation of the Law should be uniform, there is no guarantee that it is or that it will be.

(8) Telephone requests and requests by mail are not specifically considered in either the Law or the regulations. Similarly, there is no statement regarding on site inspection or copying of records. Nevertheless, it is clear that agencies and municipalities are not at complete liberty to formulate the policies and procedures regarding these kinds of requests.

Section 88(10) of the Law and 1401.6(a) of the regulations preserve all rights of access that existed prior to enactment of the Freedom of Information Law. Therefore, where requests had been accepted by mail or phone prior to September 1, 1974, agencies should continue to accept these requests to comply with the spirit of the Law.

This is consistent with Section 1401.6(a) of the regulations which prescribes that a request may be oral or in writing. There is no requirement that requests be made in person, and to require on site requests only would violate the spirit of the Law.

With regard to inspection of records, a different conclusion is reached. Case law holds that any inspection of documents must be made in the offices of an agency, because the public official responsible for maintaining the records is not permitted to surrender them from his custody [Sorley v. Lister, 33 Misc. 2d 471, 218 NYS 2d 215 (1961)].

This restriction should not apply to requests for copies of specified records made by mail or telephone. The custody of the records is never threatened, and an agency should comply with these kinds of requests.

(9) The Freedom of Information Law makes no provision relating to the length of time records must be kept, but other statutes may govern the length of time that records must be preserved (See Section 44(2) of Executive Law). Requests for records which still exist must be honored regardless of the age or utility of the records.

The Law makes no distinction between a member of the public interested in current government practices, a historian, or even a person motivated merely by curiosity, and all should be given equal access to records.

Insurance Contract
"Audit"

February 4, 1975

#64

Mr. Robert Gollnick, President
New York State Professional
Fire Fighters Association, Inc.
Executive Office
1 Columbia Place
Albany, New York 12207

Dear Mr. Gollnick:

First, I would like to apologize for the delay in responding to your letter of January 8, 1975.

The Insurance Service Organization contracts with insurance companies and has no contact with the State Insurance Department. Nevertheless, the surveys that you are seeking may be accessible if they are in the possession of municipalities.

As I stated in our conversation, the surveys in question are probably in the nature of an audit. "Audit" may be defined not only as a financial review, but also as any examination in general. As you know, audits are accessible under the Freedom of Information Law.

If it is argued that the surveys are not audits, they may be accessible via a different route. The Freedom of Information Law preserves all existing rights of access granted under existing law. Specifically, Section 51 of the General Municipal Law grants access to

> "All books of minutes, entry or account, and the books, bills, vouchers, checks, contracts or other papers connected with or used or filed in the office,of, or with any officer, board or commission acting for or on behalf of any county, town, village or municipal corporation in this state which possesses the power to levy taxes..."

This statute grants access to any taxpayer or registered voter. However, the Freedom of Information Law expands this right of access to "any person."

Consequently, if the surveys are in the possession of or used by any unit of local government, they may be accessible.

I hope that I have been of some assistance. Should any further questions arise, feel free to call.

Very truly yours,

Robert J. Freeman
Deputy Counsel

RJF/sd

"AGENCY"

February 4, 1975

#65

Mr. Isidore Allen Hanover
[redacted]

Dear Mr. Hanover:

I regret that I can only reaffirm what Mr. Tomson stated in his letter to you of December 3, 1974.

There is little question that the New York City Off-Track Betting Corporation falls within the scope of the Freedom of Information Law. The Law defines "agency" as

> "any state or municipal board, bureau, commission, council, department, public authority, public corporation, division, office or other governmental entity performing a governmental or proprietary function for the state of New York or one or more municipalities therein."

Assuredly, OTB performs a governmental function.

In my opinion, you should appeal to the head of the agency, or the person designated by him, who must inform you of his decision in writing within seven business days of receipt of your appeal (see enclosed a copy of the regulations adopted by the Committee which have the force and effect of law throughout the State).

If you are denied access to the records sought on appeal, your only recourse is the initiation of a judicial proceeding.

I hope that I have been of some assistance. Should any further questions arise, please write again.

Very truly yours,

Robert J. Freeman
Deputy Counsel

RJF/sd

RE: ACCESS TO TEACHERS' NAMES AND ADDRESSES (A LIST)

PRIVACY

February 4, 1975

#64

Mr. Robert B. Loew
Behrens and Loew
Attorneys-at-Law
P.O. Box 698
Melville, New York 11746

Dear Mr. Loew:

I would like to apologize for the delay in responding to your letter of January 16.

There are several issues involved regarding the question of access to a list of teachers' names and addresses. First, the Freedom of Information Law provides access only to existing records. Therefore, if the school district has compiled no such list, there is no obligation under the Law to do so to comply with a request.

However, if the district has compiled such a list, it may be accessible pursuant to section 88(1)(d) of the Law, which provides access to factual tabulations and section 88(1)(i), which preserves rights of access to records under any existing law. In the case of a school district, section 2116 of the Education Law is applicable. It provides that all records belonging or appertaining to a school district are accessible to qualified voters of the district. The Freedom of Information Law expands this right of access to "any person," and not only to qualified voters of the district.

With regard to Section 88(3)(d) of the Law, release of such a list may be considered an unwarranted invasion of personal privacy. However, the utility of this provision is limited to consideration of your inquiry. Payroll information, which includes employees' names, addresses, titles and salaries, is specifically accesssible under 88(1)(g) of the Law. Moreover, the Committee has resolved that this information is accessible to any person. The reference to the news media is included in the Law to eliminate barriers that previously operated to deny access, such as the prerequisite in section 2116 of the Education Law that access to records need only be granted to qualified voters of the district. Furthermore, section 88(1)(g) reflects the idealthat some invasions of personal privacy may not be "unwarranted.

Consequently, any person, without regard to status or interest, has a right of access to payroll records. Presumably, payroll records contain information similar to that in the requested list. However, in providing access to payroll information, the Law is silent as to which address, home or business, should be included. In my opinion, in disclosing this information, you may in your discretion include either the home or business address. By including the business address, some of the privacy objections might be overcome.

I have also contacted the Public Employees Relations Board in relation to your inquiry. The Fair Employment Act (also known as the Taylor Law) does not deal with the issue.

I hope that I have been of some assistance. Should any further questions arise, please feel free to call.

Very truly yours,

Robert J. Freeman
Deputy Counsel

RJF/sd

February 10, 1975

#67

Ransom Pratt
Law Offices
403-4 First National
Bank Building
Corning, New York 14830

I apologize for the delay in responding to your letter of January 6.

The Committee has promulgated regulations pursuant to its authority under section 88(9)(a)(ii) of the Freedom of Information Law. The regulations became effective on November 29, 1974, and they have the force and effect of Law with regard to every unit of government in the state.

With reference to fees, section 1401.8 of the regulations (see enclosed) states that the fee permitted to be charged under the regulations shall govern

> "[E]xcept where fees or exemptions from fees have been established by law, rule or regulation prior to September 1, 1974..."

Consequently, the fee provisions of the regulations are applicable to units of government which had not officially established fees by law, rule or regulation before September 1, 1974.

Section 66 of the Public Officers Law, which was repealed by enactment of the Freedom of Information Law, enabled public officers to charge "at the rate allowed to a county clerk for a similar service" if no fees were expressly allowed by Law.

However, since section 66 has been repealed, in my opinion, if a public officer had not charged pursuant to law, rule or regulation, he may no longer charge at the rate allowed by the county clerk; he must now charge a fee consistent with the Committee's regulations.

With regard to court records, in many instances, fees have been provided by Law (see e.g. section 8021 of the CPLR) or by the rules of the appellate division.

I hope that I have been of some assistance. Should any further questions arise, please feel free to call me.

Very truly yours,

Robert J. Freeman
Deputy Counsel

RJF/sd

enc.

February 10, 1975

#68

Mrs. Audrey Warne
[redacted]

Dear Mrs. Warne:

I apologize for the delay in responding to your letter.

With regard to your question, the Freedom of Information Law does not require that offers made by a public employer during the course of collective negotiations be disclosed to the public before the conclusion of bargaining. Several New York cases have held that documents pertaining to transactions which are "substantially inchoate or incomplete" may be withheld from public scrutiny on the ground that premature disclosure might be harmful to the public interest (Cf. Sorley v. Clerk et al. of the Incorporated Village of Rockville Centre, 30 App. Div. 2d 822, 292 NYS 2d 575, 1968, Smith v. Elliott, 61 Misc. 2d 163, 305 NYS 2d 94, 1969). Collective bargaining, the process of arriving at a final labor contract, is clearly an "inchoate and incpmplete" transaction, and premature disclosure might harm the public interest by disrupting the normal course of negotiations.

In addition, the Court of Appeals, the state's highest court, recently held that certain documents need not be disclosed due to a "public interest" privilege of nondisclosure (Cirale v. 80 Pine Street Corp., 35 NY 2d 113, 359 NYS 2d 1). It would be appropriate to invoke this principle in relation to records which if disclosed might impair the functions of government or prove detrimental to the public interest. Discovery of offers during negotiations might restrict a public employer's capacity to carry out its labor relations functions. Therefore, this principle could be applicable.

Moreover, the Freedom of Information Law grants access to existing records. If bargaining is conducted orally, and there is no written record created, a unit of government has no duty to create a record to comply with a request. Since I am not familiar with the details of the negotiations I can only conjecture that they are being conducted partly with written documentation, and partly orally.

I hope that I have been of some assistance. Should any further questions arise, please feel free to call.

Very truly yours,

Robert J. Freeman
Deputy Counsel

RJF/sd

POLICE BLOTTERS/
BOOKING RECORDS

February 10, 1975

#169

Mr. Lewis P. Fons
Editor & Publisher
The Patriot
51 East State Street
Wellsville, New York 14895

Dear Mr. Fons:

I apologize for the delay in responding to your letter of January 10, 1975.

With regard to your inquiry, as you are aware, the Freedom of Information Law provides access to police blotters and booking records. In my opinion, arguably the complaint forms to which you have referred may also be accessible.

In addition to the categories of records which are specifically accessible, the Law preserves all rights of access granted by existing law, both statutory and decisional. One such preexisting statute is section 51 of the General Municipal Law, which grants access to

> "[A]ll books of minutes, entry or account, and the books, bills, vouchers, checkes contracts or other papers connected with or used or filed in the office of, or with any office, board or commission acting for or on behalf of any county, town, village or municipal corporation in this state or any body corporate or other unit of local government in this state which has the power to levy taxes..."

Since the Freedom of Information Law preserves existing rights of access under section 51, presumably all papers "connected with or used or filed" in the office of a local police department should be accessible unless they are exempt from disclosure.

With reference to exemptions, the Law does not apply to information that is specifically exempt from disclosure by statute, nor does it apply to records that are "part of investigatory files compiled for law enforcement purposes." Consequently, all papers in possession of a police department should be accessible unless they are exempt by other law or used in an investigation.

Objections to disclosure based on invasions of privacy may be overcome. When a unit of government makes records public, it may in its discretion "delete identifying details" which if disclosed might constitute an "unwarranted invasion of personal privacy." For example, a complaint form might be disclosed with the identifying details deleted, such as the name of the complainant.

I hope that I have been of some assistance. Should any further questions arise, please do not hesitate to call me.

Very truly yours,

Robert J. Freeman
Deputy Counsel

RJF/sd

February 10, 1975

#70

Mr. James F. Garvey
Police Commissioner
Town of Deeppark
Box 204
Huguenot, New York 12746

Dear Commissioner Garvey:

The Freedom of Information Law does specifically provide access to two kinds of police records, police blotters and booking records. As you are aware, I am sure, a blotter is in the nature of a log or diary in which all the events reported to a police department are recorded. Booking records are the arrest records compiled by an arresting agency.

In addition, the Freedom of Information Law preserves all rights of access granted under existing laws. One such pre-existing provision is section 51 of the General Municipal Law. It provides access to:

> "All books of minutes, entry or account, and the books, bills, vouchers, checks, contracts or other papers connected with or used or filed in the office of, or with any officer, boarddor commission acting for or on behalf of any county, town, village, or municipal corporation in this state or other unit of local government which possesses the power to levy taxes..."

Under Section 51, all papers are accessible. However, the Freedom of Information Law provides an exception for law enforcement agencies. The Law does not apply to records that are exempt from disclosure by other statute and records that are "part of investigatory files compiled for law enforcement purposes."

Therefore, you may deny access to records when they are exempt under another law and when they are used for investigations.

I am enclosing for your perusal copies of the Law, regulations, model regulations and resolutions adopted by the Committee.

I hope that I have been of some assistance. Should any further questions arise, do not hesitate to call.

Very truly yours,

Robert J. Freeman
Deputy Counsel

RJF/sd

enc. (4)

PAYROLL

February 10, 1975

#71

Mr. David M. Jones
Superintendent of Schools
Sayville Public Schools
Administration Bldg.
99 Greeley Avenue
Sayville, New York 11782

Dear Mr. Jones:

I would like to apologize for the delay in responding to your letter of January 10, 1975.

With regard to your question, the Freedom of Information Law requires that payroll information, including employees' names, addresses, titles and salaries be accessible to any person. The Law, however, is silent as to which address, home or business, must be disclosed. In my opinion, in providing this information, you may in your discretion include either the home address or the business address of employees.

What constitutes an "unwarranted" invasion of personal privacy is not entirely clear. The payroll information section of the Law grants access to some personal information, the disclosure of which is considered to be "warranted." However, if in your opinion you feel that disclosure of home addresses and telephone numbers would constitute an unwarranted invasion of personal privacy, and would create disturbance or harassment, you may in your discretion disclose the employees' business address.

I hope that I have been of some assistance. Should any further questions arise, please feel free to call.

Very truly yours,

Robert J. Freeman
Deputy Counsel

February 11, 1975

#72

Thomas J. McElligott, Esq.
Law Offices
Cooper & McElligott
1637 Deer Park Avenue
Deer Park, New York 11729

Dear Mr. McElligott:

I apologize for the delay in responding to your letter of January 13, 1975.

Although the Freedom of Information Law does not specifically refer to accident reports, the Law preserves any existing right of access granted by law, either statutory or decisional. Consequently, in my opinion, your contentions have substantial merit.

Specifically, the Law preserves the right of access granted pursuant to Section 66-a of the Public Officers Law, which enables an interested person "[N]otwithstanding any inconsistent provisions of law, general, special or local" to inspect

> "all reports and records of any accident kept or maintained by the state police or by the police department or force of any county, city, town, village or other district of the state..."

Moreover, the courts have broadly construed the applicability of section 66-a.

The statutory exception permits the police to

> "withhold from inspection any reports or records the disclosure of which would interfere with the investigation or prosecution by such authorities of a crime involved in or connected with the accident."

However, as the court held in Wessberg v. Beckmann(194 NYS 205, 208):

> "By spelling out that limited exception with respect to criminal investigation or prosecution, the legislature has made clear that the mere fact that crime or its prosecution is involved, does not render reports related to an accident confidential or immune from inspection. It must appear that disclosure would interfere with the investigation or prosecution."

Specifically with regard to photographs, the case of Fox v. City of New York decided by the Appellate Division (280 NYS 2d 1001,1004) dealt solely with the question of whether photographs are considered public records under section 66-a. The court held affirmatively:

> "Whether or not the statute or the Rules and Procedures of the Police Department required that photographs be made is of little moment. The fact is, photographs have been made, which were made in the course of a statute-required investigation though their making was discretionary, and they can easily be made available for inspection or copies furnished upon payment of costs or a fee. Under the facts and circumstances of this case the photographs may be and are considered as an extension of the public records required to be kept and which should be made available pursuant to Section 66-a..."

Going one step further, the Appellate Division has held that although the accident report compiled by police may be used for purpose of litigation, it may not be privileged and be considered material prepared solely for litigation. In Romanchuk v. County of Westchester (346 NYS 2d 579), the court stated:

> "First, the material was gathered by the public police department. Logically, therefore, the material

> which comprised the police department's investigation file of the accident could not be material prepared solely for litigation as contemplated by CPLR 3101 (subd. [d])..."

and unless disclosure would interfere with investigation or prosecution,

> "even if we were to assume that the material was in fact prepared for litigation, it would still be discoverable under this provision of the Public Officers Law."

Consequently, in my opinion, Commissioner Kelley's contention that disclosure of the records sought would force the police to perform the chores of others is without merit. As stated in Fox, supra, the investigation made by the police is "statute-required."

With reference to records pertaining to juveniles and youthful offenders, the restricted use of police records relates to the "arrest and disposition" of juveniles (see Section 784 of the Family Court Act). With regard to youthful offender proceedings, the accusatory instruments must be sealed (see Section 720.15 of the (CPL).

Additionally, in a recent case in which an interested person was denied access to records, the court held that

> "To require petitioner to resort to litigation, as urged by appellants, is, in our opinion, grossly inequitable..." (Vermont Marble Co. v. Office of General Services, 349 NYS 2d 143, 145.)

This decision may be contrary to Commissioner Kelley's suggestion that you resort to the use of a subpoena to obtain the records sought.

Unfortunately, the Committee is unable to undertake any investigation in the nature of that which you have suggested. The Committee has no enforcement power, and its staff currently numbers five (I am the only attorney).

However, if I can be of assistance or if any further questions arise, please do not hesitate to call me.

Very truly yours,

ROBERT J. FREEMAN

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STATE OF NEW YORK

COMMITTEE ON PUBLIC ACCESS TO RECORDS

TOWER BUILDING
EMPIRE STATE PLAZA
ALBANY, NY 12242

February 19, 1975

#73

Mr. James G. Vazzana
Attorney at Law
5 South Fitzhugh Street
Rochester, New York 14614

Dear Mr. Vazzana:

I apologize for the delay in responding to your letter of January 22 regarding public access to records of the Surrogate's Court.

Although I can understand your misgivings concerning publication of bequests to the elderly or to people living in unsafe neighborhoods, the law clearly states that records of the Surrogate's Court must be available for public inspection and copying unless they are sealed.

Section 2501(2) of the Surrogate's Court Procedure Act requires the clerk of the Surrogate's Court "upon payment of the fees required by law" to "exemplify or certify all records and papers filed or recorded..." with the Court. Subdivision (8) of the same provision states that "[a]ll books and records other than those sealed are open to the inspection of any person at reasonable times." Further, section 2503(1) requires the recording of every will admitted to probate and the decree made thereon. Therefore, it is clear upon perusing the statutes noted that any person, including members of the news media, may inspect any record filed or recorded in the Surrogate's Court, including wills and their codicils.

Section 88(10) of the Freedom of Information Law provides that nothing in the Law shall be construed to limit or abridge any existing right of access. Since the public had a right of access to Surrogate's Court records prior to the enactment of the Freedom of Information Law, that right should be preserved to comply with the Law.

I hope that I have been of some assistance. Should any further questions arise, please feel free to call me.

Very truly yours,

Robert J. Freeman
Deputy Counsel

RJF/sd

February 19, 1975

#74

Ms. Joyce C. Mandeville
Town Clerk
Box 275
South Otselic, New York 13155

Dear Ms. Maddeville:

I apologize for the delay in responding to your letter of February 7.

The question of public access to records relating to vital statistics, such as birth, death and marriage records is not easily answered. With regard to disclosure of birth and death records, Section 4174 of the Public Health Law states that authorized persons (such as a town clerk) may

> "upon request, issue certification of birth or death unless in his judgment it does not appear to be necessary or required for a proper purpose."

Similarly, with respect to marriage records, Section 20-a of the Domestic Relations Law provides that authorized persons

> "shall, upon request, supply to any applicant a certified transcript of any marriage registered under the provisions of this article, unless he is satisfied that the same does not appear to be necessary or required for judicial or other proper purposes."

In neither of the statutes quoted above is there a definition of what is a "proper purpose."

The Freedom Of Information Law preserves rights of access granted under existing law, and the Committee has resolved that

> "information accessible under the Freedom of Information Law shall be made equally accessible to any person, without regard to status or interest."

R

Nevertheless, in my opinion, due to the language in the Public Health Law and the Domestic Relations Law, what is a proper purpose is to be determined by the individuals having custody of the records in question. Therefore, I believe that you, as town clerk, may exercise discretion in determining what is a proper purpose upon a request for the records in question.

Please find enclosed a copy of the model regulations, which should help you in performing your duties under the Freedom of Information Law.

I hope that I have been of some assistance. Should any further questions arise, please feel free to call.

Very truly yours,

Robert J. Freeman
Deputy Counsel

RJF/sd

enc.

February 20, 1975

#75

Mr. Edward J. Burns
Administrative Officer
New York State Bridge Authority
P.O. Box 590
Poughkeepsie, New York 12602

Dear Mr. Burns:

Thank you for forwarding the Authority's regulations on public access to its records. I have reviewed these regulations and find them to conform with the Committee's general regulations.

Sincerely,

Dennis M. O'Leary
State Agency
Liaison Officer

DO'L:lbb

DO'L:DJD:lbb

February 21, 1975

#76

Mr. James L. Casey
Counsel
New York State Division of
Veterans' Affairs
2 World Trade Center
34th Floor
New York, New York 10048

Dear Mr. Casey:

Thank you for submitting a copy of the Division's regulations on public access to records.

We recommend that in Section 9(c) of your regulations you state the name of the person designated to hear appeals as well as his title [21 NYCRR 1401.7(b)].

Also, please note that the Committee's regulations do not require enumeration of records "available" and "not available." The danger is that there are some records in your "available list" which may be legally denied. I suggest omitting Sections 4 and 5 from the regulations and placing them in your subject matter list.

Otherwise, your regulations are in compliance with the regulations of the Committee.

Enclosed is a copy of the Committee's general regulations.

Should you have any further questions, please call me at (518) 474-2722.

Sincerely,

Dennis M. O'Leary
State Agency Liaison
Officer

Enc

February 20, 1975

#77

Mr. David M. Malone
Town Attorney
Town of Little Falls
45 West Main Street
Little Falls, New York 13365

Dear Mr. Malone:

Thank you for forwarding a copy of regulations governing access to records of the Town of Little Falls.

We are pleased to note that your regulations are based on our model regulations and thus conform to Committee rules governing access to records.

Your effort to conform your regulations to those of the Committee is sincerely appreciated.

Sincerely,

Larry Zawisza
Municipal Liaison
Officer

LZ:lbb

P

February 20, 1975

#78

Mr. S. Ralph Marra
Supervising Principal
Frewsburg Central School District
Frewsburg, New York 14738

Dear Mr. Marra:

Thank you for forwarding a copy of regulations governing access to records of the Frewsburg Central School District.

To avoid possible public confusion, we suggest you designate either the supervising principal or the board of education, but not both, as the appeals unit. Of course, this unit or person should not be the same unit or person who denied access in the first instance.

We are pleased to note that your regulations are based on model regulations, and thus conform to Committee rules governing access to records.

Your effort to conform your regulations to those of the Committee is sincerely appreciated.

Sincerely,

Larry Zawisza
Municipal Liaison
Officer

LZ:lbb

SZ
R

February 20, 1975

#79

Mr. Stanley R. Benowitz
Staff Coordinator
New York State Temporary Commission
on the Problems of the Deaf
162 Washington Avenue
Albany, New York 12210

Dear Mr. Benowitz:

Thank you for submitting a copy of the Commission's regulations on public access to records.

The only recommendation which we feel is necessary is that you should state in Section 7(c) of your regulations the name, business address and telephone number of the persons designated to hear appeals [Committee Regulation 1401.7(b)]. Otherwise, your regulations are in compliance with the regulations of the Committee.

Enclosed is a copy of the general regulations of the Committee. Should you have any further questions, please call me at (518) 474-2722.

Sincerely,

Dennis M. O'Leary
State Agency Liaison
Officer

Enclosure

DO'L:DJD:lbb

P

February 21, 1975

#80

Mrs. Rhea M. Eckel Clark
Director
Office of the Aging
855 Central Avenue
Albany, New York 12206

Dear Mrs. Clark

Thank you for submitting a copy of the regulations on access to records of the Office of the Aging.

I am pleased to inform you that your regulations conform to the general regulations adopted by the Committee on Public Access to Records.

Sincerely,

Dennis M. O'Leary
State Agency Liaison
Officer

DMO'L:lbb

February 25, 1975

FOIL

Mr. Stuart M. Pearis
Pearis, Resseguie, Hogan and Kline
1001 Press Building
P.O. Box 1864
Binghamton, New York 13902

Dear Mr. Pearis:

Thank you for submitting the regulations governing access to records of the Town of Maine.

Town of Maine regulations must be amended to conform to those promulgated by the Committee on October 31, 1974. The enclosed copy of model regulations should indicate the differences between your regulations and Committee regulations. Some major differences are:

-- Records access officers, responsible for assuring that agency personnel facilitate access to records, should be designated by name or job title and business address. (Committee Regulations Section 1401.2)

-- A fiscal officer, who certifies the payroll and responds to requests for the names, addresses, titles and salaries of Town officers and employees, should be designated by name or job title and business address. (Committee Regulations Section 1401.3)

-- Locations where records are available for public inspection and copying should be designated. (Committee Regulations Section 1401.4)

-- Records must be produced during all hours Town offices are regularly open for business. (Committee Regulations Section 1401.5)

82

-- Where requests for records are required, they may be oral or in writing. While written requests may be required pursuant to Committee regulations, [Committee Regulations Section 1401.6(a)], failure to use a prescribed form for submitting requests is not a valid reason for denying access.

-- Appeals should be spelled out. An appeals person or persons or body should be identified by name, title, business address and business telephone number. (Committee Regulations Section 1401.7)

-- There shall be no fee for any certification pursuant to Committee Regulations. (Committee Regulations Section 1401.8)

-- A notice detailing locations where records are available for inspection and copying and identifying records access officers, fiscal officers, and appeals persons or person or body should be posted in a conspicuous location where records are kept. (Committee Regulations Section 1401.9)

Please note that there is no requirement of publishing regulations in the newspaper if notice required by Committee Regulations Section 1401.9 is posted conspicuously wherever the Town keeps its records.

Enclosed is a copy of the Committee's general regulations, and model regulations governing access to records.

If you have any questions, please do not hesitate to call at (518) 474-2791.

Sincerely,

Larry Zawisza
Municipal Liaison
Officer

Enclosure

LZ:lbb

February 25, 1975

82

Mr. Marvin W. Roechle
Director of Elementary Education
Central Administration Office
Middle Island Central School
Rocky Point - Yaphank Road
Middle Island, New York 11953

Dear Mr. Roechle:

Thank you for submitting regulations governing access to records of the Middle Island School District.

Because regulations promulgated by the Committee have the force and effect of law, Middle Island Central Schools' regulations must be amended to conform to Committee regulations. Changes which should be made include:

I. Designation of Records Access Officer

The business address of the Administrative Assistant for Business should be specified.

More than one person may be designated as Records Access Officer. The Records Access Officers should not be the only persons from whom records may be obtained. Records Access officers are responsible for assuring that all agency personnel facilitate public access to records [Committee Regulations Section 1401.2(b)]. Furthermore, the public shall not be denied access to records through agency or municipal officials who have in the past been authorized to make records or information available [Committee Regulations Section 1401.2(a)].

82 R/

II. Location

Records kept at locations other than the Central Administration Office may be made available for public inspection and copying at those locations [Committee Regulations Section 1401.4].

III. Hours for Public Information

VI. Specific Procedures to be followed for Access to Public Records

Records should be available during all hours the School District is regularly open for business [Committee Regulations Section 1401.5(a)].

Requests for records may be oral or in writing, and written requests shall not be required for records customarily available without written request.

Except under extraordinary circumstances, officials should respond to an oral or written request for records within five days of such request, or provide a written explanation of when a reply to a request will be made [Committee Regulations Section 1401.6(b)].

Denial of access must be in writing, advising the requester of his right to appeal to the Chief Executive Officer of the Board of Education of Middle Island Schools. That Official's business address and telephone should be specified in regulations. The Chief Executive Officer must respond to an appeal within seven business days of its receipt [Committee Regulations Section 1401.7].

The subject matter list of records shall be made available for public inspection and copying, shall be sufficiently detailed to permit a requester to identify the file category of the record sought, and shall be updated not less than semiannually, with the date of the most recent updating appearing on the first page [Committee Regulations Section 1401.6(c)]. To facilitate public access to records, a copy of the list may be attached to regulations governing access to records.

Enclosed is a copy of the Committee's general regulations, and model regulations governing access to records, which may assist you in amending your regulations.

If you have any questions, please do not hesitate to call me at (518) 474-2791.

Sincerely,

Larry Zawisza
Municipal Liaison Officer

Enclosures

LZ:lbb

February 27, 1975

#83

Mr. Joseph M. Ungaro
Managing Editor
Westchester Rockland Newspapers, Inc.
One Gannett Drive
White Plains, New York 10604

Dear Mr. Ungaro:

The report that you are seeking should be made available under the Freedom of Information Law. There are several provisions of the Law which are applicable.

Perhaps most important, Section 88(1)(i) of the Law preserves rights of access to any records made available under other laws. One such law is Section 51 of the General Municipal Law, which provides access to:

> "All books of minutes, entry or account, and the books, bills, vouchers, checks, contracts or other papers connected with or used or filed in the office of, or with any officer, board or commission acting for or on behalf of any county, town, village or municipal corporation in this state or any body corporate or other unit of local government in this state which possesses the power to levy taxes or benefit assessments upon real estate...(emphasis added).

Whether or not a record is used is irrelevant, sollong as it is "connected with" or "filed" in the office of a municipality, it should be accessible.

General Municipal Law makes the records noted above accessible to taxpayers and registered voters. Under the Freedom of Information Law, however, the records are accessible to any person, notwithstanding status or interest (see Resolution attached). Therefore, a person seeking access to the records enumerated by the General Municipal Law need not be a taxpayer or registered voter of the municipality.

The record sought is also accessible pursuant to Section 88(1)(d) of the Law, since it contains "statistical or factual tabulations made by or for the agency" and may be considered an audit. According to Webster's New International Unabridged Dictionary, which was cited by the state's highest court in defining "audit" (Aron v. Gilman, 309 NY 157, 167, 1955) an audit is:

> 1a: a formal or official examination and verification of books of account (as for reporting on the financial condition of a business at a given date or on the results of its operations for a given period).
>
> b: a methodical examination and review of a situation or condition (as within a business enterprise) concluding with a detailed report of findings..."

It is likely that the report in question consists of an examination of pperations or a review of a condition with a report of findings.

The Town Attorney has relied on Matter of Sorley v. Lister (33 Misc. 2d 471, 1961) to deny access to the record. In my opinion, his contention is erroneous for several reasons.

First, the records sought in Sorley related to appraisals and prices to be paid for real property for the purpose of urban renewal. In Sorley, the court stated that

> "These opinions as to value are necessary and preliminary to making an estimate of the cost of acquiring real estate involved in a particular project. They serve to provide the buying municipality or agency thereof a guide to the values of property from which it can determine the price to be paid on negotiation in lieu of condemnation" (Sorley, supra, 474-475; emphasis added).

The court limited its finding to records related to the urban renewal program. In a similar case, the Appellate Division found that urban renewal correspondence should not be disclosed "at least so long as the transactions to which they relate remain inchoate and uncompleted" (Sorley v. Village of Rockville Centre, 30 A.D. 2d 822, 1968). The facts of the current dispute are not analagous to those found in either Sorley case. Furthermore, the Appellate Division of the same Judicial Department as that in which Sorley v. Lister was decided held

that appraisal information is indeed accessible. In Sanchez v. Papontas, 32 A.D. 2d 948, 303 NYS 2d 711 (1969), whose facts are similar to those here, petitioner sought data prepared to reappraise real property prepared by a private company at the direction of the Board of Supervisors. The court held that the public policy of the State favored disclosure, and that the records in question were accessible under Section 51 of the General Municipal Law.'

In Winston v. Mangan, 338 NYS 2d 654 (1972), where the Board of Commissioners ordered that a report be made and paid out of public monies, the court held that

> "Undoubtedly, the public interest in the results of this study is high for the skating rink entailed a substantial financial outlay of public monies and taxpayers have aprofound right to know the value and result of that investment. However embarrassing or flattering the furnished study may prove to be to the Park District Administration, is not determinative or relevant. It is a public record" (Winston, supra, 660, 661; emphasis added).

The Deputy Town Attorney argues that disclosure of the report may result in litigation. Again in Winston, the court stated:

> "the Board argues that even if the roofing study is a public record, it is material prepared for litigation and therefore privileged...
>
> The court finds this argument interesting but unpersuasive. First, there was not mention of any ongoing or contemplated litigation in the Board minutes when the study was authorized, nor any mention thereof since...
>
> Second, material collected in the 'ordinary course of business' in governmental operations, 'including,perhaps eventual use in any litigation which may ensue,' as well might be a follow-up quality study of a major project about which adverse reports had been received, is not shielded from disclosure...
>
> Third, the shield from disclosure does not apply where it causes 'injustice or undue hardship...' This particular disclosure, perhaps otherwise

> closure, perhaps otherwise elicitable in substance in a lawsuit, is uniquely important to a public dispute on the merits.
>
> Fourth...[i]f indeed a record is 'public,' a definitive showing of need, to prevent its eventually reaching through public disclosure an adverse party in actual litigation, must be made before the documents may be secreted. There has been no such showing here, as would outweigh the public implicit gain of governmental openess" (Winston, supra, 661; emphasis added).

For the reasons offered above, in my opinion, the report sought is accessible under the Freedom of Information Law.

Should any further questions arise, please feel free to call me.

Very truly yours,

Robert J. Freeman
Deputy Counsel

RJF/sd

cc: Gilbert Smith

Robert B. Bianchi, Deputy Town Attorney

February 27, 1975

#84

Mr. Lloyd L. Hurst
Chairman
State Human Right Appeal Board
2 World Trade Center - 82nd Floor
New York, New York 10047

Attention: Ms. Ruby B. Yearwood
Secretary to the Appeal Board

Dear Mr. Hurst:

Thank you for submitting a copy of the Board's regulations on public access to records.

The following comments are based upon a review of the Board's regulations for conformity with the general regulations adopted by the Committee.

Section 3(a) - While written requests may be required pursuant to Committee regulations, [Committee Regulations Section 1401.6(a)], failure to use a prescribed form for submitting requests is not a valid reason for denying access

Section 7 - Committee regulation Section 1401.7(b) requires that a denial of access be in writing. The last sentence of Section 7 of the Board's regulations should state that the denial shall be in writing.

Section 8 - Committee regulation Section 1401.7(e) requires that the requester be informed of a decision on appeal in writing. The last sentence of the Board's regulation should state that the decision on appeal shall be in writing.

Enclosed please find a copy of the Committee's general regulations and model regulations governing access to records. If you have any questions regarding the above comments, please contact me at (518) 474-2722.

As requested, the original of the Board's regulations is enclosed and stamped with the date filed with this Committee. However, to be effective, a certified copy of these regulations must be filed with the Secretary of State pursuant to Executive Law Section 102.

Sincerely,

Dennis M. O'Leary
State Agency Liaison
Officer

Enclosures

DOL:lbb

February 27, 1975

#85

Mr. Donald M. Kelly
[redacted]

Dear Mr. Kelly:

Thank you very much for your letter of February 12, 1975.

Denial of access by an agency appeals person or persons or body is subject to court review in the manner provided in Article 78 of the Civil Practice Law and Rules. In reversing a denial of access, the court will order that the agency make the record available for public inspection and copying. There are no penalities specified in the Law for denial of access.

The Committee has attempted to mediate disputes between agencies and persons seeking access to records, but has no authority under the Law to act as an official appeals body. The only recourse a citizen denied access by an appeals body has is to the courts.

You may be interested to know that the Committee, recognizing that judicial proceedings are costly and relief often untimely, has recommended that the Legislature amend the appeals procedures of the Law to place the burden of defending secrecy on the agency denying access, giving docket preference to actions brought under the Law, enabling a court to inspect records in camera and allowing a court discretion to assess reasonable costs against a denying agency in cases in which a person seeking records substantially prevails.

Other than the State Comptroller's form specified in the Law [Section 88(1)(g)] which may be used by bona-fide news media representatives requesting payroll information, no other form is mandated by the Law or by the Committee regulation. While written requests may be required pursuant to Committee regulations [Com Regs Sec 1401.6(a)], failure to use a prescribed form for submitting requests is not a valid reason for denying access.

Because the Legislature failed to appropriate funds for the Committee when the law was passed, the Committee, which has had to rely on staff loaned from other state agencies, has no funding and no legislative authorization to undertake an advertising campaign. Committee staff have, however, taken advantage of every opportunity to speak to gatherings of state and municipal officials and regularly inform the press of Committee activities.

If I can be of further assistance to you, please let me know. I can be reached at (518) 474-2791.

Sincerely,

Larry Zawisza
Municipal Liaison Officer

LZ:sl

February 27, 1975

#36

Hon. Thomas J. Murphy
Member of Assembly
Legislative Office Building
Room 629
Albany, New York

Dear Assemblyman Murphy:

The issue of public access to government insurance experience data under the Freedom of Information Law is not readily answerable. However, in my opinion, access to the information sought may legally be denied.

Officials of the Department of Civil Service have argued that the experience data does not fall within any of the categories of accessible records under Section 83(1) of the Law. They have also argued that the information is exempt under Section 88(7)(b) since it was confidentially disclosed to an agency and maintained for the regulation of commercial enterprise. I do not entirely agree with either contention.

Under Section 88(1), subdivision (d) provides access to "statistical or factual tabulations made by or for an agency." The Department of Civil Service argues that the experience information was not "made by or for the agency" and is therefore not accessible. Although Blue Cross compiled the information for its own use, it was transmitted voluntarily to the Department, which presumably used the information for its own purposes. Therefore, it could be argued that the information consists of statistical or factual tabulations made partly for the agency.

Under Section 88(1)(b), the statistical or factual materials that led to the formulation of a policy are accessible. The Department contends that there is no statement of policy relating to the information. However, the information is used in establishing policy, which is reflected by the insurance contract and Section 161 of the Civil Service Law. Therefore, the information may arguably be accessible under SS(1)(b).

In both instances, the arguments favoring access are tenuous.

R.

In addition, the Department has denied the information based in part on Section 88(7)(b) of the Law, as information "confidentially disclosed to an agency and compiled and maintained for the regulation of commercial enterprise" (see letter, September 18, 1974, Harold Snyder to David Moses). It is true that the information was confidentially disclosed, but it is not compiled and maintained for the regulation of commercial enterprise. Obviously, the Department of Civil Service does not regulate the activities of insurance carriers.

Consequently, the information sought may possibly be accessible under the Freedom of Information Law. However, there is a substantial body of case law upon which the Department could rely in denying access to the information. The thrust of this body of law is reflected in a letter of February 11, 1974 from Ersa Poston, President of the Civil Service Commission to Assemblyman John G. McCarthy, chairman of the Assembly Insurance Committee.

In the letter, Mrs. Poston noted that disclosure of this information has led to "raids" on the part of local insurance carriers.

> "[T]he pattern appeared to be that if the agency's claim experience was less than the premium paid for their participation in the State's program, the insurance agent would remain interested in securing the account. If the claims experience was more than the premium, he would lose interest...Obviously if we are raided of our good experience groups and left with our poorer risks, the cost of coverage under the program to both the State and local governments to their employees will increase markedly...
>
> If we divulge experience data, we hurt the agencies remaining in our program who are sharing the inevitably high costs resulting from the selecting out of our 'best risks'."

The statement of the President of the Civil Service Commission relates to case law reflecting a governmental privilege to withhold information if its disclosure would be detrimental to the public interest.

In a recent case, Cirale v. 80 Pine Street Corp., 35 NY 2d 113 (1974), the Court of Appeals held that the privilege is properly invoked ~~et~~ by balancing the needs of society as a whole against the needs of the person seeking the information. The Court stated that

> "the balancing that is required goes to the determination of the harm to the overall public interest. Once it is shown that disclosure would be more harmful to the interests of the government than the interests of the party seeking the information, the overall public interest on balance would then be better served by non-disclosure" (Cirale, supra, 118).

The Court continued, stating that

> "Such a determination is a judicial one and requires that the governmental agency come forward and show that the public interest would indeed be jeopardized by a disclosure of the information" (Cirale, supra, 119).

Although the dispute has not yet resulted in a judicial proceeding, in my opinion, a court would find that disclosure of the information sought on balance would result in greater harm to the public interest than benefit to a single school district.

It is unfortunate that the application of the Freedom of Information Law is unclear in this instance, and I wish that I could provide a more specific answer. However, if you would like to discuss the problem more fully, Iwwould be happy to meet with you ataany time.

Sincerely yours,

Robert J. Freeman
Deputy Counsel

RJF/sd

cc: Douglas H. Coon, C.E.O.
Naylor, Freyer & Coon, Inc.
429 James Street
Syracuse, New York 13203

Harold Snyder, Esq.
Dept. of Civil Service
State Office Building Campus
Albany, New York

"Agency"

February 28, 1975

#87

Mr. Harvard Hollenberg
Chief Counsel
Temporary State Commission
to Evaluate the Drug Laws
270 Broadway, Room 1800
New York, New York 10007

Dear Mr. Hollenberg:

I apologize for the delay in responding to your letter of January 21.

There are two issues to be considered. Is the Freedom of Information Law applicable to legislative committees; and if so, to what extent?

In my opinion, the legislature and its committees are agencies as defined by the Freedom of Information Law. Under the Law, "agency" includes:

> "any governmental entity performing a governmental or proprietary function for the state of New York..."

Certainly the legislature and its committees are governmental entities performing governmental functions. As such, barring any constitutional impediment, the legislature and its committees are within the scope of the Law.

Given the fact that the Freedom of Information Law is impliedly applicable to the legislative branch, can any constitutional challenges be forwarded?

In theory, a challenge to the application of the Law to the legislative branch could be based on the argument that such application would infringe on the inherent power of the legislature, thereby offending the principle of "separation of powers." This contention would in this instance be inaccurate. "Separation of powers" means that the inherent functions and powers of one

branch of government may not be exercised by the "same hands" which control the powers of either of the other branches (Saratoga Springs v. Saratoga Gas, Electric, Light and Power Co., 191 NY 123, 83 N.E. 693, 1921).

In practice, the principle of separation of powers seeks to avoid interference with the inherent powers and functions of the three branches, i.e. the power of the executive to implement the laws as passed by the Legislature, the power of the legislature to make laws, and the power of the courts to review, interpret, and apply the laws (People v. Tremaine, 252 NY 27, 168 N.E. 817, 1929; and LaGuardia v. Smith, 288 NY 1, 41 N.E. 2d 153, 1939). The extension of the Freedom of Information Law to each branch of government does not infringe on any inherent power or function; it does not force any official to act in a particular manner in carrying out his inherent powers and duties. The Law is administrative in nature with regard to the duties of public officials; it merely makes certain documents available for inspection and copying. Therefore, application of the Law does not offend the principle of "separation of powers."

Although Article 3 of the New York Constitution, pertaining to the Legislature, and Article 6, pertaining to the Judiciary, delineate and protect the powers and functions of those two branches of government, this does not mean that the courts and legislature may not be affected by statutory enactments. The administrative "housekeeping" functions (including the compilation and maintenance of records) of both branches are extensively regulated by law. The Legislature, as empowered by the state constitution, has established and set out many of its rules and procedures in the Legislative Law, and the courts' practices are subject to regulation in the Civil Practice Law and Rules, the Judiciary Law and numerous special court acts. Even though the Constitution has vested the supervision of administrative operations of the courts in the Administrative Board of the Judicial Conference, and supervision of the practices and procedures of the legislature in each house, the Court of Appeals has held that these bodies are themselves subject to the power of the Legislature to grant or rescind reasonable limitations on the exercise of their power (Matter of Shea v. Falk, 8 NY 2d 1071, 207 NYS 2d 285, 1960). Using this principle, the Court of Appeals recently upheld the application of the Taylor Law to employees of the judicial branch (McCoy v. Helsby, 28 NY 2d 790, 270 N.E. 2d 722, 321 NYS 2d 902, 1972), even though that statute does not specifically mention the judicial branch. Therefore, each branch of government may be subject to enactments which do not specifically purport to apply to them.

Consequently, it is arguable that the Law, by implication, is applicable to the legislative branch. In construing other statutes, the courts have given such statutes similar application even though an express statement of intent was lacking (cf. McCoy and Shea, supra). In my opinion, the application of the Law to the Legislative branch is limited only to the extent that regulations promulgated under the Law may infringe upon the Legislature's constitutional authority to "determine the rules of its own proceedings" (Constitution, Article 3, Section 9).

I hope that I have been of some assistance. Should any further questions arise, please feel free to call me.

Very truly yours,

Robert J. Freeman
Deputy Counsel

RJF/sd

February 28, 1975

#88

Mr. Peter A. Bee
President
Richlea Garden Apartments
Tenant Association
1 Bradley Court
Mineola, New York 11501

Dear Mr. Bee:

Your letter to the Attorney General dated February 25, 1975, was forwarded to the Committee on Public Access to Records for response. The Committee is responsible for overseeing implementation of New York's Freedom of Information Law.

I spoke today with Mr. Charles Hogg, Records Access Officer for the New York State Division of Housing and Community Renewal about your request for copies of all relevant statistical data on which the Nassau County Rent Guidelines Board is making determinations. Mr. Hogg informs me that statistical data compiled in tables for presentation to the Board is available for public inspection and copying.

Pursuant to Section 88(1) of the Freedom of Information Law, "statistical and factual tabulations made by or for the agency" shall be made available for public inspection and copying. Therefore, statistical and factual data compiled in tables by the Division of Housing and Community Renewal must be available to the public, upon request, even if prior to actual presentation to a Rent Guideline Board. The written response you received from Mr. Robert E. Herman, State Rent Administrator, dated February 11, 1975, conflicts

FOIL

with the Freedom of Information Law insofar as it delays access to tabulated statistical data until after it is presented to the Board.

I suggest that you contact Mr. Charles Hogg, Records Access Officer for the Division of Housing and Community Renewal, to make arrangements for inspecting and copying statistical tabulations made by the Division. Mr. Hogg can be reached at (212) 488-4961.

Please feel free to contact me for any further assistance at (518) 474-2791.

Sincerely,

Dennis M. O'Leary
State Agency Liaison
Officer

DO'L:lbb

cc: Mr. Charles Hogg
Records Access Officer
NYS Division of Housing and
Community Renewal
2 World Trade Center
60th Floor
New York City, New York 10047

February 28, 1975

#89

Ms. Barbara J. Kenny
Legal Research Assistant
State Consumer Protection Board
99 Washington Avenue
Albany, New York 12210

Dear Ms. Kenny:

Thank you for submitting a copy of the Board's proposed regulations on public access to records.

The following comments are based upon a review of the proposed regulations for conformity with the general regulations adopted by the Committee.

Section 1.2 - Committee Regulation Section 1401.6(1) does not require that the subject matter list be in regulations. The list need not be in the agency regulations because updating such list will require amending the regulations [Section 1401.6(2)]. We recommend that Section 1.2 be deleted and made available as a subject matter list separate from regulations.

Section 2.1 - We recommend that the business address of General Counsel and Head Account Clerk be stated. [Sections 1401.2(a) and 1401.3(a)].

Please note that the prescribed form by the Comptroller is required of bona fide members of the news media [Freedom of Information Law Section 88(1)(g)]. We recommend that the last sentence read "Requests for such payroll information by bona fide members of the news media..."

Section 2.2 - While written requests may be required pursuant to the Committee's regulations, failure to use a prescribed form for submitting a written request is not a valid reason for denying access [Section 1401.6]. We recommend that Section 2 state that written requests which identify the records sought and have a return address should be processed immediately pursuant to Section 2.3.

Section 2.3 - We recommend the phrase "the completed form" be deleted and replaced by "a request." The present wording violates Section 1401.6.

Section 2.4 - Pursuant to Committee Regulations Section 1401.7 an appeal should be in writing. However, use of a prescribed appeal form to commence an appeal is not authorized. We recommend deletion of reference to the request and appeal form, in the third sentence of (a). Also, we recommend that requirements of Section 1401.7(d) be repeated in this sentence.

Enclosed please find a copy of the Committee's general regulations and model regulations governing access to records.

If you have any questions on these comments, please call me at 474-2722.

Sincerely,

State Agency Liaison
Officer

Enclosures

DO'L:lbb

March 4, 1975

#90

Mr. F. W. Dunham, Jr.
General Manager
Albany Port District Commission
Port of Albany
Albany, New York 12202

Dear Mr. Dunham:

Thank you for submitting a copy of the Authority's regulations governing public access to records. I am pleased to inform you that these regulations conform to the general regulations adopted by the Committee on Public Access to Records on October 31, 1974.

Sincerely,

Dennis M. O'Leary
State Agency Liaison
Officer

DO'L:lbb

March 4, 1975

#91

Mr. Donald J. Grant
District Principal
Administrative and Business Office
General Brown Central School District
Brownville, New York 13615

Dear Mr. Grant:

Thank you for submitting a copy of the District's regulations on public access to records. Based on a review of these regulations, the following changes are recommended:

1. Payroll records should be made available to any person including members of the news media (COPAR Regulation 1401.3[b]).

2. The regulations should provide that unless there are extraordinary circumstances, requests for records should be responded to within five business days and that failure to so respond would constitute a denial of access (COPAR Regulations 1401.6[b] and 1401.7[c]).

3. In addition to the records specified in the record retention and disposition schedule of the State Education Department, the subject matter list should include all records produced, filed, or first kept after September 1, 1974.

4. Requests for public access to records must be accepted and records produced during <u>all</u> hours the school district is regularly open for business.

5. Failure to use the District's prescribed form for submitting requests is not a valid reason for denying access.

10/4

6. Regulations should note that the District Principal's decision on appeal must be given in writing to the person making the appeal within seven business days of receipt of the appeal. District Principal should be identified by phone number as well as by name or job title and business address.

Enclosed are copies of the general regulations of the Committee and some model regulations. If you have any more questions, please call me at (518) 474-2722.

Very truly yours,

Dennis O'Leary
State Agency Liaison Officer

DO'L:DJD/sd

enclosures

Ms. Tillman

March 4, 1975

#92

Ms. Elizabeth F. Molnar
Clerk
Town of Louisville
Star Route
Massena, New York 13662

Dear Ms. Molnar:

Thank you for submitting a copy of the regulations governing access to records of the Town of Louisville.

We are pleased to note that, in general, your regulations conform to the legally binding Committee regulations.

There are, however, a few changes you should make to completely conform your regulations to the Committee's regulations. These include:

1. Noting that a subject matter list of Town records must be updated semi-annually, and made available for public inspection and copying.

2. Identifying the appeals body, the Town Board, by business address and business telephone number.

Your effort to conform your regulations to those of the Committee is greatly appreciated.

Sincerely,

Larry Zawisza
Municipal Liaison
Officer

LZ:lbb

March 4, 1975

#93

Ms. Norma K. Stapley
Village Clerk
Village of Avon
102 Genesee Street
Avon, New York 14414

Dear Ms. Stapley:

Thank you for submitting a copy of the Village's regulations on public access to records. Based on a review of these regulations, we find the Village to be in compliance with the Freedom of Information Law and with the regulations of the Committee.

Your effort to conform your regulations to those of the Committee is sincerely appreciated.

Very truly yours,

Larry Zawisza
Municipal Liaison Officer

LZ:DJD/sd

R

March 4, 1975

#94

Mr. Russell O. Blodgett
Administrative Assistant
to the Superintendent
Averill Park Central School District
Averill Park, New York 12018

Dear Mr. Blodgett:

Thank you for submitting a copy of regulations governing access to records of the Averill Park School District.

We are pleased to note that, with one exception, your regulations conform to Committee regulations.

The section of your regulations entitled "Requests for Public Access to Records" should note that requests for records may be oral or in writing, and written requests shall not be required for records available without written request. While written requests may be required pursuant to Committee regulations [Committee Regulations Section 1401.6(a)], failure to use a prescribed form for submitting requests is not a valid reason for denying access.

Your effort to conform your regulations to the Committee's general regulations is appreciated.

Sincerely,

Larry Zawisza
Municipal Liaison
Officer

LZ:lbb

2

March 5, 1975

#95

Ms. June B. Stalker
Town Clerk
Town of Ridgeway
406 West Avenue
Medina, New York 14103

Dear Ms. Stalker:

Thank you for submitting a copy of the Town of Ridgeway regulations governing access to records.

Some changes in your regulations should be made in order to completely conform them to Committee regulations. These include:

The Records Access Officer and the Fiscal Officer should be designated by business address as well as by job title. [Committee Regulations Sections 1401.2 and 1401.3]

If, because of extraordinary circumstances, records cannot be produced promptly (no more than five days after receipt of the request), a written explanation of the reason for the delay and an estimate of the date when a reply will be made should be furnished to the person making the request. [Committee Regulations Section 1401.6(b)]

It should be noted that, while written requests may be required pursuant to Committee Regulations Section 1401.6(a), failure to use a prescribed form for submitting requests is not a valid reason for denying access.

Regulations should set forth the procedure for appealing a denial and state the business address and business telephone number, as well as the job title of the appeals person or persons or body. Regulations should note that the appeals unit must inform the person making a request of its decision within seven business days of receipt of an appeal. [Committee Regulations Section 1401.7]

Regulations should also require a listing of records access officer, fiscal officer, appeals person or persons or body and location where records can be seen or copied to be posted everywhere records are kept. [Committee Regulations Section 1401.9]

Enclosed are a copy of Committee regulations, and model regulations governing access to records, which may assist you in amending your regulations.

If you have any questions, please do not hesitate to call at (518) 474-2791.

Sincerely,

Larry Zawisza
Municipal Liaison
Officer

Enclosures

LZ:lbb

March 5, 1975

#96

Mr. John P. Dolan
Records Access Officer
Dormitory Authority
Normanskill Boulevard
Elsmere, New York 12054

Dear Mr. Dolan:

Thank you for submitting a copy of the Dormitory Authority procedures governing access to records.

Certain changes should be made in your procedures to conform them to Committee regulations governing access to records. These include:

Committee regulations do not require listing kinds of records available in the body of regulations, although a subject matter list of records may be attached to regulations for the convenience of the public. Should you choose to list records available, however, you should list all categories of records made available by Section 88(1) of the Freedom of Information Law.

Procedures should note that requests for records may be oral or in writing, and written requests shall not be required for records customarily available without written request. While written requests may be required pursuant to Committee Regulations Section 1401.6(a), failure to use a prescribed form for submitting requests is not a valid reason for denying access.

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Procedures should also note that, except under extraordinary circumstances, officials should respond to an oral or written request for records within five days of such request, or provide a written explanation of when a reply to the request will be made. [Committee Regulations Section 1401.6(b)]

The person or persons or body established to hear appeals should be identified by business address and business telephone number as well as by name or job title. [Committee Regulations Section 1401.7] Appeals should be sent to the appeals body to avoid delay in responding to the appeal.

A listing of records access officers, fiscal officer, appeals person or persons or body and locations where records can be seen or copied should be posted everywhere records are kept. [Committee Regulations Section 1401.9]

If you have any other questions, please do not hesitate to call at (518) 474-2791.

Sincerely,

Larry Zawisza
Municipal Liaison
Officer

LZ:lbb

March 5, 1975

#97

Ms. Lucile Bailey
Town Clerk
Town of Geneseo
119 Main Street
Geneseo, New York 14454

Dear Ms. Bailey:

Thank you for submitting a copy of regulations governing access to records of the Town of Geneseo.

Certain changes in your regulations must be made to conform them to Committee regulations, which have the force and effect of law. These include:

Records Access Officers and the Fiscal Officer should be designated by business address as well as by job title [Committee Regulations, Section 1491.2, 1401.3].

Committee regulations specify that an appointment procedure to inspect and copy records must be established in agencies which do not have daily regular business hours [Committee Regulations Section 1401.5]. No appointment procedure is required of agencies which do have regular business hours, and failure to use an appointment procedure in such agencies is not a valid reason for denying access.

Regulations should state that requests for records may be oral or in writing and written requests shall not be required for records customarily available without written request [Committee Regulations Section 1401.6(a)]. While written requests may be required pursuant to Committee regulations, failure to use a prescribed form for submitting requests is not a valid reason for denying access.

Except under extraordinary circumstances, officials should be required by regulation to respond to an oral or written request for records within five days of such request, or provide a written expalnation of the delay and estimate when access or denial will be made [Committee Regulations Section 1401.6(b)].

A subject matter list of Town records, updated semi-annually, must be available for public inspection and copying [Committee Regulations Section 1401.6(c)].

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A procedure to appeal denial of access to records must be explained in regulations. Access to records may be denied in part, as well as in whole. Denial of access must be in writing. A person, persons or body, designated by business address and business telephone as well as by name or job title must be established to hear appeals. The appeals unit must inform the person making the request in writing of its decision within seven business days of receipt of the appeal [Committee Regulations Section 1401.7].

Unless established by law, rule or regulation of the Town Board prior to September 1, 1974, the fee for copying records shall not exceed twenty-five cents per page for photocopies not exceeding 8 1/2 x 14 inches. For copies larger than 8 1/2 x 14 inches, the actual copying cost, excluding fixed agency costs such as salaries, may be charged [Committee Regulations Section 1401.8

A listing of records access officer, fiscal officer, appeals person or persons or body and location where records can be seen or copied should be posted everywhere Town records are kept [Committee Regulations Section 1401.9].

Enclosed are a copy of Committee general regulations, and model regulations governing access to records, which may assist you amend your regulations. If you have any questions, please do not hesitate to call (518) 474-2791.

Sincerely,

Larry Zawisza
Municipal Liaison
Officer

LZ/sd

enc. (2)

March 5, 1975

#98

Mr. Miller D. Magley
Mayor
Village of Red Hook
24 South Broadway
Red Hook, NY 12571

Dear Mr. Magley:

Thank you for submitting a copy of regulations governing access to records of the Village of Red Hook.

Because regulations promulgated by the Committee have the force and effect of law, Village of Red Hook regulations must be amended to conform to Committee regulations. Changes which should be made include:

Records access officers should be designated by business address as well as by name or specific job title. [Committee Regulations Section 1401.2(a)]

Bona fide members of the news media may be required to use a form specified by the State Comptroller to obtain payroll information. [Freedom of Information Law Section 88(1)(9)] While written requests may be required pursuant to Committee Regulations Section 1401.6(a), failure to use a prescribed form for submitting requests is not a valid reason for denying access.

To avoid having to amend regulations every time the subject matter list is changed, the subject matter list should be separate from the body of regulations. However, the subject matter list can be stapled to the back of the regulations.

L2 R1

All agencies which have regular business hours must accept requests for access to records and produce records during all hours regularly open for business. Police and court records must be available during all daily regular business hours of those agencies. [Committee Regulations Section 1401.5]

Regulations should state that a request for records may be oral or in writing, and that written requests shall not be required for records customarily available without written request. [Committee Regulations Section 1401.6(a)] As noted above, other than the Comptroller's form for use by bona fide media representatives requesting payroll information, no other form or written request is mandated by Law or Committee regulation.

Regulations should note that, except under extraordinary circumstances, officials should respond to an oral or written request within five days of such request, or provide written notice of when a reply to the request will be made. [Committee Regulations Section 1401.6(b)]

The appeals person, persons or body should be identified by business address and business telephone number as well as by name or job title. Decisions on appeal must be provided in writing to the requester within seven business days of receipt of an appeal. [Committee Regulations Section 1401.7]

Regulations should state that unless specified by law, rule or regulation passed by the Village Board prior to September 1, 1974, no fee shall be charged for search for records. [Committee Regulations Section 1401.8]

A listing of records access officers, fiscal officer, appeals person or persons or body and location where records can be seen or copied should be posted in a conspicuous location wherever village records are kept. [Committee Regulations Section 1401.9]

I am enclosing a copy of model regulations, which may assist you in amending your regulations. If you have any questions, please do not hesitate to call at (518) 474-2791.

Sincerely,

LZ:lbb

Larry Zawisza

Enc

March 5, 1975

#99

Ms. Mildred S. Littell
Town Clerk
60 Main Street
P.O. Box 365
Warwick, New York 10990

Dear Ms. Littell:

Thank you for submitting a copy of the regulations governing public access to records of the Town of Warwick.

Certain changes in your regulations should be made to conform them to the Committee's general regulations, which have the force and effect of law. These include:

The Records Access Officer, who shall have the duty of coordinating the Town requests for public access to records, should be designated by business address and job title [Committee Regulations Section 1401.2(a)].

The fiscal officer should also be designated by business address and job title [Committee Regulations Section 1401.3(a)].

Requests for records may be oral or in writing, and written requests shall not be required for records customarily available without written request. While written requests may be required pursuant to Committee regulations, [Committee Regulations 1401.6(a)] failure to use a prescribed form for submitting requests is not a valid reason for denying access.

Except under extraordinary circumstances, officials should respond to an oral or written request for records within five days of such request, or provide a written explanation of when a reply to the request will be made [Committee Regulations Section 1401.6(b)].

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A subject matter list of Town records, updated semi-annually, must be available for public inspection and copying. [Committee Regulations Section 1401.6(c)].

While information on dates, titles, file designations or other infprmatien which may help identify records should be provided where possible, a request for any or all records falling within a specific category conforms to the standard that records be identifiable [Committee Regulations Section 1401.6(d) and (e)].

A procedure to appeal denial of access to records must be established. Access to records may be denied in part, as well as in whole. Denial of access must be in writing. A person, persons or body, designated by business address and business telephone as well as by name or job title, must be established to hear appeals. The appeals unit must inform the requester in writing of its decision within seven business days of receipt of the appeal [Committee Regulations Section 1401.7].

A listing of records access officers, fiscal officer, appeals person or persons or body and location where records can be seen and copied should be posted everywhere records are kept [Committee Regulations Section 1401.9].

Enclosed is a copy of Committee general regulations, and regulations governing access to records, which may assist you in amending your regulations.

If you have any questions, please do not hesitate to call (518) 474-2791.

Sincerely,

Larry Zawisza
Municipal Liaison
Officer

LZ/sd

enc. (2)

request for records

March 5, 1975

Mr. Owen B. Walsh
Deputy Supervisor
Office of the Supervisor
Town Hall
Oyster Bay, New York 11771

Dear Mr. Walsh:

As you have stated, in responding to requests for records, it is difficult to dray a line between inconvenience and harassment of public officials.

There are, however, two cases that have dealt tangentially with the problem. In New York Post Corp. v. Moses, 12 A.D. 2d 243, 210 NYS 2d 88, 100 (1961), the Court held that

> "Mere inconvenience resulting from inspection cannot be equated with public detriment, nor be construed as inimical to the public welfare, or against public policy."

Sorley v. Lister, 218 NYS 2d 212, 217 (1961) cited New York Post and reiterated that "mere inconvenience" is not detrimental. Nevertheless, the Court held that, pursuant to reasonable regulations citizens and taxpayers can inspect and copy records "without unduly interfering with the conduct of the business" of a government office.

Since the courts have not adopted any hard and fast rules, in my opinion, public officials will have to determine subjectively, when requests for records result in something more than "mere inconvenience."

As you requested, I am enclosing a copy of the questions posed by Counsel Spatz in his letter of September 30, 1974.

I hope that I have been of some assistance. Should any further questions arise, please feel free to contact me.

Very truly yours,

March 5, 1975

#101

Ms. Ruth Mongero
Clerk
Board of Education
Yorktown Central School District
2729 Crampond Road
Yorktown Heights, New York 10598

Dear Ms. Mongero:

Thank you for submitting a copy of the District's regulations on public access to records. Based on a review of these regulations, the following changes are recommended:

Section IV. - Payroll records should be available to any person including bona fide members of the news media as required under Sections 88(1)(g), (1)(i) and (10) of the Freedom of Information Law. [Committee Regulations Section 1401.3(b)]

Section V. - The tender of cash instead of a check or money order is not a valid reason for denying a person a copy of a record.

Section VI(A)(2). - While written requests may be required pursuant to the Committee's regulations, failure to use a prescribed form for submitting a written request is not a valid reason for denying access to records.

Section VI(A)(3). - Although the Committee's regulations do permit the use of appointment schedules for agencies and municipalities which do not have regular business hours, those agencies and municipalities which do have regular business hours should not mandate an appointment to inspect and copy a record. [Committee Regulations Section 1401.5]

Section VI(B). - Except under extraordinary circumstances, regulations should require officials to respond to oral or written requests for records within five days of such request, or provide a written explanation of when a reply to the request will be made. [Committee Regulations Section 1401.6(b)] Failure to reply within the time set out above will be considered a denial of access. [Committee Regulations Section 1401.7(c)]

Section VI(C). - If an official cannot supply a copy of a requested record within the five-day time period discussed above in the comment on Section VI(B), he or she must provide a written explanation of when the copy will be available.

The District's regulations should also provide for the posting of a public notice of rights of access pursuant to Committee Regulations Section 1401.9.

Enclosed are copies of the general regulations of the Committee and some model regulations. If you have any questions, please call me at (518) 272-2722.

Sincerely,

Dennis M. O'Leary
State Agency Liaison
Officer

Enclosures

DMO'L:DJD:lbb

denied
NAMES, ADDRESSES

March 5, 1975

#102

Mr. James Northrup
Acting Director
Office of Employee Relations
Twin Towers - 12th Floor
99 Washington Avenue
Albany, New York

Dear Mr. Northrup:

I apologize for the delay in responding to your AGENCY'S letter of January 5.

The request involves disclosure of a record containing the names and addresses of employees in a particular bargaining unit.

The Freedom of Information Law provides public access to certain existing records. If an agency does not possess or has not created a record containing the information sought, the request must be denied. Even if an agency has all of the information sought contained in a variety of records, it has no obligation to cull out the information and compile a record to comply with a request.

Therefore, unless the Office of Employee Relations has in its possession the record requested, there is no obligation to grant access to the information sought.

I hope that I have been of some assistance. Should any further questions arise, please feel free to call me.

Very truly yours,

Robert J. Freeman
Deputy Counsel

RJF/sd

R

March 6, 1975

#103

Mr. Thomas McPheeters
The Troy Publishing Co., Inc.
The Times Record
Broadway and Fifth Avenue
Troy, New York 12181

Dear Mr. McPheeters:

In your letter dated February 11, 1975, you asked whether breathalyzer test results are accessible under the Freedom of Information Law. Based upon my research, I have concluded that breathalyzer test results kept, filed or maintained in the offices of the Police Court Judge, District Attorney and the Police Chief are accessible to the public only after the case has been disposed of by dismissal or conviction, whether by guilty plea or plea bargaining to a reduced charge. However, breathalyzer test results kept, filed or maintained by a state agency, such as the State Police, are probably not accessible under the Freedom of Information Law.

I will first explain why the breathalyzer test results are accessible from municipal officers and judges. The Freedom of Information Law Section 88(1)(i) preserves the right of access to files, records, papers or documents required by any other provision of law to be made available for public inspection and copying. Therefore, the broad access provisions of General Municipal Law Section 51 and Judiciary Law Section 255 are preserved by the Freedom of Information Law.

The Section 88(7) exemptions, which can be asserted to deny a request for access to breathalyzer test results, include information that is "specifically exempted by statute," or "part of investigatory files compiled for law enforcement purposes."

The privilege established by case law rests on the Court of Appeals conclusion in Cirale v. 80 Pine Street Corporation (35 NYS 2d 113) [decided July 15, 1974] that, notwithstanding the new Freedom of Information Law, government bodies may withhold records from public disclosure provided they can prove to the courts that the public interest is better served by secrecy.

In my opinion, these exceptions do not apply to a request for breathalyzer test results after the case has been disposed of. I will deal with each exception separately.

1. Information specifically exempted by statute.

   The Legislature may enact statutes which specifically exempt records or categories of records on a statewide basis. However, my research has not revealed any statutes which specifically exempt breathalyzer test results from public inspection and copying.

2. Information that is "part of investigatory files compiled for law enforcement purposes."

   While a cursory review of this question seems to indicate that all breathalyzer test results are exempted from access under the Freedom of Information Law, a closer analysis reveals that there is a point where the breathalyzer test results are no longer compiled for law enforcement purposes.

   When the breathalyzer test is conducted, there is a clear law enforcement purpose to obtain evidence of the influence of alcohol on a motor vehicle operator involved in an accident or violating the rules of the road. This law enforcement purpose continues until the case is disposed of by dismissal, or conviction, whether by guilty plea or plea bargaining to a reduced charge.

I would be remiss, however, if I did not emphasize that the issue of serving the public interest by withholding access to records can be decided only by the courts on the merits of each case.

Breathalyzer test results in the files of the State Police or any other state agency are probably not accessible to the public because such records are not within any of the categories of records enumerated as accessible under Section 88(1) of the Freedom of Information Law. The fact that breathalyzer test results are available under the General Municipal Law and the Judiciary Law is not relevant to State Police records because the Division of the State Police is not within the scope of these laws. As a result, there may be a double standard of access to records under the Freedom of Information Law, which preserves access to records by other provisions of law without making those access provisions equally applicable to all agencies.

The Committee has submitted an amendment to the Legislature to make records equally accessible from all agencies and municipalities in the state, unless specifically exempted by statute (copy attached).

I regret that a full response to your questions on access to breathalyzer test results was not made more promptly. If you have any questions, please feel free to call me at 474-2791.

Sincerely,

Dennis M. O'Leary
State Agency Liaison
Officer

DMO'L:lbb

March 6, 1975

#104

Ms. Vanetta Gill
Village Clerk
Village of Rensselaer Falls
Rensselaer Falls, New York

Dear Ms. Gill:

Thank you for submitting a copy of regulations governing access to records of the Village of Rensselaer Falls.

Certain changes should be made in your regulations to conform them to the Committee's regulations. These include:

A fiscal officer should be designated in your regulations by job title and business address. He shall be the person charged with certifying the payroll and shall respond to requests for an itemized payroll record [Committee Regulations Section 1401.3].

If you have regular business hours at your home office, you must accept requests and produce records during all hours you are regularly open for business. If you do not have daily regular business hours, then you must establish a written procedure for setting up an appointment which identifies the name, position, address and phone number of the party to be contacted for making an appointment [Committee Regulations Section 1401.5].

Requests for records may be oral or in writing, and written requests shall not be required for records customarily available without written request. While written requests may be required pursuant to Committee regulations [Committee Regulations Section 1401.6(a)], failure to use a prescribed form for submitting requests is not a valid reason for denying access. The state comptroller form is for use by members of the media who desire to inspect payroll information.

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A procedure to appeal denial of access to records must be established. Access to records may be denied in part, as well as in whole. Denial of access must be in writing. A person, persons or body, designated by business address and business telephone as well as by name or job title, must be established to hear appeals. The appeals unit must inform the requester in writing of its decision within seven business days of the receipt of the appeal [Committee Regulations Section 1401.7].

Unless provided for by law, rule or regulation of the Village Board prior to September 1, 1974, fees for any certification pursuant to Committee regulations are not allowed [Committee Regulations Section 1401.8(a)].

A listing of records access officers, fiscal officer, appeals person or persons or body and location where records can be seen or copied should be posted everywhere records are kept [Committee Regulations Section 1401.9].

Enclosed are a copy of the Committee's general regulations, and model regulations governing access to records, which may be of assistance in amending your regulations.

If you have any questions, please do not hesitate to call at (518) 474-2791.

Sincerely,

Larry Bawisza
Municipal Liaison
Officer

LZ/sd

enc. (2)

March 6, 1975

105

Mr. Clifford F. Hart
Supervisor
Town of Salina
913 Old Liverpool Road
Liverpool, New York 13088

Dear Mr. Hart:

Thank you for submitting a copy of regulations governing access to records of the Town of Salina.

Certain changes should be made to your regulations to conform them to general regulations of the Committee, which have the force and effect of law. These include:

The fiscal officer should be designated by business address as well as by job title [Committee Regulations Section 1401.3].

The appeals person or persons or body should be designated by business address and business telephone as well as by job title [Committee Regulations Section 1401.7(b)].

Regulations should state that the public shall not be denied access to records through officials who haveein the past been authorized to make records or information available [Committee Regulations Section 1401.2(a)].

Requests for records may be oral or in writing, and written requests shall not be required for records customarily available without written request [Committee Regulations Section 1401.6(a)]. While written requests may be required pursuant to Committee regulations, failure to use a prescribed form for submitting requests is not a valid reason for denying access.

Requests for public access to records must be accepted and records produced during all hours Town offices are regularly open for business [Committee Regulations Section 1401.5].

R

While Committee regulations specify that a request for access to records should be sufficiently detailed to identify records and should, where possible, contain information regarding dates, titles, file designations or other information which may help identify records [Committee Regulations Section 1401.6(c)], a request for any or all records falling within a specific category conforms to the standard that records be identifiable [Committee Regulations Section 1401.6(e)].

Except under extraordinary circumstances, officials should repond to an oral or written request for records within five days of such request, or provide a written explanation of when a reply to the request will be made [Committee Regulations Section 1401.6(b)].

Regulations should specifiy that the fee for copying records shall not exceed twenty-five cents for photocopies not exceeding 8 1/2 x 14 inches [Committee Regulations Section 1401.8(c)].

Denial of adcess must be in writing stating the reason for denial and advising the requester of the right to appeal to the Appeal Officer [Committee Regulations Section 1401.7(b)].

A listing of records access officers, fiscal officers, appeals person or persons or body and location where records can be seen or copied should be posted everywhere records are kept [Committee Regulations Section 1401.9].

Enclosed is a copy of the Committee's general regulations, and model regulations which may assist you to amend your regulations.

If you have any questions, please do not hesitate to call at (518) 474-2791.

Sincerely,

Larry Zawisza
Municipal Liaison
Officer

LZ/sd

enc. (2)

March 6, 1975

#104

Ms. Grace A. Neylon
Public Information Officer
Elmira Urban Renewal Agency
307 East Church Street
Elmira, New York 14901

Dear Ms. Neylon:

Thank you for submitting a copy of regulations governing access to records of the Elmira Urban Renewal Agency.

Urban Renewal Agency regulatons should be amended to conform to Committee regulations, which have the force and effect of law. Changes which should be made include:

Regulations should designate a fiscal officer, by name or job title and business address, who shall certify the payroll and respond to requests for an itemized payroll record. [Committee Regulations Section 1401.3]

Regulations should state that requests for records may be oral or in writing, and written requests shall not be required for records customarily available without written request. [Committee Regulations Section 1401.6(a)] While written requests may be required pursuant to Committee Regulations Section 1401.6(a), failure to use a prescribed form for submitting requests is not a valid reason for denying access.

Except under extraordinary circumstances, officials should respond to an oral or written request for records within five days of such request, or provide a written explanation of when a reply to a request will be made. [Committee Regulations Section 1401.6(b)]

A subject matter list of Urban Renewal Agency records, updated semi-annually, must be available for public inspection and copying. [Committee Regulations Section 1401.6(c)]

Regulations should state that, where possible, the requester should supply information regarding dates, titles, file designations and other information which may help identify the records. [Committee Regulations Section 1401.6(d)] However, it must be noted that a request for all records falling within a specific category conforms to the standard that records be identifiable. [Committee Regulations Section 1401.6(d) and (e)]

A procedure to appeal denial of access to records must be established. Access to records may be denied in whole, or in part. Denial of access must be in writing. A person, persons, or body, designated by business address and business telephone as well as by name or job title, must be established to hear appeals. The appeals unit must inform the requester in writing of its decision within seven business days of receipt of the appeal. [Committee Regulations Section 1401.7]

A listing of records access officers, fiscal officer, appeals person or persons or body and location where records can be seen or copied should be posted everywhere records are kept. [Committee Regulations Section 1401.9]

Enclosed are copies of the Committee's general regulations and model regulations governing access to records, which may assist you in amending your regulations.

If you have any questions, please do not hesitate to call at (518) 474-2791.

Sincerely,

Larry Zawisza
Municipal Liaison
Officer

Enclosures

LZ:lbb

#107

March 6, 1975

Mr. Ramsey G. Ludington
Counsel
Fulton Housing Authority
Fulton, New York 13069

Dear Mr. Ludington:

Thank you for submitting a copy of the Authority's regulations on public access to records.

The following comments are based upon a review of the Authority's regulations for conformance with the enclosed general regulations issued by the Committee on Public Access to Records:

Section 1. The list of records available should include access to "a record of name, address, title and salary of every officer and employee of the Authority" [Public Officers Law Section 88(1)(g)]; and "a record votes of the members of the governing body of the Authority" [Public Officers Law Section 88(5)].

Please note that the Committee's regulations do not require that records made available for public inspection pursuant to Public Officers Law Section 88(1) be set forth in agency regulations. However, if a list of records accessible to the public is provided in regulations, it should identify all categories of records available under the Law.

Section 2 a. We recommend including the wording of Committee Regulations Section 1401.6(e) which provides that requests for all records falling within a specific category conform to the standard that the request for records be identifiable.

I have also enclosed a copy of the Committee's model regulations which will be of assistance to the Authority in drafting regulations which conform to the Committee general regulations governing access to records.

The Authority's regulations should provide:

1. designation of a records access officer [Model Regulations Section 2]

2. designation of a fiscal officer [Model Regulations Section 3]

3. exact hours which are the regular working hours [Model Regulations Section 5]

4. maximum time for responding to appeals [Model Regulations Section 6]

5. appeals procedure [Model Regulations Section 7]

6. fees for inspection, search and certification [Model Regulations Section 8]

7. public notice [Model Regulations Section 9]

Should you have any questions on the review of the Authority's regulations, please call me at (518) 474-2791.

Sincerely,

Dennis M. O'Leary
State Agency Liaison
Officer

Enclosures

DMO'L:lbb

March 5, 1975

#103

Mr. Bernard M. Bergmann
Mayor
Village of Croghan
Village Clerk Office
Main Street
Croghan, New York 13327

Dear Mr. Bergmann:

Thank you for submitting a copy of the Village's regulations on public access to records. Based on a review of these regulations, the following changes are recommended:

Section 2 - For the purposes of making an appointment to copy records, the Village Clerk should be identified by telephone number as well as by name or job title and business address.

Section 3 - Unless established by law, rule, or regulation of the Village Board prior to September 1, 1974, the maximum fee for a photocopy of a record not exceeding 8 1/2 x 14 inches shall be 25 cents per copy. However, if an agency or municipality does not have photocopy equipment, the requester may be charged for the clerical time in making the copy. [Committee Regulations Section 1401.8(c)(1) and (2)]

Section 4(a) - While written requests may be required pursuant to Committee Regulations Section 1401.6(a), failure to use a prescribed form for submitting requests is not a valid reason for denying access.

R

Section 4 - Regulations should note that except under extraordinary circumstances, officials shall respond to an oral or written request for records or copies thereof within five days of such request or provide a written explanation of when a reply to the request will be made. [Committee Regulations Section 1401.6(b)] Failure to reply within the time period set out above shall be considered a denial of access. [Committee Regulations Section 1401.7(c)]

Section 5 - A procedure to appeal denial of access to records must be established. Access to records may be denied in part as well as in whole. Denial of access must be explained in writing. The appeals officer must be designated by business address and business telephone as well as by name or job title. The appeals officer must inform the person requesting the record in writing of his decision within seven business days of receipt of the appeal. [Committee Regulations Section 1401.7]

The regulations should also include requirements that the subject matter list be updated at least semi-annually and require a listing of the records access officer, fiscal officer, appeals officer and location where records can be seen or copied to be posted everywhere records are kept. [Committee Regulations Sections 1401.6(c)(2) and 1401.9]

Enclosed are copies of the general regulations of the Committee and some model regulations. If you have any questions, please call me at (518) 474-2791.

Sincerely,

Dennis M. O'Leary
State Agency Liaison
Officer

Enclosures

DMO'L:DJD:lbb

March 6, 1975

FF109

Ms. Shirley Zeller
Town Clerk
Town of Deerpark
Drawer A
Huguenot, New York 12746

Dear Mrs. Zeller:

I thank you again for your interest in complying with the Freedom of Information Law.

With regard to fees, Section 1401.8 of the regulations promulgated by the Committee states that the fee permitted to be charged under the regulations shall govern

> "[E]xcept where fees or exemptions from fees have been established by law, rule or regulation prior to September 1, 1974..."

Consequently, the fee provisions of the regulations are applicable to units of government which had not established fees by law, rule or regulation before September 1, 1974.

Section 66 of the Public Officers Law, which was repeated by enactment of the Freedom of Information Law, enabled public officers to charge "at the rate allowed to a county clerk for similar services" if no fees were expressly allowed by law. In my opinion, since Section 66 has been repealed, if a public officer had not charged pursuant to law, rule or regulation, he may no longer charge at the rate allowed by the county clerk; he must now charge a fee consistent with the Committee's regulations.

From you letter, I am unable to determine whether the fee set by the Town of Deerpark was created by policy or resolution, or by rule or regulation. If it was created merely by a resolution of the Board, the Committee's fees govern. If however, the fee was adopted in the form of a law or regulation, it remains in effect.

R

In response to question two, I believe that the problem relates to the degree to which an individual must identify a record sought. Section 1401.6(d) of the regulations provides that

> "...a request for access to records should be sufficiently detailed to identify the records. Where possible, the requester should supply information regarding dates, titles, file designations or other information which may help identify record."

Further, Section 1401.6(e) states that

> "A request for any or all records falling within a specific category shall conform to the standard that records be identifiable."

The category referred to relates to the breakdown in an agency's subject matter list. If, for example, the docket book is listed as a separate category in your subject matter list, it might be impossible for a person seeking records in the docket book to identify anything more specific than the docket book itself. As such, his request would conform to the regulations. Moreover, under Section 1401.2(b)(2), the records access officer has the responsibility of assisting a requester in identifying the records sought. As I mentioned before, unless a person knows specifically which records he is seeking, the specificity of the request depends upon the degree of detail of the subject matter list.

With regard to question three, all I can offer is that common sense and common courtesy should be used. I imagine that, in some instances, either the records access officer or the person requesting records might be forced to break an appointment.

I called Mr. Ray concerning your previous questions. He told me that an answer is being prepared and that he anticipates that it will be completed shortly.

I hope that I have been of some assistance. Should any further questions arise, feel free to contact me.

Very truly yours,

Robert J. Freeman
Deputy Counsel

denial
of fire dist.

March 7, 1975

#110

Mr. Alan Nucci, Secretary
Brighton Professional
Fire Fighters Association
I.A.F.F. Local 2223
P.O. Box 18083
Rochester, New York 14618

Dear Mr. Nucci:

I am sorry to hear that your efforts to gain access to records has been unsuccessful.

I can only advise you what the responsibilities of the fire district are under the Freedom of Information Law and the regulations, which have the force and effect of law.

First, every unit of government must publish regulations regarding access to records pursuant to Section 88(2) of the Law. You may ask to have a copy of the fire district regulations. No appointment should be necessary; they can be mailed.

Second, under section 1401.9 of the regulations, the fire district must

> "publicize by posting in a conspicuous location wherever records are kept and/or by publication in a local newspaper of general circulation:
>
> (a) The location where public records shall be made available for inspection and copying.
> cop
> (b) The name, title, business address and business telephone number of the designated records access officer and fiscal officer.

F

(c) The right to appeal by any requester denied access for whatever reason and the name and business address of the person or persons or body to whom an appeal is to be directed."

Also, pursuant to section 1401.7(c), if the fire district "fails to provide requested records promptly...such failure shall be deemed a denial of access." If that is the case, you may appeal to the person or persons to whom appeals should be directed.

Finally, your best course of action probably would be to request another appointment, specifying that it should be made in advance, at a mutually convenient time.

I am enclosing a copy of the regulations for your perusal.

I hope that I have been of some assistance. Should any further problems arise, please feel free to contact me.

Very truly yours,

Robert J. Freeman
Deputy Counsel

RJF/sd

enc.

cc: Brighton Fire District
368 Landing Road
South Rochester, New York 14610

March 10, 1975

#111

Mr. Austin Crawford
Assistant Counsel
Facilities Development Corporation
44 Holland Avenue
Albany, New York 12208

Dear Mr. Crawford:

Thank you for submitting a copy of the Corporation's regulations on public access to records.

The following comments are based upon a review of these regulations for conformity with the Committee's General Regulations.

Section 3(a) - We recommend that this section state whether requests can be oral or in writing. [Committee Regulations Section 1401.6(a)]

We recommend including Committee Regulations Section 1401.6(a) which states that a request for all records within a specific category is a request for identifiable records.

Section 3(b) - The last sentence should set forth that upon payment or offer to pay established fees, copies of records will be made available. [Committee Regulations Section 1401.2(b)(4)(i)] We also recommend including a statement that copies will be certified as true copies upon request. [Committee Regulations Section 1401.2(b)(5)]

Section 3(c) - Committee Regulations Section 1401.3(b) requires that the payroll information be made available to any person, including bona fide members of the news media.

Section 3(e) - We recommend that this paragraph provide for certification upon failure to locate a requested record. [Committee Regulations Section 1401.2(g)] Also, this section should include a statement that the person denied access will be notified in writing of his right to appeal to the appeals officer.

Section 4(a) - We recommend including the statement that no fee will be charged for any certification pursuant to these regulations. [Committee Regulations Section 1401.8(a)]

Enclosed is a copy of the Committee on Public Access to Records' General Regulations. Should you have any questions, please call me at 474-2722.

Sincerely,

Dennis M. O'Leary
State Agency Liaison Officer

Enclosure

DMO'L:lbb

March 10, 1975

#112

Ms. Lois E. Nutting
Clerk - Treasurer
Village of Dexter
Municipal Building
Lock Street
Dexter, New York 13634

Dear Ms. Nutting:

Thank you for submitting a copy of the Village's regulations on public access to records. Based on a review of these regulations, the following changes are recommended:

Section 4. Please note that failure to use the form you have prescribed for submitting requests would not be a valid reason for denying access to a records requested in writing. [Committee Regulations Section 1401.6(a)]

Section 5. Except under extraordinary circumstances, the records access officer must reply to a request for records within five business days of receipt of the request. [Committee Regulations Section 1401.6(b)] Failure to reply to a request within that time shall be considered a denial of access. [Committee Regulations Section 1401.7(c)]

Section 6. As appeals officer, the Mayor should be identified by business telephone number as well as by job title and business address. The appeals officer must inform the person requesting the record in writing of his decision within seven business days of receipt of an appeal. A final denial of access by the appeals officer shall be subject to court review in the manner provided in Article 78 of the Civil Practice Law and Rules.

Section 7. Any "record-retention and disposition schedule" should include all records produced, filed or first kept or promulgated after September 1, 1974.

Section 8. Regulations should note that payroll information will be made available to any person, including bona fide members of the media. [Committee Regulations Section 1401.3(b)]

Enclosed are copies of the general regulations of the Committee, and model regulations. If you have any questions, please call me at (518) 474-2722.

Sincerely,

Dennis M. O'Leary
State Agency Liaison
Officer

Enclosures

DO'L:DJD:lbb

any person

March 10, 1975

#113

Mr. Theodore Spatz
Counsel
Department of Audit
and Control
Alfred E. Smith Building
Albany, New York

Dear Mr. Spatz:

In response to your first question, since Section 88(6) of the Freedom of Information Law provides that agencies shall make records available to "any persons," an individual may seek access to records through another person, including a paid agent. Moreover, as the Committee has resolved,

> "information accessible under the Freedom of Information Law shall be made equally accessibible to any person, without regard to status or interest" (see Resolution attached).

Second, an agency need not disclose the name of the principal or the interest of the principal in acquiring the record. However, as you have intimated, an inquiry as to the purpose of the request may be made when an individual seeks to obtain a list of names and addresses as contemplated by Section 88(3)(d).

I hope that I have sufficiently answered your questions.

Sincerely,

Louis R. Tomson
Executive Director

Enclosure

R

March 11, 1975

#114

Mr. Albert J. MacBrien
Secretary
Board of Fire Commissioners
Roosevelt Fire District
P.O. Box 394
Hyde Park, New York 12538

Dear Mr. MacBrien:

Thank you for submitting a copy of rules and regulations governing access to records of the Roosevelt Fire District.

Certain changes in your regulations must be made in order to conform them to Committee regulations, which have the force and dffect of law. These include:

Regulations should clearly state that the Fire District is establishing an appointment procedure to inspect and copy records because it does not have daily regular business hours.

Unless established by law, rule or regulation prior to September 1, 1974, nn fee for searches for records is allowed by Committee regulations. Also, an applicant who copies records by hand himsepf cannot be charged a fee [Committee Regulations Section 1401.8].

Regulations should state that requests for records may be oral or in writing, and written requests shall not be required for records customarily available without written request. While written requests may be required pursuant to Committee regulations, [Committee Regulations Section 1401.6(a)], failure to use a prescribed form for submitting requests is not a valid reason for denying access.

Regulations should note that, except under extraordinary circumstances, officials should respond to an oral or written request for records within five days of such request, or provide a written explanation of when a reply to the request will be made [Committee Regulations Section 1401.6(b)].

The Chairman of the Board of Fire Commissioners, as the appeals person, must be designated in regulations by business address and business telephone number as well as by name or job title. He must inform the person seeking access in writing of his decision within seven business days of receipt of the appeal.

The notice of denial provided a person seeking access which informs him of his right to appeal to the Chairman of the Board of Fire Commissioners must state the reason for denial of access [Committee Regulations Section 1401.7].

A listing of records access officers, fiscal officer, appeals person or persons or body and location where records can be seen or copied should be posted everywhere records are kept [Committee Regulations Sedtion 1401.9].

Because any changes in the subject matter list would necessitate amending your regulations, I suggest making the subject matter list separate from the body of your regulations. However, the list can be stapled to the regulations for the convenience of the public. The list must be updated semi-annually, and the date of the most recent updating placed on the first page.

Enclosed are a copy of the Committee's general regulations, and model regulations governing access to records, which may assist you in amending your regulations. If you have any questions, please do not hesitate to call (518) 474-2791.

Sincerely,

Larry Zawisza
Municipal Liaison
Officer

LZ/sd

enc. (2)

March 12, 1975

#115

Mr. Andrew Geddes, Director
The Nassau Library System
The Lower Concourse
Roosevelt Field
Garden City, New York 11530

Dear Mr. Geddes:

I apologize for the delay in responding to your letter.

Generally, I want to confirm the conclusions that we reached jointly during our telephone conversations. To reiterate, the issue is whether the Nassau Library System is an agency as defined by the Freedom of Information Law.

Section 87(1) of the Law defines "agency" as

> "any state or municipal board, bureau, commission, council, department, public authority, public corporation, division, office or other governmental entity performing a governmental or proprietary function for the state of New York or one or more municipalities therein."

The System does not fall within any of the specific kinds of agencies within the definition, but is it a governmental entity performing a governmental function? In my opinion, it is not.

Although the System has many of the trappings of a governmental entity (i.e., funding from government, participation in state health and retirement plans), it is a private, separate legal entity controlled by a board of trustees which has the power to hire and fire its employees without any governmental infringement. Neither the System nor its trustees possess governmental powers; they merely provide a service (see New York Public Library v. New York State, 357 NYS 2d 522, 533, 1974).

R

Decisional law upholds this conclusion. The Appellate Division has held that the New York public library is not a government or public employer within the Taylor Law (New York Public Library, supra). The Comptroller has held that a co-operative library is not governmental in nature (Op. State Compt. 67-543) and that cooperative library service systems, although established under grant of a charter by the State Board of Regents, are not municipal corporations. (Op. State Compt. 67-200). Further, neither a library system nor an association library has state sovereignty, and the Commissioner of the State Department of Education has held that obligations executed by a free association library do not in any way encumber the faith or credit of a school district from which it receives funds (Matter of Appeal of Richard L. Boyle, 1968, 7 Education Department Rep. 102).

In view of the opinions cited and their various sources, in my opinion, the Nassau Library System is not an agency as defined by the Freedom of Information Law and is therefore not within the scope of the Law.

I hope that I have been of some assistance. Should any further questions arise, please feel free to call me.

Very truly yours,

Robert J. Freeman
Deputy Counsel

RJF/sd

March 13, 1975

#116

The Hon. Donald M. Halperin
Legislative Office Building
Room 413
Albany, New York

Attention: Ms. Kathy Becker

Dear Ms. Bekker:

As requested, please find enclosed two memoranda considered by the Committee on Public Access to Records Dealing with invasion of privacyy I have also enclosed a copy of proposed amendments to the Freedom of Information Law adopted by the Committee. Of particular relevance for your project is Section 88(1)(b) of the amendments, which would enable an individual to inspect and copy records pertaining to him.

If I can be of any assistance to you, or if you would like to discuss the issues in question, please feel free to call me. I can be reached at 474-2518.

Very truly yours,

Robert J. Freeman
Deputy Counsel

RJF/sd

enc. (3)

March 14, 1975 #117

Gilbert Harwood, Counsel, Department of State

Louis R. Tomson, Executive Director

Proposed State Administrative Procedure Act - Senate 1236
Your Memorandum of March 11, 1975

As you requested, this memorandum examines the impact of the proposed State Administrative Procedure Act (APA) on the Freedom of Information Law, Committee activities, and its legislative proposals.

Both the APA and the Freedom of Information Law relate to public knowledge of and participation in government. But, because they are the products of separate draftsmen, they duplicate and contravene each other.

The Federal Freedom of Information Act is part of the Federal APA which has consistent definitions, uniform access provisions and a requirement for publishing rules.[1]

The proposed state APA would be codified as an independent chapter of the Consolidated Laws, while the Freedom of Information Law is part of the Public Officers Law. The public interest would be better served if all "open government" statutes, such as the APA, the Freedom of Information Law and any open meeting laws, were codified in the same chapter of law.

I. Impact on the Present Freedom of Information Law.

Persons not familiar with rules of construction and incorporation by reference will be confused by the differences between the APA and the Freedom of Information Law. However, our analysis indicates that these differences will have little impact on the Freedom of Information Law and the Committee.

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1. 5 USC §551-559 (Federal APA); 5 USC §552 (Federal Freedom of Information Act)

Dick
R/

1. The Freedom of Information Law governs access to records made available for public inspection by the APA.

   The definition of "agency" in APA Section 102(1) omits municipalities and a variety of state agencies included in the Freedom of Information Law.

   However, Section 103(1) provides that the APA "...shall not be construed to limit or repeal additional requirements imposed by statute or otherwise." Therefore, access provisions of the Freedom of Information Law will continue to apply to all agencies and municipalities whether or not affected by the APA.

   Section 88(1)(i) of the Freedom of Information Law incorporates all records made available by any other provision of law. Therefore, all records created by the APA will be subject to both the substantive and procedural provisions of the Freedom of Information Law and the Committee's regulations and advisory opinions.

2. Duplication of access provisions.

   Except for providing access to the entire record upon which a decision or rule is made in a rule making or adjudicatory proceeding, all the access provisions of APA Section 501 duplicate the access provisions of the Freedom of Information Law, Section 88(1)(a),(b),(e) and (h).

3. The Freedom of Information Law and Committee Regulations will preclude an agency from requiring the public to obtain the agency's APA records solely from the department of state.

   Section 501 of the APA provides that each agency shall make certain records available for public inspection "either by itself or through the department of state." This contravenes the Freedom of Information Law and Committee regulations, none of which are repealed or limited by the APA. Any agency designating the Secretary of State as the sole source through which these records shall be available would still be required by the Freedom of Information Law and Committee regulations to make any Section 501 record in its possession available from its own records access officer.

4. Definition of "rule" in the APA may be invalidly invoked by an agency to limit access to "statements of policy and interpretations" under the Freedom of Information Law.

Section 88(1)(b) of the Freedom of Information Law provides access to "statements of policy and interpretations" adopted by an agency without defining these terms. Therefore, an agency may attempt to interpret these terms by applying the definition of "rule" in Section 102(2)(a) of the APA.

In spite of APA Section 103's rule of construction, some agencies will probably argue that records excluded from the APA definition of "rule" and not required to be made available to the public under APA Section 501, should not be available as statements of policy and interpretations under the Freedom of Information Law. This conclusion contravenes the intent of the Freedom of Information Law.

5. APA's requirement that each agency prepare a separate publication of its rules, and forms and instructions for implementing the APA is unnecessary.

APA Section 202(1)(e) and 202(2)(d) provide that any rule of general applicability adopted by an agency must be published in the State Bulletin. This is similar to the requirement in the federal APA that all rules adopted by an agency be published in the Federal Register.[2] However, APA Section 501 goes one step further and requires each agency to prepare a separate publication of its rules.

The federal government does not require a separate publication for each agency since publishing rules in the Federal Register provides adequate public notice. Publishing rules in the State Bulletin similarly obviates the need for a separate publication of each agency's rules.

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2. 5 USC §552(a)(1)(D) (Freedom of Information Act)

Furthermore, rules, forms and instructions or any portion thereof are available upon request under both the APA and the Freedom of Information Law. Placing these records in a single publication is not necessary.

6. APA Section 501(1), authorizing a fee for a copy of the publication of rules, has no standard and may conflict with the Committee regulations, particularly if the entire copy, rather than parts thereof, must be purchased.

APA Section 501(1) provides that the publication shall be made available to the public at a "charge not more than cost for each copy of the publication distributed upon request." This indicates that the entire publication should be made available and that the person requesting access must pay the actual cost of reproduction of a complete copy. However, because of the APA Section 103 rule of construction, the Committee's regulations will govern and make records (including publications) available for public inspection and copying in whole or in part. A person can request part of a publication and pay the copy cost of not more than 25 cents per page, rather than pay for the whole publication as implied by the APA Section 501(1).

Also, there is no standard in Section 501(1) for computing actual cost of a publication. The cost of printing a single copy may be prohibitive. A recent U.S. Senate Report on amendments to the Freedom of Information Act noted that the fee charged for a copy of a publication should not reflect the complete cost of reproduction, but the per item cost as if the publication was printed in quantity.

7. There is an inconsistency between APA Sections 201 and 501(1).

Section 201 requires that the "nature and requirements" of forms, instructions and procedures for implementing Article 2 "rule making" be made available for public inspection. However, Section 501(1) requires that the actual forms, instructions and procedures adopted by the agency to implement the

APA be made available for public inspection. Nevertheless, when a person requests access under the Freedom of Information Law to APA rule making forms, instructions and procedures, the agency must make the actual record available.

8. The fees and procedure for obtaining a record giving notice of proposed rule making conflict with fees and procedure for obtaining a copy of a record under the Freedom of Information Law.

The requirement that an agency give written notice of proposed rule making to persons filing written requests with the agency [APA Sections 202(1)(a)(2) and 202(2)(a)(2)] does not limit the right of any person to request access to such a notice under the Freedom of Information Law, Section 88(1)(b). However, agencies will probably argue that the APA alone controls the procedure for access to such a notice.

The Committee regulations authorize a fee not to exceed 25 cents for a photocopy of a record, while the APA permits an agency to charge for preparation, handling and postage regarding the notice set forth in Sections 202(1)(c) and 202(2)(b). The Committee's fee regulation will control the fee to be charged when the notice is requested as a record pursuant to the Freedom of Information Law.

II. Impact of the APA on the Committee's amendments to the Freedom of Information Law.

The proposed amendment to Section 88 of the Freedom of Information Law would make "all agency records" available, except those in specifically enumerated categories. Therefore, the record upon which a decision in a rule making or adjudicatory proceeding is based would be accessible under the Freedom of Information Law as would all other records required to be created by the APA.

However, the exceptions to access in the amended Freedom of Information Law are not included in Article 5 of the APA. This raises the question of whether there will be double standard of access. For example, if a person requests APA records under the

Freedom of Information Law, the exceptions apply; however, if he requests access under the APA, there are no exceptions.

III. Fiscal Impact on Committee Operations.

It is not entirely clear from the definition of "agency" in Section 102(1) that the Committee is covered by the APA. However, if covered, there will only be a nominal fiscal impact on the Committee in connection with publication of its rules and providing notice of rule making proceedings. Issuing declaratory rulings will be similar to the Committee's present procedure of issuing formal advisory opinions.

Please call me if you have any questions pertaining to these comments.

LRT:DMO'L:lbb

cc: Mario M. Cuomo
Secretary of State

March 14, 1975

#118

Mr. Basil Y. Scott
Administrative Director
Department of Motor Vehicles
Empire State Plaza
Albany, New York 12228

Dear Mr. Scott:

The issue you have posed involves the sale of a motor vehicle registration list and its relation to the Freedom of Information Law. In my opinion, you may continue to sell the list.

Section 88(3)(d) of the Law states that an unwarranted invasion of personal privacy includes:

> "[T]he sale or release of lists of names and addresses in the possession of any agency or municipality if such lists would be used for private, commercial, or fund-raising purposes..."

However, the Law does not mandate that an agency must delete identifying details or withhold such a list from disclosure. Instead, it gives the Committee authority to promulgate guidelines regarding specified records. The Committee has not done so. Further, the Law states that, in the absence of such guidelines, an agency may act to prevent an unwarranted invasion of personal privacy.

Since the Committee has not acted, an agency has discretion to prevent such an invasion as it sees fit.

As such, although you have power to withhold the registration list, there is no authority in the Law to the effect that you must.

Viewing the issue from a different perspective, it may be argued that the provisions of the Freedom of Information Law do not apply in this situation. Section 88(7) of the Law states that:

> "[N]otwithstanding the provisions of subdivision one of this section, this article shall not apply to information that is:
>
> a. specifically exempted by statute..."

In effect, Section 202(3)(b) of the Vehicle and Traffic Law exempts the list from disclosure from all but one statutory party, the highest responsible bidder. Therefore, if the list is considered exempt from the public, the provisions of the Freedom of Information Law are not applicable.

I hope that I have been of some assistance. Should any further questions arise, please feel free to contact me.

Very truly yours,

Robert J. Freeman
Deputy Counsel

RJF/sd

Any Person

fees

March 14, 1975

#119

Ms. Rose L. Berman
President
Clinical Laboratory Directors
Of New York State, Inc.
1780 Broadway
New York, New York 10019

Dear Ms. Berman:

I spoke to Mr. Whitlin of the New York City Health Department regarding your letter. My inquiries were directed at two practices of the Department: the requirement that an individual's purpose be stated when requesting records, and the search file.

With reference to the purpose for seeking records, I advised Mr. Whitlin that, in my opinion, such a requirement is contrary to the spirit of the Freedom of Information Law. I advised that any person should be able to gain access to available records without regard to status or interest.

On the matter of the search fee of $2.50, the regulations adopted by the Committee on Public Access shall govern

> "[E]xcept where fees or exemptions from fees have been established by law, rule or regulation prior to September 1, 1974..."

The search fee charged by the Department of Health was adopted pursuant to a regulation prior to September 1, 1974. Consequently, in my opinion, the Department's search fee is permissible and legal.

I hope that I have been of some assistance. Should any further questions arise, please feel free to write again.

Very truly yours,

Robert J. Freeman
Deputy Counsel

RJF/sd
enc Irving Whitlin, Esq.

March 17, 1975

#120

Mr. Howard E. VerGown
Superintendent
Lansingburgh Central
School Diatrict
320 Seventh Avenue
Troy, New York 12182

Dear Mr. VerGow:

Thank you for submitting a copy of regulations governing access to records of the Lansingburgh Central School District at Troy.

Because regulations promulgated by the Committee have the force and effect of law, Lansingburgh Central School District regulations must be amended to conform to Committee regulations. Changes which should be made include:

Please note that Committee regulations do not require listing records available for public inspection and copying. However, should you choose to list such records, you should include all categories of records mentioned in Section 88(1) of the Freedom of Information Law.

Records access officers and fiscal officer should be designated by business address as well as by name or job title.

Requests for records may be oral or in writing, and written requests shall not be required for records customarily available without written request. While written requests may be required pursuant to Committee regulations, [Committee Regulations Section 1491.6(a)], failure to use a prescribed form for submitting requests is not a valid reason for denying access.

Regulations should specify that requests for records shall be accepted, and records produced, during all hours the School District is regularly open for business.

R

Except under extraordinary circumstances, officials should respond to an oral or written request for records within five days of such request, or provide a written explanation of when a reply to the request will be made.

A subject matter list of School District records, updated semi-annually, must be available for public inspection and copying.

Access to records may be denied in part, as well as in whole.

Committee regulations do not require listing which records, if disclosed, might constitute an unwarranted invasion of personal privacy. However, should you choose to list records to which access must be denied on the basis of invasion of privacy, you should include all types of invasion of privacy listed in Section 88(3) of the Law.

Denial of access must be in writing. A person, persons or body, designated by business address and business telephone as well as by name or job title, should be established to hear appeals. The appeals unit must inform the requester in writing of its decision within seven business days of receipt of the appeal.

A listing of records access officers, fiscal officer, appeals person or persons or body and location where records can be seen or copied should be posted everywhere records are kept.

Enclosed are model regulations governing access to records, which may assist you in amending your regulations. If you have any questions, please do not hesitate to call at (518) 474-2791.

Sincerely,

Larry Kawisza
Municipal Liaison
Officer

Lz/sd

enc.

March 17, 1975

#124

Dr. J. W. Yarbrough
Assistant Superintendent for Business
West Seneca Central School District
45 Allendale Road
West Seneca, New York 14224

Dear Dr. Yarbrough:

Thank you for submitting a copy of the District's policy on public access to records.

I hope the model regulations have assisted the Board in amending the District's rules to conform to the Committee's regulations, which are legally binding.

Should the District's regulations not have been amended as yet, some important points to consider are:

Section 1. Section 88(1)(g) of the Freedom of Information Law requires the designation, by business address as well as by job title, of a fiscal officer as well as a record access officer. [Committee Regulation Section 1401.3]

Section 2. While written requests may be required pursuant to the Committee's regulations, failure to use a prescribed form for submitting a written request is not a valid reason for denying access to records. Any request for a record must be replied to within five days by granting access, denying access in writing or explaining any delay in writing. [Committee Regulation Sections 1401.2(b) and 1401.6(b)] Failure to reply within the time limit set out above shall be deemed a denial of access. [Committee Regulation Section 1401.7(c)]

82p

Section 3. Any definition of "record" should not be limited to "an existing document that the district is normally or legally required to maintain." It should include any memorial either temporary or permanent in whatever form produced, filed, kept or received by the District.

Section 6. The procedures for appealing a denial of access should be more detailed. Procedures should note that denial of access must be in writing, and advise the person making the request of his right to appeal to the appeals body. [Committee Regulation Section 1401.7(b)] Procedures also should include the name, title, business address and telephone number of the appeals officer, a statement of his or her obligation to reply to an appeal in writing within seven days after its receipt, and a statement of the right of the person requesting the record to seek court review of a final denial of access, as provided for in Article 78 of the Civil Practice Law and Rules. [Committee Regulation Section 1401.7]

Section 7. The subject matter list should be updated semi-annually and should include all records produced, filed or first kept after September 1, 1974, regardless of whether the District is required by law to have them.

The regulations should also include a more detailed list of the duties of the records access and fiscal officers as outlined in Committee Regulations 1401.2 and 1401.3. In addition, a listing of the records access officer, fiscal officer, appeals officer and location where records can be seen or copied should be posted everywhere records are kept.

Enclosed are copies of the general regulations of the Committee and some model regulations. If you have any more questions, please feel free to call me at (518) 474-2791.

Sincerely,

Larry Zawisza
Municipal Liaison
Officer

Enclosures LZ:DJD:lbb

March 17, 1975

#122

Mrs. Anne H. Newton
Town Clerk
Town of Alden
13280 Broadway
Alden, New York 14004

Dear Mrs. Newton:

Thank you for submitting a copy of the Town of Alden's regulations on public access to records. Based upon a review of these regulations, the following changes are recommended:

Section 6 A. The Committee's regulations do not authorize the requirement that requests be made on a prescribed form. The use of a form is for the convenience of the requester and should not bar a request. We recommend that 6 A. read, "...should be submitted to the Records Access Officer in writing. Forms will be available in the Office of the Town Clerk, however, use of such forms is not mandatory." [Committee Regulations Section 1401.6(a)]

Section 6 C. This section is not consistent with the fees section 8 c. which states that there will be no fee for certification. Also, the Committee regulations do not authorize a fee for preparation of records. This section would be an apprpropriate place to state that a copy of a record will be made available upon tender of the required fee.

Section 6 D. We also recommend changing this section's reference to the prescribed form. Suggested wording is, "... Records Access Officer shall provide written notice of the reason for unavailability, or, if a request form is used, note the reason on the form and return a copy to the requester." [Committee Regulations Section 1401.7(b)]

Section 6 K. We recommend that wording of Committee Regulations Section 1401.6(e) be added. This section provides that a request for any or all records within a specific category conforms to the standard that the request for records be identifiable.

Section 7. We recommend including a sentence informing the public that it can seek review of a denial of an appeal to the courts via Article 78 of the Civil Practice Law and Rules. [Committee Regulations Section 1401.7(f)]

I have enclosed a copy of the Committee's general regulations governing access to records. If you have any questions, please feel free to call me at (518) 474-2791.

Sincerely,

Larry Zawisza
Municipal Liaison
Officer

Enclosure

LZ:lbb

March 17, 1975

#123

Mr. Charles Perris
Village Clerk
Village of Fultonville
Fultonville, New York 12072

Dear Mr. Perris:

Thank you for a copy of the Village Board's resolution adopting rules and regulations governing access to records of the Village of Fultonville.

The following changes in your regulations should be made to conform them to general regulations of the Committee, which have the force and effect of law:

A records access officer, designated by name or job title and business, should bee appointed to coordinate agency response to public requests for access to records. [Committee Regulations Section 1401.2(a)] He should assure that agency personnel carry out the duties listed in Section 1401.2(b) of Committee regulations.

A fiscal officer, charged with certifying the payroll and responding to requests for itemized payroll information, should be designated by name or job title and by business address. [Committee Regulations Section 1401.3]

Committee regulations require agencies which have daily regular business hours to accept requests and produce records during all hours they are regularly open for business. Agencies which do not have daily regular business hours may establish a procedure in writing for arranging an appointment to inspect and copy records. [Committee Regulations Section 1401.5]

Village regulations should state that requests for records may be oral or in writing, and that written requests shall not be required for records customarily available without written request. [Committee Regulations Section 1401.6(a)]

Because the history of access to government records in New York State reveals a continual broadening of the class of citizens entitled to inspect records, Committee regulations require any person, including members of the news media, to be granted access to itemized payroll information. The village may require bona-fide members of the news media to fill out a form specified by the State Comptroller to obtain access to itemized payroll information pursuant to Section 88(1)(g) of the Law.

However, the Law and Committee regulations do not require anyone other than bona fide members of the news media seeking requests for payroll information to use any specific form.

Consequently, while written requests may be required pursuant to Committee Regulations Section 1401.6(a), failure to use a prescribed form for submitting requests is not a valid reason for denying access.

Village regulations should require officials to respond to an oral or written request for records within five days of such request, or, if extraordinary circumstances delay a reply beyond five days, provide a written explanation of when a reply to the request will be made. [Committee Regulations Section 1401.6(b)]

The procedure through which denial of access to Village records may be appealed should be more detailed. It should be noted that access to records may be denied in part, as well as in whole. Denial of access must be in writing, advising the person denied access of his right to appeal and to whom that appeal is to be directed. The person, persons or body established to hear appeals must be designated by business address and business telephone number as well as by name or job title. The appeals unit must inform the appellant in writing of its decision within seven business days of receipt of the appeal. [Committee Regulations Section 1401.7]

Unless established by law, rule or regulation of the Village Board prior to September 1, 1974, Committee regulations allow no fee to be charged for any certification pursuant to Committee Regulations Section 1401.8(a).

Village regulations should require a list of records access officers, fiscal officer, appeals person or persons or body and location where records may be seen or copied to be posted everywhere records are kept. [Committee Regulations Section 1401.9]

Enclosed are a copy of general regulations of the Committee, and model regulations governing access to records, which may assist you to amend your regulations. If you have any questions, please call (518) 474-2791.

Sincerely,

Larry Zawisza
Municipal Liaison
Officer

Enclosures

LZ:lbb

#124

March 17, 1975

Mr. R. Donald Lucas
Village Manager
Village of Horseheads
Horseheads, New York 14845

Dear Mr. Lucas:

Thank you for submitting a copy of regulations governing access to records of the Village of Horseheads.

The following changes should be made in your regulations to conform them to Committee regulations.

Records access officers should be designated by business address as well as by name or job title [Committee Regulations Section 1401.2(a)].

A fiscal officer, responsible for certifying the payroll and responding to itemized requests for payroll information, should be designated by name or job title and business address [Committee Regulations Section 1401.3].

Regulations should state that requests for records may be oral or in writing, and written requests shall not be required for records customarily available without written request [Committee Regulations Section 1401.6(a)]. While written requests may be required pursuant to Committee regulations, failure to use a prescribed form for submitting requests is not a valid reason for denying access.

The Village must accept requests for public access to records and produce records during all hours it is regularly open for business [Committee Regulations Section 1401.5].

Officials should respond to an oral or written request for records within five days of such request. However, if because of extraordinary circumstances, more than five days is required to produce a record, officials should acknowledge receipt of the request and indicate the reason for delay and estimate the date when a reply will be made [Committee Regulations Section 1401.6(b)].

A semi-annually updated subject matter list of Village records, must be available for public inspection and copying [Committee Regulations Section 1401.6(c)].

Denial of access must be in writing, Access to records may be denied in part, as well as in whole. A person, persons or body, designated by business address and business telephone as well as by name or job title, must be established to hear appeals. The appeals unit must inform the requester in writing of its decision within seven business days of receipt of the appeal [Committee Regulations Section 1401.7].

Regulations should require a listing of records access officers, fiscal officer, appeals person or persons or body and location where records can be seen or copied to be posted everywhere Village records are kept.

Enclosed are a copy of Committee general regulations, and model regulations governing access to records, which may assist you in amending your regulations.

If you have any questions, please call (518) 474-2791.

Sincerely,

Larry Zawisza
Municipal Liaison Officer

LZ/sd

enc. (2)

#125

March 17, 1975

Mr. Richard A. Conover
Chief School Officer
Waterloo Central School District
9 East River Street
Waterloo, New York 13165

Dear Mr. Conover:

Thank you for submitting a copy of the Board's resolution governing access to records of the Waterloo Central School District.

I hope the model regulations have assisted the Board in amending its rules governing access to records to conform to Committee regulations, which have the force and effect of law.

Should the Board's resolution not have been amended as yet, some important points to consider are:

Records access officers and the fiscal officer should be designated by business address as well as name or job title. [Committee Regulations Sections 1401.2 and 1401.3]

School district regulations should state that requests for records may be oral or in writing, and written requests shall not be required for records customarily available without written request. [Committee Regulations Section 1401.6(a)]

While written requests may be required pursuant to Committee Regulations Section 1401.6(a), failure to use a prescribed form for submitting requests is not a valid reason for denying access.

School district regulations should note that except under extraordinary circumstances, officials must respond to an oral or written request for records within five days of such request, or provide a written explanation of when a reply to the request will be made. [Committee Regulations Section 1401.6(b)]

School district regulations should require a semi-annually updated subject matter list of school district records to be available for public inspection and copying. [Committee Regulations Section 1401.6(c)]

A procedure to appeal denial of access to records must be established in regulations. Access to records may be denied in part, as well as in whole. Denial of access must be in writing advising the person making the request of his right to appeal. A person, persons or body, designated by business address and business telephone as well as by name or job title, must be established to hear appeals. The appeals unit must inform the requester in writing of its decision within seven business days of receipt of the appeal. [Committee Regulations Section 1401.7]

Unless established by law, rule or regulation of the Board prior to September 1, 1974, fees for search are not allowed. [Committee Regulations Section 1401.8]

Regulations should require a listing of records access officers, fiscal officer, appeal person or person or body and location where records can be seen or copied to be posted everywhere records are kept. [Committee Regulations Section 1401.9]

If you have any questions, please do not hesitate to call at (518) 474-2791.

Sincerely,

Larry Zawisza
Municipal Liaison
Officer

LZ:lbb

#126

March 17, 1975

Mr. Sayers A. Lutz
Clerk
Greene County Legislature
61 Washington Avenue
Coxsackie, New York 12051

Dear Mr. Lutz:

Thank you for submitting a copy of the County Legislature's regulations governing access to records of Greene County.

The following changes should be made in your regulations to conform them with Committee regulations, which have the force and effect of law:

Records access officers should be designated by name or job title and by business address. [Committee Regulations Section 1401.2]

A fiscal officer, charged with certifying the payroll and responding to requests for itemized payroll records, should be designated by name or job title and by business address. [Committee Regulations Section 1401.3]

Sections 3 and 6 of the regulations should allow records to be made available through agency and municipal officials who have in the past been authorized to make records or information available. Duties of the records access officer should be specified in greater detail in Section 3 and should reflect the duties listed in Committee Regulations Section 1401.2(b).

Greene County agencies cannot frivolously assert that a record is not assessible by virtue of an executive privilege.

The Court Appeals concluded in Cirale v. 80 Pine Street Corp. (35 NY 2d 113) that government bodies cannot protect records simply by stating that it was in the public interest to maintain secrecy. Any agency attempting to assert privilege must prove that the public interest is better served by secrecy. If necessary, the court will examine the documents itself, in secret, prior to making a determination. The court has clearly conveyed its message that it does not concede the authority to make the determination to any other governmental body.

County Regulations should state that requests for records may be oral or in writing, and that written requests shall not be required for records customarily available without written request. [Committee Regulations Section 1401.6(a)] While written requests may be required pursuant to Committee Regulations Section 1401.6(a), failure to use a prescribed form for submitting requests is not a valid reason for denying access.

County Regulations should require that, except under extraordinary circumstances, officials should respond to an oral or written request for records within five days of such request, or provide a written explanation of when a reply to the request will be made. [Committee Regulations Section 1401.6(b)]

Regulations should note that a subject matter list of County records, updated semi-annually, must be available for public inspection and copying. [Committee Regulations Section 1401.6(c)]

A procedure through which denial of access to records may be appealed must be established in writing. Access to records may be denied in part, as well as in whole. Denial of access must be in writing, advising the person denied access of his right to appeal and to whom that appeal is to be directed. The person, persons or body established to hear appeals must be designated by business address and business telephone as well as by name or job title. The appeals unit must inform the requester in writing of its decision within seven business days of receipt of the appeal. [Committee Regulations Section 1401.7]

Unless established by law, rule or regulation of the County Board prior to September 1, 1974, Committee regulations require that no fee be charged for search for records or any certification pursuant to Committee regulations. Committee regulations also require that, unless established by law, rule or regulation prior to September 1, 1974, the fee for copying records shall not exceed 25 cents per page for photocopies not exceeding 8 1/2 x 14 inches in size. For copies greater than 8 1/2 x 14 inches in size, the actual copying cost, which excludes fixed agency costs such as salaries, may be charged. Agencies which do not have copying machines shall prepare typed or handwritten transcripts upon request, and may charge for the clerical time involved in preparing the transcript. [Committee Regulations Section 1401.8]

County Regulations should require a listing of records access officers, fiscal officer, appeals person or persons or body and location where records can be seen or copied to be posted everywhere records are kept. [Committee Regulations Section 1401.9]

Enclosed are a copy of general regulations of the Committee, and model regulations governing access to records, which may assist you to amend your regulations. If you have any questions, please call (518) 474-2791.

Sincerely,

Larry Zawsiza
Municipal Liaison
Officer

Enclosures

LZ:lbb

Minutes of school bd. mtg.

#127

March 18, 1975

Mr. Donald M. Kelly
[redacted]

Dear Mr. Kelly:

Your letter is directed at the following issue: when do notes taken at a school board meeting become minutes accessible to the public?

In a Judicial Decision of the Commissioner of Education, it was held that minutes are not accessible until they are approved by the Board. The Commissioner based his opinion on the "inchoate document" rule, which holds essentially that notes or preliminary drafts upon which a report is based are not public records under Section 2116 of the Education Law. The opinion stated that:

> "the notes of a board meeting, while still in nonfinal form, are not such records as are open to public inspection. Once the minutes are approved by the board, they become public records. Reasonable disclosure of board action may not, however, be evaded by an unreasonable delay in the board's action on such minutes. The minutes must be acted on within a reasonable time. In this case, the record indicates that approval of minutes was often long delayed, occasionally for as long as three months. Absent unusual circumstances, the board should act upon the minutes of a meeting at the next following meeting" (In the Matter of Appeal of Richard L. Rosinbaum, Decision No. 8013, June 17, 1969).

In response to your other point regarding the cost of bringing suit, the Committee has proposed legislation which shifts the burden of proof to the agency denying access and gives a court discretion to award reasonable attorney fees in cases in which a member of the public substantially prevails. I have enclosed a copy of the proposed amendments for your perusal.

I hope that I have been of some assistance. Should any further questions arise, please feel free to contact me.

Very truly yours,

Robert J. Freeman
Deputy Counsel

RJF/sd

enc.

INVESTIGATIVE FILES

#128

March 18, 1975

Mr. Ralph P. Miccio
Deputy Corporation Counsel
City of Cohoes
Cohoes, New York 12047

Dear Ralph:

As I interpret our discussions, the issue involves public access to an investigative report prepared for and used by the Cohoes Common Council in compiling its report to the public.

If the facts that you have described are accurate, in my opinion, the report is accessible.

The Freedom of Information Law grants access to certain categories of records, one of which includes those records made available by other provisions of law. One such provision preserved by the Law is Section 51 of the General Municipal Law, which grants access to:

> "[A]ll books of minutes, entry or account, and the books, bills, vouchers, checks, contracts or other papers connected with or used or filed in the office of or with any officer, Board or commission acting for or on behalf of any county, town, village or municipal corporation in this state...to...any taxpayer or registered voter..."

Since the City of Cohoes is a municipal corporation within the scope of General Municipal Law, virtually all of its records are accessible. The only effect of the Freedom of Information Law on Section 51 is that accessible records should be made available to any person [see Section 88(6) and the attached Resolution], without regard to status or interst.

It should be noted that Section 51 is entitled "Prosecution of officers for illegal acts." The access provisions of Section 51 were enacted to ensure the accountability and efficient functioning of public officers.

You have mentioned three possible grounds for withholding the report: protection of personal privacy, interference with a criminal prosecution, and assertion of the governmental secrecy privilege.

First, whose privacy would be protected by denying access? As I understand the situation, the privacy consideration relates to those officials who were the subject of the investigation. If the report involves the officials' performance of their duties as public officers, in my opinion, protection of their privacy is not a sufficient ground upon which the report may be withheld. As mentioned previously, one of the purposes of Section 51 is to provide access to records relating to the manner in which public officers perform their duties. Moreover, none of the examples of unwarranted invasions of privacy contained in the Freedom of Information serve to protect individual privacy in a similar situation. In fact, perhaps the most pertinent example for this case is Section 88(3)(a), which states that an "unwarranted invasion of personal privacy" includes:

> "[D]isclosure of such personal matters as may have been reported in confidence to an agency or municipality and which are not relevant to the ordinary work of the agency or municipality..." (emphasis added).

It appears that the material contained in the report was reported in confidence. However, it seems certain that the material is relevant to the work of the municipality and the officers' performance of their duties.

Furthermore, under Section 88(3), a unit of government may act to prevent such an unwarranted invasion, but there is no direction in the statute that such an invasion must be prevented. Consequently, officials of a unit of government have discretion to protect privacy as they see fit. (*see

However, if the report is disclosed, it may be desirable to protect privacy of the individuals who supplied the information upon which the report is based. For example, the names or other identifying details of witnesses deponents, informants, etc., may be deleted if you feel that such disclosure might constitute an unwarranted invasion of personal privacy.

Second, would disclsoure of the report interfere with a criminal prosecution? The results of the investigation were made public more than a year ago and no criminal charges have yet been brought. Therefore, it is unlikely that criminal charges will be brought.

Third, can the governmental secrecy privilege be properly invoked? Such a privilege attaches to

> "confidential communications between public officers, and to public officers, in the performance of their duties, where the public interest requires that such confidential communications or the sources should not be divulged" (People v. Keating, 286 App. Div. 150, 153).

In a recent case, the Court of Appeals stated that information may not be withheld by a "mere assertion of privilege" and that

> "[T]here must be specific support for the claim of privilege, Public interest is a flexible term and what sufficient potential harm to the public interest so as to render the privilege operable must of necessity be determined on the facts of each case. Such a determination is a judicial one and requires that the governmental agency come forward and show that the public interest would indeed be jeopardized by a disclosure of the information. Otherwise, the privilege could be easily abused, serving as a cloak for official misconduct" [Dirale v. 80 Pine Street Corp., 35 NY 2d 113, 118-119 (1974)].

In the instant situation, since the findings of the report were announced publicly and there is little likelihood of criminal prosecution, in my view, a court could find that disclosure might serve to enlighten the public and enhance the public interest [see also Winston v. Mangan, 338 NYS 2d 654; Scott v. County of Nassau, 252 NYS 2d 135, 138).

Finally, since neither you nor I have inspected the report in question, it is impossible to make a judgment. However, if you have portrayed the facts accurately, in my opinion, the report should be made accessible.

If you have any further questions, feel free to call me.

Best of luck in your new endeavor and regards to your family.

Very truly yours,

Robert J. Freeman
Deputy Counsel

RJF/sd

enc.

#129

March 19, 1975

Ms. Barbara Ward
Office of the Town Attorney
Audrey Avenue
Oyster Bay, New York 11771

Dear Ms. Ward:

In reply to our telephone conversation of Friday, February 21, 1975, the following information is provided:

QUESTION: Are there guidelines regarding repeated requests for information?

ANSWER: Yes. There are two instances in which an agency might receive repeated requests for the same information.

In one case, a person denied access to a record may again request the record by appealing to the head or authorized representative of the agency [Freedom of Information Law, Section 88(8), Committee Regulations Section 1401.7]. A further denial of access on appeal is subject to review in the manner provided in Article 78 of the Civil Practice Law and Rules.

In the second case, an individual may request the same record from the agency several times, even though he has already been granted or denied access by the agency. Although repeated requests for records may cause inconvenience for an agency, the Court of Appeals has ruled that "mere inconvenience" to an agency is not so detrimental to the government as to preclude access (New York Post v. Moses, 12 A.D. 2d 243, 210 NYS 2d 88, APpellate Division, First Dept. 1961, Rev'd on other grounds, 10 NY 3d 199, 219 NYS 2d 7, N.E. 2d 709, 1961).

R/52

An agency may, however, regulate repeated requests for information. A lower court in New York has held that an official may properly establish rules controlling such activity to prevent disruption of the orderly functioning of his office (Sears Roebuck & Co. v. Hoyt, 202 Misc. 43 107). Another court has held that examination of records must proceed in an "orderly and chronological fashion" (Sorley v. Lister, 33 Misc. 2d 471, 218 NYS 2d 215, Sup. Ct. Special Term, Nassau County, 1961). Agencies also have an obligation to insure that one individual's request for records does not effectively prevent other individuals from exercising their rights of access to records.

Committee regulations note that if extraordinary circumstances delay a reply to a request for records beyond five days after receipt of the request, an acknowledgement explaining the reason for delay and estimating a date when a reply will be made should be given within five days of receipt of the request to the person requesting the records [Committee Regulations Section 1401.6(b)]. In estimating when a reply will be made, agencies may negotiate with individuals making repeated requests for information to establish mutually agreeable procedures for inspection and copying of records.

QUESTION: Are there guidelines regarding requests for large numbers of records?

ANSWER: Yes. An individual might request an entire category of records simply because he does not have enough information to make his request more specific. Standards exist to reduce the number of records sought by enabling persons requesting records to better identify them.

Section 88(6) of the Law provides for prompt access to records upon receipt of a"request for identifiable records made in accordance with the published rules." Regulations note that "a request for access to records should be sufficiently detailed to identify records." The onus for identifying records does not, however, rest entirely with the person requesting records. Committee regulations make a records access officer responsible for assuring that agency personnel assist a person making a request to identify records [Section

1401.2(b)(2)]. The Law [Section 88(4)] requires a current, reasonably detailed subject matter list to assist in identifying records, and Committee Regulations Section 1401.6(c) establish standards for updating the list and for its degree of detail.

It should be noted that federal courts have held that it is incumbent upon federal agencies to provide assistance and information concerning the location and identification of records [Vaughn v. Rosen, 484 F. 2d 820, CA DC, 1973), (National Cable Television Association, Inc. v. FCC, 479 F 2d 183, CA DC, 1973).

Nevertheless, there may still be occasions when records can only be identified by broad or general categories.

Committee Regulations Section 1401.6(e) notes that a request for any or all records falling within a specific category conforms to the standard that records be identifiable. An agency may not deny a request because it encompasses a entire category of records, and there is no restriction which forbids "fishing expeditions" because, as noted above, inconvenience is not so detrimental to government as to preclude access. [New York Post V. Moses, supra].

However, an official faced with a request for an entire category of records may properly establish rules to prevent disruption of orderly office functions [Sears Roebuck & Co. v. Hoyt, supra] and to preserve other persons' rights of access.

As noted earlier, Committee Regulation Section 1401.6(b), provides for replies to requests within five days, or, in cases where extraordinary circumstances (such as voluminous requests for records) intrude, requires acknowledgement of the request within five days of an estimate when a reply is made.

Again, in estimating when a reply will be made, an agency may negotiate with a person requesting an entire category of records to establish a mutually agreeable schedule for inspection and copying of records.

QUESTION: Is an itemized record setting forth the name, address, title and salary of agency officers and employees available only to bona fide members of the news media upon request?

ANSWER: No. Examination of legislative enactments and judicial interpretations (Matter of Egan, 205, NY 147) indicates that in New York State the evolution of the public's right to inspect government records is a history of continually broadened classes of people entitled to inspect records. Section 88(6) of the Freedom of Information Law, effective September 1, 1974, requires agencies and municipalities to make their records available to "any person." In light of this history, it is unlikely that Section 88(1)(g) was intended to limit access to payroll records to members of the news media. Case law, in fact, holds that municipal payroll information is accessible to the public (Winston v. Mangan, 338 NYS 2d 654 1972).

Discussions with legislative staff reveal that in the past, a number of government agencies had denied access to newsmen who were neither residents nor taxpayers. Therefore, the intent of Section 88(1)(g) seems to have been to emphasize that newsmen have the right to payroll information regardless of residence or tax status.

As a result, Committee Regulations state that the fiscal officer shall make payroll items available to any person, including bona fide members of the news media.

Because the acts broadening the class of citizens entitled to inspect government records in New York State did not require use of a prescribed form to gain access, it seems clear that Section 88(1)(g) of the Law, requiring bona fide news media members to complete a form specified by the State Comptroller, is intended to insure that newsmen can rely on a specific written procedure to facilitate their access to payroll records.

However, the Law and Committee Regulations do not require anyone other than bona fide members of the news media seeking requests for payroll information to use any specific form.

Consequently, while written requests may be required pursuant to Committee Regulations Section 1401.6(a), failure by any person other than a news media representative to use a prescribed form to make a written request is not a valid reason for denying access.

If you have any further questions, please do not hesitate to call at (518) 474-2791.

Sincerely,

Larry Zawisza
Municipal Liaison Officer

LZ:lbb

#130

March 25, 1975

Mr. Arnold M. Schwartz
[redacted]

Dear Mr. Schwartz:

As you are aware, your letter of March 18 has been referred by Assistant Attorney General Donald P. Hirschorn to the Committee on Public Access to Records. The Committee has the responsibility of implementing the Freedom of Information Law and giving advice regarding the Law.

It is clear that the assessment information you are seeking is accessible. Section 88(1)(i) of the Law grants access to any records required to be made available for public inspection and copying by any other provision of law. One such provision is Section 51 of the General Municipal Law, which enables taxpayers and registered voters to inspect and copy:

> "[A]ll books of minutes, entry or account, and the books, bills, vouchers, checks, contracts or other papers connected with or used or filed in the office of, or with any officer, board or commission acting for or on behalf of any county, town, village or municipal corporation in this state or any body corporate or other unit of local government in this state which possesses the power to levy taxes..."

The only effect of the Freedom of Information Law on General Municipal Law that records should be made available to any person (see attached resolution); a person seeking access need not be a taxpayer or registered voter.

Consequently, virtually all records in the possession of a municipality, including those in possession of an assessor, are accessible.

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Furthermore, courts have held that information used in preparation of an assessment roll is accessible (Sanchez v. Papontas, 303 NYS 2d 711, 1969).

With regard to fees for copies of records, the Committee has promulgated regulations effective statewide which permit a fee of not more than twenty-five cents per page for copies of records up to 8 1/2 by 14 inches. This fee is applicable unless a unit of government established fees by law, rule or regulation prior to September 1, 1974.

I hope that I have been of some assistance. Should any further questions arise, please feel free to contact me.

Very truly yours,

Robert J. Freeman
Deputy Counsel

RJF/sd

enc.

cc: Hon. Donald P. Hirschorn

#131

March 25, 1975

Senator Norman J. Levy
The Senate
State of New York
Albany, New York 12224

Dear Senator Levy:

The issue before the Merrick Bus Safety Committee involves the protection of privacy of bus drivers and disclosure of records pertaining to them.

Section 88(1)(i) of the Freedom of Information Law provides access to any records required by any other provision of Law to be made available for public inspection and copying. One such provision is Section 2116 of the Education Law, which states:

> "[T]he records, books and papers belonging or appertaining to the office of any officer of a school district are hereby declared to be the property of such district and shall be open for inspection by any qualified voter of the district at all reasonable hours, and any such voter may make copies thereof."

The Freedom of Information Law affects this provision of the Education Law in several ways. First, all units of government must adhere to the regulations promulgated by the Committee regarding access. Second, the Committee has resolved that accessible records shall be made equally available to "any person, without regard to status or interest" (see attached resolution). Consequently, if a record in possession of a school district is accessible, it should be made equally available to any person, rather than only

to qualified voters of the district. Third and perhaps most relevant under the circumstances to which you have referred, the Freedom of Information Law provides that units of government, in their discretion, may act to prevent an "unwarranted invasion of personal privacy."

Section 88(3) states:

> "To prevent an unwarranted invasion of personal privacy, the committee on public access to records may promulgate guidelines for the deletion of identifying details for specified records which are to be made available. In the absence of such guidelines, an agency or municipality may delete identifying details when it makes records available. An unwarranted invasion of personal privacy includes, but shall not be limited to:
>
> a. Disclosure of such personal matters as may have been reported in confidence to an agency or municipality and which are not relevant or essential to the ordinary work of the agency or municipality;
>
> b. Disclosure of employment, medical, or credit histories or personal references of applicants for employment, except such records may be disclosed when the applicant has provided a written release permitting such disclosure;
>
> c. Disclosure of items involving the medical or personal records of a client or patient in a hospital or medical facility;
>
> d. The sale or release of lists of names and addresses in the possession of any agency or municipality if such lists would be used for private, commercial or fund-raising purposes;

> e. Disclosure of items of a personal nature when disclosure would result in economic or personal hardship to the subject party and such records are not relevant or essential to the ordinary work of the agency or municipality."

Since the Committee has not promulgated guidelines regarding privacy, the school district has discretion to determine what constitutes such an unwarranted invasion. Subdivisions "a" through "e" above are merely examples of unwarranted invasions of privacy. However, they do provide some indication of the intent of the Legislature. For example, records of a personal nature may be withheld when such records "are not relevant or essential to the ordinary work of an agency or municipality." Consequently, if the records are relevant to the work of the school district, it appears that disclosure would be favored.

In the case at hand, it is ppssible that the records may or may not be relevant to the work of the school district. Some of the records may be accessible pursuant ot other provisions of law. For instance, a traffic infraction docketed by a court is accessible under Section 255 of the Judiciary Law. As such, denial of a judicial record in possession of a school district would serve no purpose.

In any event, it is reemphasized that the school district has discretion to determine what constitutes an unwarranted invasion of personnal privacy. Therefore, a decision to disclose or withhold the records in question is within the power of the school district officials.

I hope that I have been of some assistance. If you would like to discuss the matter further, please feel free to contact me.

Very truly yours,

enc.

#132

March 27, 1975

Mr. Donald M. Kelly
[redacted]

Dear Mr. Kelly:

Thank you for the clippings from Newsday enclosed in your March 17, 1975, letter.

It would not be possible for the Committee to invervene as a friend of the Court in the Freeport case, as you suggested, because the Freedom of Information Law does not authorize the Committee to intervene in cases as a friend of the court.

Thank you again for your interest.

Sincerely,

Larry Zawisza
Municipal Liaison
Officer

bcc: Robert Freeman

LZ:lbb

#133

April 1, 1975

Ms. Yolanda J. DeRosa
First Deputy County Clerk
Cayuga County Clerk's Office
P.O. Box 616
Auburn, New York 13021

Dear Ms. DeRosa:

In your March 11, 1975, letter to the Secretary of State, you asked if it is "permissible and within our legal right to give out information on a DD214 to an insurance representative, employer, representative of a school, etc., on a particular veteran they give us the name of?"

Several Sections of law are relevant to your question.

First, Section 250 of the Military Law provides that a veteran may file and record a certificate of honorable discharge in the office of a county clerk.

Second, Section 79-g of the Civil Rights Law of New York State, entitled, "Filing of certificates of honorable discharge with county clerks" states:

> "a. Notwithstanding the provisions of any general, special or local law to the contrary, any person filing a certificate of honorable discharge in the office of a county clerk shall have the right to direct the county clerk to keep such certificate sealed.
>
> b. Thereafter, such certificate shall be made available to the veteran, a duly authorized agent of such veteran or representative of the estate of a deceased veteran but shall not be available for public inspection."

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Third, Section 87(3) of the Freedom of Information Law states that an unwarranted invasion of personal privacy includes, but shall not be limited to:

> "d. The sale or releast of lists of names and addresses in the possession of any agency or municipality if such lists would be used for private, commercial or fund raising purposes."

Therefore, if a veteran has directed the county clerk to keep his certificate of discharge sealed, that certificate is not accessible pursuant to Section 79-g of the Civil Rights Law of New York State.

If a veteran has filed a certificate with the county clerk but has not directed that the certificate be sealed, access to that certificate may still be denied pursuant to Section 87(3) of the Freedom of Information Law if the county clerk, in his discretion, determines that release of the name or names of veterans would be used for "private, commercial or fund-raising purposes" and thus constitute an unwarranted invasion of personal privacy.

However, discharge certificates are accessible to a "duly authorized agent of such veteran" pursuant to Section 97-g of the Civil Rights Law of New York State. Because the Civil Rights Law does not define "duly authorized", a form like the one submitted to you that has not been notarized, may be accepted by the county clerk as conforming with the phrase "duly authorized"/.

If you have any questions, please call (518) 474-2791.

Sincerely,

Larry Zawisza
Municipal Liaison
Officer

LZ:lbb

#134

April 1, 1975

Mr. Floyd Rosenberg
Deputy Commissioner
Erie County Department of
Fire Safety
Erie County Office Building
95 Franklin Street
Buffalo, New York 14202

Dear Mr. Rosenberg:

In reply to your March 12, 1975 letter, the following information is provided:

QUESTION: Must volunteer fire departments comply with the Law?

ANSWER: Yes. Fire districts, fire protection districts, fire alarm districts, and those fire companies, corporations, or departments (including volunteer fire departments) incorporated under the Not-For-Profit Corporation Law, are subject to the Freedom of Information Law.

-- Section 87(2) of the Freedom of Information Law specifically cites fire districts as "municipalities" subject to the Law.

-- Fire protection districts and fire alarm districts are "other governmental entities performing governmental functions for the state or one or more municipalities therein" [Section 87(2)] and are subject to the Law.

-- Case law holds that fire companies, corporations and departments, even if they are independent volunteer companies chartered under the Not-For-Profit Corporation Law, are government entities. Therefore, they are subject to the Freedom of Information Law.

Fire districts, fire protection districts, fire alarm districts or those fire companies, corporations or departments (including volunteer fire departments) incorporated under Not-For-Profit Corporation Law must therefore adopt regulations governing public access to records.

-- Fire districts are defined as "municipalities" under Section 87(1) and (2) of the Freedom of Information Law. Because there is no superior governing body which may make uniform rules for access to fire district records, each fire district must promulgate regulations governing access to records. A fire district may choose to promulgate uniform rules for all fire companies serving the district pursuant to Section 88(2) of the Law.

-- Fire protection and fire alarm districts, and volunteer fire departments or companies incorporated under the Not-For-Profit Corporation Law are subject to the Freedom of Information Law. In the case of fire protection and fire alarm districts, the governing body (the town board or boards) may choose to promulgate uniform rules for all fire companies serving those districts pursuant to Section 88(2) of the Freedom of Information Law.

However, if a town board or boards or a fire district does not promulgate uniform regulations which specifically include fire companies, corporations and departments, including volunteer fire companies, each individual fire company, corporation or department must promulgate rules and regulations conforming with those issued by the Committee on Public Access to Records.

QUESTION: What forms must be used to gain access to records?

ANSWER: A fire protection or fire alarm district; or an incorporated fire company, corporation or volunteer department may require bona fide members of the news media to fill out the form specified by the State Comptroller to obtain access to itemized payroll information pursuant to Section (88)(1)(g) of the Law.

However, the Law and Committee regulations do not require anyone other than bona fide members of the news media seeking requests for payroll information to use any specific form.

Consequently, while written requests may be required pursuant to Committee regulations [Section 1401.6(a)], failure to use a prescribed form for submitting requests by anyone other than a bona fide member of the news media seeking payroll information is not a valid reason for denying access.

Please note that because the history of access to government records in New York State reveals a continual broadening of the class of citizens entitled to inspect records, Committee

regulations [Section 1401.3(b)] require any person, including members of the news media, to be granted access to itemized payroll information. However, as noted above, any person may obtain access to payroll information without using a prescribed form, although members of the news media seeking information may be required to fill out a form to facilitate their access to records.

QUESTION: What information must fire, fire protection and fire alarm districts; and fire companies, corporations or departments, including volunteer companies, incorporated under the Not-For-Profit Corporation Law keep on hand?

ANSWER: Section 88(1) of the Law lists nine categories of records which are accessible under the Freedom of Information Law. The ninth category [88(1)(i)] requires "any other files, records, papers or documents required by any other provision of law to be made available for public inspection and copying."

Section 51 of the General Municipal Law states that "All books of minutes, entry or account, and the books, bills, vouchers, checks, contracts or other papers connected with or used or filed in the office of, or with any officer, board of commission acting for or on behalf of any county, town, village or municipal corporation in this state, or any body corporate or other unit of local government in this state which possesses the power to levy taxes or benefit assessments upon real estate or to require the level of such taxes or assessments or for which taxes or benefit assessments upon real estate may be required pursuant to law to be levied, including the Albany port district commission, are hereby declared to be public records ..."

QUESTION: For how long must fire, fire protection and fire alarm districts; and fire companies, corporations or volunteer departments incorporated under the Not-For-Profit Corporation Law, keep records?

ANSWER: The Freedom of Information Law and Committee regulations are silent on the length of time records must be kept. The State Education Department, Office of State History, Albany, New York 12224, publishes record retention and disposition schedules applicable to fire districts and fire companies. Copies of those schedules may be obtained from the Office of State History.

Enclosed are copies of the Law, Committee regulations which have the force and effect of law, and model regulations based on Committee regulations. If you have any questions, please call (518) 474-2791.

Sincerely,

Larry Zawisza
Municipal Liaison
Officer

Enclosures

LZ:sl

denied

#135

April 7, 1975

Mr. Alfred B. Lowy
Managing Editor
The Daily Item
Port Chester, New York 10573

Dear Mr. Lowy:

I thank you for sending a copy of the denial on appeal by the Town of Harrison regarding the study prepared by Valuation Associates.

You have exhausted your administrative remedies, having been denied access upon your initial request and upon appeal, pursuant to Section 88(8) of the Freedom of Information Law.

Therefore, should you decide to pursue the matter further, your only recourse is initiation of a proceeding pursuant to Article 78 of the Civil Practice Law and Rules.

Should any further questions arise, please feel free to contact me.

Very truly yours,

Robert J. Freeman
Deputy Counsel

RJF/sd

Any Person

PRIVATE

PAYROLL

F#136

April 8, 1975

Ms. Elizabeth S. Brown
Records Access Officer
City School District
13 South Fitzhugh Street
Rochester, New York 14614

Dear Ms. Brown:

You have raised several issues in your letter of April 2.

First, it should be noted that the Freedom of Information Law grants access to specified categories of records [Section 88(1)] and preserves rights of access to records made available by other laws [Section 88(1)(i)].

One of the laws in which access is preserved is Section 2116 of the Education Law, which states that:

> "[T]he records, books and papers belonging or appertaining to the office of any officer of a school district are hereby declared to be the property of such district and shall be open for inspection by any qualified voter of the district at all reasonable hours, and any such voter may make copies thereof."

The application of the Freedom of Information Law upon Section 2116 is relevant to your inquiry in two respects. While Section 2116 grants access only to qualified voters of the district, the Law states [Section 88(6)] and the Committee has resolved that accessible records shall be made available to "any person, without regard to status or interest" (see attached resolution).

Second, the privacy provisions of the Law [Section 88(3)] may be applied when granting access to records. Protection of privacy will be discussed in greater detail as the issue arises.

With reference to payroll records, the fiscal officer of the school district is required by Section 88(1)(g) of the Law to compile a record containing the name, address, title and salary of every employee of the district. As noted earlier, this information is accessible to any person, and the Committee's regulations so state (see attached Regulations, Section 1401.3).

However, the Law is silent as to which address, home or business, should be provided as part of the payroll record. Further, the Committee has not rendered an opinion as to which address should be made available. Therefore, in my opinion, an agency has discretion to provide either the home or business address. If, for example, you feel that disclosure of home addresses would constitute an unwarranted invasion of personal privacy, you may in your discretion furnish employees' business addresses.

Regarding personal information, as we discussed this morning, the Committee has not yet adopted guidelines relating to deletion of identifying details which if disclosed would constitute an unwarranted invasion of personal. Consequently, when making records available, an agency may in its discretion delete identifying details to protect privacy. The Law does, however, state that an unwarranted invasion of personal privacy includes:

> "[D]isclosure of employment, medical or credit history or personal references for employment, except such records may be disclosed when the applicant has provided a written release permitting such disclosure" [Section 88(3)(b)].

Therefore, although you <u>may</u> withhold an individual's employment history, there is no provision in the Law which states that you <u>must</u>.

Your final question involves the distinction between the press and the public in obtaining access to records. Under the Law, the press has no greater right of access than any member of the public.

If a record is made available to the press, it should be made equally available to any person.

Furthermore, in my opinion, once a record has been made available to the press, it should continue to be made available to the public.

I hope that I haveebeen of some assistance. Should any further questions arise, please feel free to contact me.

Very truly yours,

Robert J. Freeman
Deputy Counsel

RJF/sd

enc.

#137

April 8, 1975

Mr. Peter A. Bee

Dennis M. O'Leary

Your Letter Dated March 10, 1975

The following is an excerpt from a letter dated November 18, 1974, from the Committee's Counsel, Robert Freeman, to the Counsel of the Department of Audit and Control:

"(7) The Law recognizes no distinction between a 'primary repository' and a 'secondary repository' of records, and there is no case law on the matter.

If an agency is one of two or more legal custodians of a record, it has the same duties under the Law as the other agencies. There is no provision in the Law or regulations which permits public access to records in possession of one agency to be conditioned upon approval of another agency. Each legal custodian is responsible for knowing which of its records are accessible and which are not.

There is nothing in the Law to prohibit officials of one agency from consulting with those of another. Section 1401.6(b)(2) enables an agency to delay a decision to grant or deny access. Acting pursuant to this provision, an agency could obtain from another agency the added information necessary to make a decision. Perhaps consultation would be beneficial to determine the confidentiality of a record with which one official is more familiar than another. In any case, if Audit and Control denies access to a record on the recommendation of another agency, the appeal would still be taken to the person designated by Audit and Control to hear appeals. Also, since reasonable men may differ, reasonable records access officers may also differ. Although implementation of the Law should be uniform, there is no guarantee that it is or that it will be."

cc: Commissioner Robert Herman
State Rent Administrator
Division of Housing and Community Renewal

Mr. Charles Hogg
Records Access Officer
Division of Housing and Community Renewal

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#138

April 7, 1975

Mr. Peter A. Bee
President
Richlee Tenant Association
1 Bradley Court
Mineola, New York 11501

Dear Mr. Bee:

Thank you for your letter of March 10, 1975. As indicated by Mr. Zawisza in his letter to you dated March 25, 1975, the issues you have raised have been reviewed by our Counsel.

The following conclusions are based on the enclosed regulations of the Committee on Public Access to Records which control the procedure for access to all records including those held by one agency for delivery to another.

1. Any agency which has records in its custody (possession) shall provide or deny access to such records upon request from a member of the public [Committee Regulation Section 1401.2(b)(3)].

2. An agency which receives a request for records held for delivery to another agency may provide or deny access independently without consulting the other agency or may delay responding to a request for not more than five working days during which time the other agency may review the record. An agency may delay providing access or notice of denial beyond five working days only under extraordinary circumstances [Committee Regulation Section 1401.6(b)(1) and (2)].

Committee Regulation Section 1401.6(b)(1) provides that an agency shall, except under extraordinary circumstances, respond to a request within not more than five working days after receipt of the request. Within this five-day period, an agency may have the requested record reviewed by another agency for whom it was prepared. Therefore, the Division of Housing can have the County Rent Guidelines Board review statistical data prepared for delivery to the Board prior to providing public access. Although this practice is permissible, neither the law nor the regulations require that an agency in possession of a record condition access upon consent of another agency.

If more than five working days is required to produce a record, Committee Regulation Section 1401.6(b)(2) requires the agency to acknowledge receipt of the request within five working days after receipt, and include a brief explanation of the reason for delay and an estimate of the date production or denial will be forthcoming. Whether delay results from an extraordinary circumstance is an issue for the courts in an Article 78 Proceeding challenging the constructive denial of access [Committee Regulation Section 1401.7(c)].

Delay of access beyond five days to have the record reviewed by the agency for whom the record was prepared would, in my opinion, be considered to be an extraordinary circumstance by the courts if the agency was unable in <u>good faith</u> to have the record reviewed within the five-day period.

If, on the other hand, access was delayed to enable the agency to whom the record was to be delivered to make final determinations or policies based on the record, then the court would have to determine if the public interest required delay beyond five days.

I hope this letter explains the Committee's general regulations regarding access to records in the possession of one agency prepared for delivery to another agency.

If you need any assistance in the future, please contact me in writing, or by telephone at (518) 474-2791.

Sincerely,

Dennis M. O'Leary
State Agency Liaison
Officer

Enclosure

cc: Commissioner Robert Herman
State Rent Administrator
Division of Housing and Community Renewal

Mr. Charles Hogg
Records Access Officer
Division of Housing and Community Renewal

DMO'L:lbb

REQUESTS FOR RECORDS
#139

April 8, 1975

Ms. Rose L. Berman
President
Clinical Laboratory Directors
of New York State, Inc.
1780 Broadway
New York, New York 10019

Dear Ms. Berman:

I apologize for being unable to respond to all of your questions. Since we last communicated, our staff was moved to another building and I have tried unsuccessfully to locate your letters.

In any case, as I wrote previously, a request for records need not be in affidavit form. An agency may require that a request be in writing, but the request need only be "sufficiently detailed to identify the records" [Regulations, Section 1401.6(d)].

Also, there is no requirement that an interest be indicated when seeking records. As the Committee has resolved, information accessible under the Law "shall be made equally accessible to any person, without regard to status or interest" (See attached Resolution).

With regard to the secrecy of the Board of Health as a legislative body, Section 88(5) of the Law requires that a board compile a record of the final votes of each member in every agency proceeding in which a member votes. Consequently, you should be able to discover the issues discussed by the Board and the members' voting records.

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Once again, I apologize for being unable to answer you specific questions. If I have not answered them in this letter, I would be happy to do so if you could restate them in another letter.

Very truly yours,

Robert J. Freeman
Deputy Counsel

RJF/sd

enc.

#140

April 8, 1975

Mr. Bruno Nannie
Business Manager
Byron-Bergen Central School
Townline Road
Bergen, New York 14416

Dear Mr. Nannie:

Thank you for submitting a copy of the District's regulations on public access to records. Based on a review of these regulations, the following changes are recommended:

1. The procedures for requesting records and appealing a denial of access should be more detailed (see Committee Regulations 1401.6 and 1401.7).

2. While written requests may be required pursuant to Committee Regulations Section 1401.6(a), failure to use a prescribed form for submitting requests is not a valid reason for denying access.

3. The regulations should state that the records access officer must reply to a request within five days or provide an explanation for delay [see Committee Regulations 1401.6(b)].

4. Regulations must provide that the subject matter list must be updated semi-annually and must be reasonably detailed, including all records held by the District and first produced, filed, or first kept or promulgated after September 1, 1974 [see Committee Regulations 1401.6(c)].

5. The duties of the records access and fiscal officers should be more detailed (see Committee Regulations 1401.2 and 1401.3).

Enclosed are copies of the general regulations of the Committee and model regulations. If you have any further questions, please call me at (518) 474-2722.

Very truly yours,

Larry Zawisza
Municipal Liaison
Officer

DO'L:DJD/sd

enc.

#141

April 8, 1975

Ms. Joyce Fitzgerald, Clerk
Livingston County Board
of Supervisors
Court House
Geneseo, New York 14454

Dear Ms. Fitzgerald:

Thank you for submitting a copy of the County's regulations on public access to records. Based on a review of these regulations, the following changes are recommended:

Section 4. The requirement that written notice be made by members of the news media on a form prescribed by the County Treasurer differs with the Law [Section 88(1)(g)], which refers to a form prexcribed by the State Comptroller. I am enclosing a copy of the Comptroller's form, which may be copied and used by the County Treasurer [See also Regulations, Section 1401.3(b)].

Section 7. The Committee's regulations state that the maximum fee for copying records shall not exceed twenty-five cents per page for photocopies not exceeding 8 1/2 by 14 inches, unless established by law, rule or regulation of the County Board of Supervisors prior to September 1, 1974. The County's one dollar copying fee is in violation of the Committee's regulation.

Section 9. The County Clerk may not frivously deny access to a record on the basis of adverse effeet on the public interest. The Court of Appeals concluded in Cirale v. 80 Pine Street Corp., (35 NY 2d 113) that government bodies cannot protect records simply by stating that it was in the public interest to maintain secrecy. Any agency attempting to assert privilege must prove that the public interest is better served by secrecy. If necessary, the court will examine the documents itself, in secret, prior to making a determination. The court has clearly conveyed its message that it does not concede the authority to make the determination to any other governmental body.

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Section 11. Neither the Freedom of Information Law nor the regulations of the Committee require a person requesting a record to give reasons why he or she was denied access when he or she appeals that denial.

If you have any further questions, please call me at (518) 474-2722.

Very truly yours,

Larry Zawisza
Municipal Liaison
Officer

LZ:DJD/sd

enc.

#142

April 9, 1975

Mr. Gustave Lienau
Deputy County Clerk
of Saratoga County
Ballston Spa, New York 12020

Dear Mr. Lienau:

This letter is to confirm our conversation of April 8, 1975, during which we discussed the maximum fee allowed by the Committee regulations for photocopies of records requested by members of the public.

The County's resolution dated September 9, 1974, establishing a fee of $1.00 per photocopy, exceeds the maximum fee of $.25 per photocopy of a record not exceeding 8 1/2 by 14 inches, pursuant to general regulations adopted by the Committee on Public Access to Records [21 NYCRR 1401.8(c)(1)].

As you are aware, Section 88(2) of the Freedom of Information Law requires each municipality to adopt regulations on availability, nature and location of records (including fees for copies) pursuant to general rules issued by the Committee on Public Access to Records.

The section of the Committee's regulations regarding fees for copies is attached.

I trust this information will be forwarded to the Board of Supervisors for appropriate remedial action regarding the fee for copies.

Thank you for your cooperation in this matter.

Sincerely,

Dennis M. O'Leary
State Agency Liaison
Officer

Enclosure

DMO'L:sl

#143

April 9, 1975

Mr. Donald Phelps, Supervisor
Town of Pitcairn
Supervisor's Office
Route 2
Harrisville, New York 13648

Dear Mr. Phelps:

Thank you for submitting a copy of the Town's regulations on public access to records. Please accept our apologies for the delay in our response.

Unfortunately, the Town's regulations do not conform to the Committee's general regulations. Enclosed are copies of the general regulations and model regulations to help you in reformulating your regulations.

In reference to your question regarding justice records, we are presently waiting for an opinion from the Office of Court Administration on the applicability of the Freedom of Information Law to a town court. When we receive it, we will forward a copy to you for your information.

The question of public access to records relating to vital statistics, such as birth, death and marriage records is not easily answered. With regard to disclosure of birth and death records, Section 4174 of the Public Health Law states that authorized persons may

> "upon request, issue certification of birth or death unless in his judgment it does not appear to be necessary or required for a proper purpose."

Similarly, with respect to marriage records, Section 20-a of the Domestic Relations Law provides that authorized persons

> "shall, upon request, supply to any applicant a certified transcript of any marriage registered under the provisions of this article, unless he is satisfied that the same does not appear to be necessary or required for judicial or other proper purposes."

In neither of the statutes quoted above is there a definition of what is a "proper purpose."

The Freedom of Information Law preserves rights of access granted under existing law, and the Committee has resolved that

> "information accessible under the Freedom of Information Law shall be made equally accessible to any person, without regard to status or interest."

Nevertheless, in my opinion, due to the language in the Public Health Law and the Domestic Relations Law, what is a proper purpose is to be determined by the individuals having custody of the records in question. Therefore, I believe that the town clerk may exercise discretion in determining what is a proper purpose upon a request for the records in question.

If you have any more questions, please feel free to call me at (518) 474-2722.

Very truly yours,

Larry Zawisza
Municipal Liaison
Officer

LZ:DJD/sd

STATE OF NEW YORK
COMMITTEE ON PUBLIC ACCESS TO RECORDS FOIL-AO-144

DEPARTMENT OF STATE, 162 WASHINGTON AVENUE, ALBANY, NEW YORK 12231
(518) 474-2518, 2791

April 9, 1975

Mr. William R. Liddell, III
[redacted]

Dear Mr. Liddell:

I regret to inform you that under New York's Freedom of Information Law, investigatory files compiled for law enforcement purposes are not accessible [Section 88(7)(d)].

However, I would suggest that your attorney attempt to obtain the records you are seeking through a discovery proceeding. If you do not have an attorney, the office of the Otsego County Public Defender will furnish one.

I hope that I have been of some assistance.

Very truly yours,

Robert J. Freeman
Deputy Counsel

RJF:sl

#145

April 10, 1975

Dr. Michael Grenis
Superintendent of Schools
Chenango Valley Central School District
768 Chenango Street
Binghamton, New York 13901

Dear Dr. Grenis:

Thank you for submitting a copy of the District's regulations on public access to records. Based on a review of the regulations, the following changes are recommended:

Section 1. The duties of the records access officers should be more detailed pursuant to Section 1401.2(b) of the Committee's regulations.

Section 1.3. While written requests may be required pursuant to the Committee's regulations, failure to use a prescribed form for submitting a written request is not a valid reason for denying access to records. Regulations should also note that a subject matter list of school district records, updated semi-annually, should be available for public inspection and copying.

Section 1.4. The thirty day statute of limitations has no basis in either the Freedom of Information Law or the Committee's regulations and is therefore invalid. The Superintendent of Schools or his authorized representative must inform the requester of his decision on appeal in writing.

Section 1.5. According to the District's original set of regulations, the basic fee for copies was $.10 per page. When the Board amended the regulations, it raised the fee to $.25 per page. Section 1401.8(c)(1) of the Committee's regulations provides that the maximum fee set by the Committee "shall not be construed to mandate the raising of fees where agencies in the past have charged less than $.25 for such copies."

If you have any questions, please call me at (518) 474-2791.

Very truly yours,

Larry Zawisza
Municipal Liaison Officer

LZ/djd:sl

#146

April 11, 1975

Mr. Charles L. Button
Chief School Officer
Chautaugua Central School
Chautaugua, New York 14722

Dear Mr. Button:

Thank you for submitting a copy of the District's regulations on public access to records. Based on a review of these regulations, the following changes are recommended:

Section 2. Although the Board has designated the District Clerk as its records access officer, regulations should state that the public shall not be denied access to records through District officials who have in the past been authorized to make records or information available [Committee Regulations Section 1401.2(a)]. Also, records access officers should be designated by business address as well as by job title or name.

Section 3. The fiscal officer should be designated by business address as well as by name or job title.

Section 7, A person appealing a denial of access shall provide a written appeal which need only identify:

1. The date and location of requests for records;

2. The records to which the requester was denied accesss; and

R/

3. The name and return address of the requester. Also, the appeals person or persons or body should be designated by business telephone and address as well as by job title. [Committee Regulations Section 1401.7(b) and (d)]

The regulations should also provide for a listing of records access officers, fiscal officer, appeals officer and location where records can be seen or copied to be posted everywhere records are kept [Committee Regulations Section 1401.9].

If you have any questions, please call me at (518) 474-2791.

Sincerely,

Larry Zawisza
Municipal Liaison
Officer

LZ:DJD:lbb

ADOPTED REGS/
RECOMMENDATIONS
#147

April 11, 1975

Mr. Robert E. Caswell
Clerk
Board of County Legislators
Oneida County
Oneida County Office Building
800 Park Avenue
Utica, New York 13501

Dear Mr. Caswell:

Thank you for submitting a copy of the County's regulations on public access to records. Based on a review of these regulations, the following changes are recommended:

Section 1. Section 88(2) of the Freedom of Information Law provides that the governing body of a municipality may promulgate uniform rules for any group of or all agencies within that municipality. Although the intent may be inferred, it is unclear whether the County regulations are intended to embrace all County agencies.

Section 2. Neither the Law nor the regulations adopted by the Committee define "record". First, in my ppinion, a definition should not be limited to a writing. There may be instances in which a tape recording or a computer disc or tape could be considered a record. Second, your definition includes each category of records found in Section 88(1) of the Law, with the exception of subdivision (h), final determinations of members of the governing body of an agency. If you want to use the framework that the County has adopted, in my view, the excluded subdivision should be included in the definition.

Also, in subdivisions ii, iii, and iv of the definition of "records," the statements of policy, minutes and audits relate to the County of Oneida. It is noted that the items enumerated are accessible from each agency or department within the County. For example, a statement of policy need not be adopted by the County Legislature to be accessible; it may be adopted by a department within the County.

Subdivision (b), in which "statistical tabulation" and "factual tabulation" are defined meet a dictionary definition of the terms. However, in my opinion, the intent of the Law is to provide access to statistics and facts. Consequently, in my view, an arrangement of statistical or factual material in a form other than tabular should not be intentionally used as a method of circumventing the spirit of the Law. Moreover, since the County is a municipality, it is subject to Section 51 of the General Municipal Law. Rights of access under Section 51 are preserved in the Law through Sections 88(1)(i) and 88(10). Under Section 51, virtually all records in possession of a municipality are accessible, unless disclosure would result in detriment to the public interest.

Section 3(a). While written requests may be required pursuant to Committee regulations, failure to use a prescribed form for submission of requests is not itself a valid ground upon which access may be denied.

Further, the duties of the records access officer should be more fully delineated. In addition to the duties listed in your regulations, the officer must assist a requester in identifying the records sought and must certify upon request that a transcript is a true copy of the record copied [Committee Regulations Section 1401.2(b)]. Also, the official to whom a request is made must respond within five days of receipt of a request by granting access, denying access or by providing a brief explanation of the delay and an estimate of the date upon which production or denial of a record will be made [Committee Regulations Section 1401.6(b)]. Failure to respond within the time period provided constitutes a denial

of access [Committee Regulations Section 1401.6(b)]. Also, if records have been made available in the past from other authorized officials, application to such an official, rather than the records access officer, cannot be a basis for a denial of access [Committee Regulations Section 1401.2(a)].

Section 3(b). Regarding payroll records, the name or job title and the business address of the fiscal officer must be provided [Committee Regulations Section 1401.3(a)]. Further, it is emphasized that payroll information is available to any person, including members of the news media, pursuant to Section 88(1)(g), Section 1(i) and Section 10 of the Law and Section 1401.3(b) of the Committee regulations.

Section 4. The subject matter list must be updated semiannually [Committee Regulations Section 1401.6(c)(2)].

Section 5. The regulations governing fees should be more explicit. Unless established by law, rule or regulation adopted by the County Legislature prior to September 1, 1974, the fee for copying a record cannot exceed twenty-five cents per page for copies not exceeding 8 1/2 x 14 inches [Committee Regulations Section 1401.8(c)(1)]. For copies greater than 8 1/2 x 14 inches, a fee reflecting actual copying cost excluding fixed costs (e.g. salaries, overhead, etc.) may be charged [Committee Regulations Section 1401.8(c)(3)]. When photocopying equipment is unavailable and handwritten or typed copies are made, a fee may be charged for the clerical time necessary to produce the transcript [Committee Regulations Section 1401.8(c)(2)].

Section 7. Denials of access must be made in writing, containing the reasons therefor and a notice of the right to appeal, which must include the name, title, business address and business telephone number of the appeals officer [Committee Regulations Section 1401.7(b)].

It should also be noted that the County Clerk cannot withhold records on the basis of an unsubstantiated assertion that the public interest would be adversely affected by disclosure.

In Cirale v. 80 Pine Street Corp. 35 NY 2d 113, 359 NYS 2d 1 (1974), the state's highest court held that:

> "[A]s part of the Common Law of evidence, 'official information' in the hands of governmental agencies has been deemed in certain contexts privileged...Although the Legislature has recently passed the Freedom of Information Law, it does not abolish the Common Law privilege for official information."

The court noted that:

> "[S]uch a privilege attaches to 'confidential communications between public officers, and to public officers in the performance of their duties, where the public interest requires that that confidential communications or the sources should not be divulged'."

However the court concluded that governmental bodies cannot prevent disclosure merely by asserting that it is in the public interest to maintain secrecy. Therefore, an agency attempting to assert the privilege must prove that the public interest would be better served by nondisclosure. If necessary, the court may examine the records in question in private prior to making a determination. Moreover, the court clearly stated that it has not conceded the authority to make such a determination to any other governmental unit.

Section 8. When appealing to the appeals officer, the person seeking to appeal need not state the reasons for the initial denial [Committee Regulations Section 1401.(d)].

In addition to the comments made above, the County's regulations should provide for public notice of rights of access consistent with Committee Regulations Section 1401.9.

Please find enclosed copies of the Committee's regulations as well as model regulations, which may be helpful in amending your regulations.

I hope that I have been of assistance. Should any further questions arise, please feel free to contact me.

Sincerely,

Robert J. Freeman
Assistant Counsel

Enclosures

ADOPTED REGS/
RECOMMENDATIONS

#148

DSJ

April 11, 1975

Mr. John A. Glendinning
Public Access Officer
The State Insurance Fund
199 Church Street
New York, New York 10007

Dear Mr. Glendinning:

Thank you for submitting a copy of the Board's regulations on public access to records. Based on a review of these regulations, the following changes are recommended:

Section 2

It is unnecessary to cite a specific body of law, such as the Workmen's Compensation Law. If a statute exempts information, the exemption is preserved by Section 88(7)(a) of the Freedom of Information Law (hereafter "the Law") .

With reference to the list of records available to the public (subdivisions a through e), it appears that some of the categories of records listed in Section 88(1) of the Law are present, while others are absent. In using the type of framework adopted by the Board, this kind of list might be more easily understood by both staff and the public if in conformity with Section 88(1) of the Law.

Section 2a

The meaning of "filed" is unclear. Perhaps it would be more appropriate to replace the term in question with "in possession of" or "made by or for." Such a modification would be consistent with the Law [(see Section 88(1)(d)].

Section 2d

"Requested" should be replaced with "required."

Again, if the framework embodied by Section 2 is to be used, minutes of the governing body should be added. Section 88(5) of the Law requires agencies controlled by a board to compile a record of

the final votes of its members in every proceeding in which a member votes. This provision does not conflict with the power of commissioners to adopt rules (Section 83, Workmen's Compensation Law), since the applicable statute pertains to "the keeping of records" while Section 88(5) pertains to the compilation of a record.

Section 3

The subject matter list should include references to all categories of records, not only those deemed accessible. In effect, without knowledge of the existence of a record, no challenge or appeal can be made. [See Section 88(4) of the Law and Section 1401.6(c)(1) of the Regulations.] Also, the subject matter list must be updated semiannually [Committee Regulations, Section 1401.6(c)(2)].

Section 4

First, subdivision (1) of the Board's regulations requires that an appointment be made to peruse records. However, the Committee regulations state that requests shall be accepted during all regular business hours [Section 1401.5(a)]. Although an appointment may be appropriate in some circumstances, it cannot be a prerequisite to seeking access.

Second, subdivision (3) of the Board's regulations requires a showing of interest as a condition precedent to access. This is contrary to the Law [Section 88(6)], which states that records shall be made promptly available to "any persons." Moreover, the Committee has resolved that information available under the Law "shall be made equally accessible to any person, without regard to status or interest" (see attached resolution).

Third, the duties of the records access officer should be delineated in greater detail. [See Committee Regulations, Sections 1401.2(b), 1401.6(b) and 1401.7(c)].

In addition, a more specific appeal procedure should be stated. The reasons for denial of access, in whole or in part, must be stated in writing. Further, a person, persons or body designated by name or job title, business address and phone should be established to hear appeals. When an appeal is taken, the person or body designated to hear appeals must inform the appellant of its decision in writing within seven business days of receipt of the appeal [see Committee Regulations, Section 1401.7].

Section 5

Except where fees were established by law, rule or regulation prior to September 1, 1974, no more than twenty-five cents may be charged for photocopying a page up to 8 1/2 by 14 inches [Committee Regulations, Section 1401.8(c)]. Unless such a fee had been established as stated above, fees for statements filed with the Insurance Fund should also be twenty-five cents per page.

Further, to be consistent with the public notice provision [Section 1401.9], details concerning the records access and fiscal officers should be stated more specifically.

Please find enclosed copies of both the Committee regulations and model regulations.

Should any further questions arise, please feel free to contact me.

Very truly yours,

Robert J. Freeman
Deputy Counsel

Enclosures

RJF:sl

#149

April 11, 1975

Mr. Michael F. Troy, Clerk
Common Council of the
City of Hudson
City Hall
Hudson, New York 12225

Dear Mr. Troy:

Thank you for submitting a copy of the City's rules and regulations on public access to records. Based on a review of these regulations, the following changes are recommended:

Section 2

"Record" is not defined under either the Law or the committee regulations. In my opinion, the requirement that a record consist of a writing should be deleted. There may be instances in which a tape recording or computer disc or tape might be considered a record. Also, the requirement that "record" include only accessible records is inaccurate. In essence, a record is a record even if it is not accessible.

Section 3

(a). The regulations should state the name, business address and telephone numbers of all records access officers and the fiscal officer [Committee Regulations, 1401.2(a) and 1401.3(a)]. There should also be a provision for a public notice to advise members of the public of their rights of access consistent with Section 1401.9 of the Committee Regulations.

(b). While written requests may be required pursuant to the Committee's regulations, failure to use a prescribed form for submitting a written request is not a valid ground for denying access to records. The regulation should provide that a records access officer shall respond to a request for records within five business days by producing the record, denying access or acknowledging the request and estimating the date when production or denial will be forthcoming. [Committee Regulation 1401.6(b)]. The regulations should also state that failure to provide

requested records promptly within the time limits established above shall be deemed a denial of access [Committee Regulations 1401.7(c)].

(c). Regarding payroll information, the form prescribed is that of the State Comptroller, a copy of which is enclosed.

Section 8

Appeals taken from a denial of access need not state the reasons for the denial [Committee Regulations 1401.7(d)].

Enclosed are copies of the general regulations of the Committee and model regulations. If you have any further questions, please call me at (518) 474-2722.

Very truly yours,

Larry Zawisza
Municipal Liaison Officer

Enclosures

LZ:sl

#150

April 14, 1975

Mr. John P. Adams
Assistant Counsel
New York State Division of
Criminal Justice Services
270 Broadway
New York, New York 10007

Dear Mr. Adams:

Thank you for submitting a copy of the Division's regulations on public access to records. Based on a review of these regulations, the following changes are recommended:

Section 2(b). Any definition of "record" should not be limited to a writing. Neither the Freedom of Information Law nor the Committee's regulations define "record", but limiting the form of a record to a writing excludes tape recording and computer tapes which record information.

Section 6(b). Requests for records may be oral or in writing, and written requests shall not be required for records customarily available without written request [21 NYCRR 1401.6(a)]. While written requests may be required pursuant to Committee Regulations Section 1401.6(a), failure to use a prescribed form for submitting requests is not a valid reason for denying access.

Section 6(c). Each agency should accept requests during all hours they are regularly open for business [21 NYCRR 1401.5(a)].

Section 6(d). Except under extraordinary circumstances, officials should respond to an oral or written request for records within five days of such request, or provide a written explanation of the reasons for delay and estimate the date when production or denial will be forthcoming. [21 NYCRR 1401.6(b)].

Section 7. Payroll records shall be accessible to any person including, but not limited to, bona fide members of the news media as required under Sections 88(1)(g), (1)(i) and (10) of the Freedom of Information Law [21 NYCRR 1401.3(b)].

Section 11. The name and business telephone number of the commissioner should also be stated [21 NYCRR 1401.7(b)]. No statute or Committee regulation requires that the appeal be made on a special form prescribed by the agency or that the person requesting the record state the reasons for the denial [21 NYCRR 1401.7(d)].

In addition to the recommendations listed above, your regulations should also require the posting of a public notice of the public's right of access [21 NYCRR 1401.9], include a more detailed list of the records access officer's duties [21 NYCRR 1401.2(b)], provide that no fee will be charged for inspection, search or certification of records [21 NYCRR 1401.8(a)] and include the requirement that a subject matter list of all records produced, filed or kept or promulgated after September 1, 1974, shall be maintained and updated semiannually []1 NYCRR 1401.6(c)].

Enclosed are copies of the general regulations of the Committee and some model regulations. If you have any more questions, please call me at (518) 474-2518.

Sincerely,

Dennis M. O'Leary
State Agency Liaison
Officer

Enclosures

DMO'L:DJD:lbb

ADOPTED Reg/
Recommendations
#151

April 15, 1975

Theodore H. Kline, Esq.
New York State Thruway Authority
200 Southern Boulevard
Post Office Box 189
Albany, New York 12201

Dear Mr. Kline:

Thank you for your interest in complying with the Freedom of Information Law. Having reviewed the regulations adopted by the Thruway Authority, the following recommendations are offered:

Section 107.2(b):

There is no requirement in the Law that a persnn demonstrate an interest as a condition precedent to inspection of payroll information. Both the regulations promulgated by the Committee [Section 1401.3(b)] and a resolution adopted by the Committee reflect that information available under the Law should be made equally accessible to any person, regardless of status or interest.

Section 107.2(c):

Unless established by law, rule or regulation prior to September 1, 1974, there cannot be a charge for either search or certification [See Committee Regulations, Section 1401.8(a)].

Regarding the specific records listed in subdivision (c)(2), the intent of "fees" is unclear. Does it mean fees for inspection, inspection and copying or search, inspection, copying and search. For example, I understand that the six dollar fee relating to accident reports represents search ($2.00), certification ($50) and copying ($3.50) pursuant to the Vehicle and Traffic Law (Section 202).

2

However, if an individual merely seeks to inspect the report, there should not be a fee imposed for certification or copying. In such a situation, presumably the only charge would be the statutory search fee of two dollars.

Similarly, unless previously officially established, the fees for contract plan prints, maps, photographs, etc., should be either twenty-five cents as in (c)(1) or the actual copying cost as in (c)(3) [See also Committee Regulations, Section 1401.8(c)(1) and (3)].

Section 107.3:

I question the propriety of adding to the list of statutory exemptions provided by Section 88(7) by means of regulations. Although the information reflected by exemptions five through nine is not expressly available under the Law, neither is it expressly exempt. Rather, it falls into a gray area between the nine categories of accessible records and the four categories of statutory exemptions. Therefore, in my opinion, access to much of the material covered by exemptions five through nine awaits judicial determination.

Additionally, it appears that all of the information in subdivisions five through eight areecovered by subdivision nine.

Section 107.4:

Reasons for an initial denial of access must be stated in writing.

General Recommendations

Duties of the records access officer, requests for public access, denial of access and public notice should be delineated in greater detail [See respectively, Committee Regulations, Section 1401.2, 1401.6, 1401.7 and 1401.9].

I am enclosing copies of the Committee Regulations and model regulations, which should be of some assistance.

Should any further questions arise, please feel free to call me.

Very truly yours,

RJF/sd
enc.

Robert J. Freeman
Deputy Counsel

ADOPTED REGS / RECOMMENDATIONS

152

April 15, 1975

Maximilian W. Kempner, Esq.
Webster, Sheffield, Fluschmann,
Hitchcock and Brookfield
1 Rockefeller Plaza
New York, New York 10020

Dear Mr. Kempner:

I thank you on behalf of the Committee for your interest in complying with the Freedom of Information Law. Having reviewed the regulations adopted by the Corporation, I would recommend the following changes:

1. The subject matter list should include references to all records in possession of the Corporation, rather than only those deemed accessible. Failure to encompass all records in the list would effectively prohibit the right to appeal.

2. In your letter of February 6, 1975, it was noted that the fee for copies was changed from ten cents to twenty-five cents per copy. Although the fee most recently adopted conforms to Committee regulations, please note that the regulations also state that:

   "[t]his section shall not be construed to mandate the raising of fees where agencies in the past have charged less than 25 cents..." [Section 1401.8(c)(1)].

The only other criticism relates to the degree of detail contained in your regulations, which in my opinion should be somewhat more substantial. For example, it is necessary to give notice to the public regarding time limits for responding to requests and appeals.

I am enclosing copies of the Committee regulations and model regulations which may be of assistance in specifying the duties of the Corporation under the Law.

Should any further questions arise, please feel free to contact me.

Sincerely,

Robert J. Freeman
Deputy Counsel

Enclosures

RJF:lbb

ADOPTED RULES/
RECOMMENDATIONS

#153

April 15, 1975

Mr. James B. Hartwick
Secretary
Nyack Fire Department
Nyack, New York 10960

Dear Mr. Hartwick:

Thank you for sending the Committee a copy of the regulations adopted by the Nyack Fire Department. Having reviewed the regulations, the following recommendations are offered:

Section 1: The duties of the records access officer should be more specifically stated [Committee Regulations Section 1401.2]. Also, a fiscal officer should be named [Committee Regulations Section 1401.3].

Section 2: Records should be made available during the regular business hours of the Department. If there are no regular hours, an appointments procedure should be adopted [Committee Regulations Section 1401.5].

Section 3: First, more detail should be included regarding denial of access to records. For example, time limitations have not been provided [See Committee Regulations, Sections 1401.6 and 1401.7].

Second, in appealing to the Board of Commissioners, a person need not state the facts concerning the denial nor the reasons for seeking records. If a record is accessible, it should be made available to any person, without regard to status or interest.

Third, the Board must notify the appellant of its decision within seven business days of receipt of the appeal [Committee Regulations Section 1401.7(e)].

Section 4: Although the Department may require that requests be made in writing, failure to use the request form prescribed by the Department cannot be a valid basis for denial of access.

Section 5: The fees adopted by the Department are excessive. Unless fees had been established by law, rule or regulation prior to September 1, 1974, the Department may charge no more than twenty-five cents per photocopy for records up to 8 1/2 by 14 inches [See Committee Regulations Section 1401.8].

I am enclosing copies of the Committee Regulations and model regulations, which should be of assistance in complying with your duties under the Law. If you use the model regulations as a basis for your own regulations, your task will be greatly simplified.

I hope that I have been of some assistance. Should any further questions arise, please feel free to contact me 474-2518.

Sincerely,

Robert J. Freeman
Deputy Counsel

Enclosures

RJF:lbb

School Districts

#154

April 15, 1975

Mr. John Beckman
[redacted]

Dear Mr. Beckman:

As promised, please find enclosed copies of the Van Allen case, a memorandum issued to school districts by Robert Stone, Counsel to the State Education Department, and Assemblyman Joseph Lisa's proposed legislation. Unfortunately, I am unable to locate a copy of the Thibadeau ruling, decided by the Commissioner of Education. However, it is cited in the body of the Van Allen case.

I found our conversation this morning quite enjoyable. If I can be of any further assistance, please feel free to call me.

Sincerely yours,

Robert J. Freeman
Deputy Counsel

RJF/sd

enc.

#155

PAYROLL
PRIVACY

April 16, 1975

Mr. Leonard B. Wachsman
Research Director
Civil Service Merit Council
3535 DeKalb Avenue
Bronx, New York 10467

Dear Mr. Wachsman:

Your letter of January 2, addressed to Mr. Judah Gribetz, Counsel to Governor Carey, has been referred to this office, which has the responsibility of implementing New York's new Freedom of Information Law.

Your request for information raises several issues. First, the Freedom of Information Law provides that the fiscal officer of each unit of government must compile and provide access to payroll information, consisting of names, addresses, titles and salaries of all employees, except law enforcement personnel, whose titles and salaries must be disclosed [see Section 88(1)(g) of the Law, a copy of which is enclosed].

With regard to employees' addresses, the Law is silent as to which address, home or business, should be provided. Thus, the officer compiling the information, in his discretion, may provide either. If he feels that disclosure of home addresses would constitute an unwarranted invasion of personal privacy [see Section 88(3)], he may provide business addresses.

The more specific information that you have requested in your complaint (items 1 through 11) may or may not be accessible. Under the Law, a unit of government need not compile a record (except the payroll record) to comply with a request. Therefore, if New York City has not created the lists that you have requested, there is no duty to do so to comply with your request.

If, however, lists that you have requested do indeed exist, they are accessible. Nevertheless, to protect personal privacy, in disclosing information, the City may in its discretion delete identifying details. For example, if City officials feel that disclosure of names would constitute an unwarranted invasion of personal privacy, the names may be deleted from the information provided.

I hope that I have been of some assistance. Should any further questions arise, please feel free to write again.

Very truly yours,

Robert J. Freeman
Deputy Counsel

RJF/sd

enc.

cc: S. Michael Nadel
Assistant Counsel to the Governor

#156

STAT./FACT

April 17, 1975

Mr. David Kellogg
Legal Affairs
New York State Department
of Social Services
1450 Western Avenue
Albany, New York

Dear Dave:

In response to your question dealing with Section 88(1)(g) of the Freedom of Information Law, the "documents, memoranda, data or other materials" which led to formulation of policy are accessible when in statistical or factual form.

Although legislative history is generally unavailable, Senator Ralph Marino, the Senate sponsor of the Law wrote:

> "[I]t is anticipated that documents or memoranda developed by staff members or outside consultants designed to provide recommendations for use in making policy determinations would not be made available, while hard statistical or factual data which led to a determination would be available. The draftsmen were fearful that to allow the disclosure of recommendations in the form of opinions would result in staff members and others becoming hesitant to express their opinions candidly in writing" [Fordham Law Review, 83, 86-87, August, 1974; See also Environmental Protection Agency v. Mink, 41 U.S. LW. 4201, 1973].

Very truly yours,

Robert J. Freeman
Deputy Counsel

#757 157

Denial

NO RECORDS compiled
STAT & FACT TABS compiled
ACCESSIBLE

April 17, 1975

Mr. Edward Krause
[redacted]

Dear Mr. Krause:

I regret that your efforts to obtain information from the State Police have been unsuccessful.

As I wrote previously, if the information that you areeseeking has not been compiled in the form of a record or records, an agency has no duty to do so to comply with a request under the Freedom of Information Law. If, however, a statistical or factual tabulation containing the information has been compiled, it should bemade available [See Section 88(1)(d) of the Freedom of Information Law, a copy of which is enclosed.]

I am also enclosing Section 255 of the Judiciary Law and Sections 107, 2019 and 2019-a of the Uniform Justice Court Act. Generally, these statutes provide that the records and dockets in possession of a court clerk or a justice are accessible to any person.

I hope that I have been of assistance. Should any further questions arise, please feel free to contact me.

Very truly yours,

Robert J. Freeman
Deputy Counsel

RJF/sd

enc.

R

#158

REQUEST FOR RECORDS

April 18, 1975

Ms. Anne Neufeld
The Times Record
501 Broadway
Troy, New York 12181

Dear Ms. Neufeld:

After having read the correspondence and your article, it appears that the problem is one of communication. In my opinion, some of the records that you requested are accessible, while others may be exempt.

District Attorney Greenberg is a public officer, his office is a public office, and the records found in his office are public records. However, although the Freedom of Information Law grants access to records in possession of a public officer, the Law lists a number of exemptions.

Section 88(7) of the Law states that the access provisions shall not apply to information that is specifically exempt by statute, that is confidential and if disclosed would permit an unfair advantage among commercial competitors, that would constitute an unwarranted invasion of personal privacy if made public, or that is part of investigatory files compiled for law enforcement purposes.

In addition, as the state's highest court recently held, information may be withheld if disclosure would result in detriment to the public interest [Cirale v. 80 Pine St. Corp., 35 NY 2d 113, 1974].

Therefore, although the records of the District Attorney are public records, some of the records may be withheld within the framework of the Law described above.

The Law also preserves existing rights of access found in other laws [Section 88(1)(i)]. One of the provisions preserved is Section 255 of the Judiciary Law, which states that:

> "[A] clerk of a court must, upon request...diligently search the files, papers, records and dockets

> in his office, and either make one or more transcripts or certificates of change therefrom, and dertify to the correctness thereof, and to the search, or certify that a document or paper, of which the custody legally belongs to him, can not be found."

Stated in another way, the papers filed with clerk of a court are accessible. Therefore, motion papers and indictments (unless sealed) filed with a court must be made available to you. Logically, it would appear that the records accessible through the clerk should also be accessible through the Office of the District Attorney.

However, many of the records involving criminal cases may properly be denied under the Freedom of Information Law. To reiterate, Section 88(7) of the Law provides that the Law shall not apply to "investigatory files compiled for law enforcement purposes." To the extent that your request included "investigatory files," the District Attorney acted appropriately in denying access. Further, Section 88(3) of the Law enables the custodian of records to protect personal privacy. Consequently, the District Attorney in his discretion, may deny access to a record if in his judgment disclosure would constitute an unwarranted invasion of personal privacy.

I am enclosing for your perusal copies of the Law and regulations promulgated by the Committee.

I hope that I have been of some assistance. Should any further questions arise, please feel free to contact me.

Very truly yours,

Robert J. Freeman
Deputy Counsel

RJF/sd

enc.

cc: Hon. Sol Greenberg
District Attorney

Request for Board
#159

April 18, 1975

Mr. Irving Witlin, Counsel
New York City Department
of Health
125 Worth Street
New York, New York 10013

Dear Mr. Witlin:

As I advised in a previous communication, the Freedom of Information Law does not require a shewing of interest as a condition precedent to granting public access to records. Therefore, requests for inspection and copying of records need not be stated in affidavit form.

I am enclosing for your perusal copies of the regulations and resolutions adopted by the Committee which may be helpful in complying with the Law.

I hope that I have been of some assistance. Should any questions arise regarding the Law, please feel free to contact me.

Very truly yours,

Robert J. Freeman
Deputy Counsel

RJF/sd

enc.

cc: Rose Berman

R

request/record
#160

April 21, 1975

Mr. Borys Korcyn-Zukowski
[redacted]

Dear Mr. Korcyn-Zukowski:

I recently received a letter from Mr. Charles Samowitz, Commissioner of the Department of Water Resources, regarding your request for records.

In my opinion, you have two courses of action. First, I recommend that you request the records from Mr. Richard Okolsky, Chief of Engineering Services of the Department of Public Works. Apparently, Mr. Okolsky has possession of the records in question. Otherwise, since you have made a claim, it is possible that your attorney may be able to obtain copies of the records by means of discovery.

I hope that I have been of some assistance. Should any further questions arise, please feel free to contact me.

Sincerely,

Robert J. Freeman
Deputy Counsel

cc: Mr. John J. Uhran
Department of Water Resources
40 Worth Street - Room 1326
New York, New York 10013

#161

April 21, 1975

Mrs. Jane Schenk
District Clerk
Naples Central School
Naples, New York 14512

Dear Mrs. Schenk:

Thank you for submitting a copy of the District's revised regulations on public access to records. The District's regulations now conform to the Freedom of Information Law and the Committee's regulations.

Very truly yours,

Dennis M. O'Leary
State Agency Liaison
Officer

DMO'L/djd:s1

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#162

April 21, 1975

Myron E. Leach, Esq.
Records Access Officer
New York Law Revision Commission
488 Broadway
Albany, New York 12207

Dear Mr. Leach:

Thank you for sending a copy of the Law Revision Commission's rules and regulations governing access to public records. The Commission's rules and regulations conform to the Freedom of Information Law and the Committee's general regulations.

Sincerely,

Dennis M. O'Leary
State Agency Liaison
Officer

DMO'L:lbb

ADOPTED REGS/
RECOMMENDATIONS
#163

April 21, 1975

Ms. Mary E. Earle
Clerk
Orange County Legislature
County Government Center - Drawer 209
Goshen, New York 10924

Dear Ms. Earle:

Your interest in complying with the Freedom of Information Law is much appreciated. Having reviewed the regulations adopted by the Orange County Legislature, I offer the following comments:

Section 2(c) "Record" is defined neither in the Law nor in the regulations promulgated by the Committee. The requirement that a record consist of a writing may not be accurate in all circumstances. For example, in some instances tape recordings or computer discs or tapes may constitute records.

Similarly, "statistical tabulations" and "factual tabulations" remain undefined. Although the language used in your regulations conforms with a dictionary definition, in my opinion, the intent of the Law favors access to statistics and facts, regardless of the form (i.e., tabular form) in which they appear on a printed page. Also, it is noted that the Law [Section 88(1)(i)] preserves rights of access granted under existing laws. In the case of a County, Section 51 of the General Municipal Law is applicable. That statute provides access to virtually all records in possession of the County, unless disclosure would result in detriment to the public interest. Consequently, statistics and facts are accessible even if they are not in tabular form.

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Section 4(a) Although you may require that requests be made in writing, failure to submit a request on a prescribed form is not a valid ground for denial of access.

Section 4(c) There is no provision in the Law or the Regulations reflecting the material in Section 4(c).

Furthermore, the provision is unnecessary because the regulations permit five days to respond to requests generally, and more than five days in the case of an extraordinary circumstance. Adoption of the standards promulgated by the Committee would be more appropriate.

Section 4(e) The regulations should provide the business address of the fiscal officer. Also, the state comptroller has not adopted regulations governing access to payroll records. The reference to the comptroller concerns only the form to be used by members of the news media in obtaining access to payroll information.

Section 7 The requirement that appeals be made within ten days from the date of denial is improper. There is no such time limit contained in either the Law or the Committee Regulations.

General Comments The names and addresses of the records access officers, fiscal officer and appeals persons should be specifically stated.

The public notice provisions [see Regulations, Section 1401.9] contained in the Committee Regulations should be included.

I am enclosing a copy of model regulations which may be of substantial aid in modifying your regulations.

I hope that I have been of some assistance. Should any further questions arise, please feel free to contact me.

Sincerely,

Robert J. Freeman
Deputy Counsel

Enclosures

RJF:bb

ADOPTED REGS/
RECOMMENDATIONS
#164

April 23, 1975

Mr. Malcolm S. Goddard
General Counsel
Division for Youth
2 University Place
Albany, New York 12203

Dear Mr. Goddard:

Your interest in complying with the Freedom of Information Law is much appreciated. Having reviewed the Division's regulations, I have but these few comments:

Section 177.3

The duties of the records access officer should be more specifically delineated [See 21 NYCRR 1401.2(b)].

Section 177.8

The appeals officer should be designated by business address and telephone as well as by title [21 NYCRR 1401.7(b)].

Additionally, although your regulations need not make reference to publicizing by posting, please note the requirement as reflected in 21 NYCRR 1401.9.

I hope that I have been of some assistance. Should any further questions arise regarding the Law or the regulations, please feel free to call me.

Very truly yours,

Robert J. Freeman
Deputy Counsel

RJF/sd

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fees
#165

April 23, 1975

Mr. Edward N. Baron
Staff Writer
Niagara Gazette
310 Niagara Street
Niagara Falls, New York 14302

Dear Mr. Baron:

It appears that the four dollar fee per page required by the county clerk in New York City is proper. Although the Committee has adopted regulations which permit a fee of no more than twenty-five cents per page for copies, this requirement governs

> "[E]xcept where fees or exemptions from fees have been established by law, rule or regulation prior to September 1, 1974..." [See Section 1401.8 of the Committee Regulations, a copy of which is enclosed].

Similarly, Section 88(2)(c) of the Freedom of Information Law states that the Committee has power to prescribe fees "to the extent authorized by this article or other statute."

The fee that you have questioned was established by law prior to September 1, 1974. Section 8021(c) of the Civil Practice Law and Rules provides that a county clerk may charge as follows:

> "8. For certifying a prepared copy of a paper filed in his office in counties within the city of New York, four dollars, and in all other counties thirty cents a page or portion thereof with a minimum fee of one dollar; such fee includes the certifying, when required, of any exhibit, affidavit of service or legal back annexed to such order, record or paper.

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> 9. For preparing only, or preparing and certifying a copy of an order, record or other paper entered or filed in his office, in the counties within the city of New York, four dollars, and in all other counties one dollar for each page or portion of a page measuring up to nine inches by fourteen inches" (emphasis added).

To reiterate, because the four dollar fee had been established by law before the effective date of the Freedom of Information Law, the fee set by the Committee is not controlling.

I am enclosing for your perusal copies of the regulations and resolutions adopted by the Committee, as well as two bills now before the legislature that were prepared in part by the Committee. I will also have your name placed on a mailing list so that you can be apprised of the Committee's future activities.

I thank you for your interest in the Freedom of Information Law. Should any further questions arise, please feel free to contact me.

Very truly yours,

Robert J. Freeman
Deputy Counsel

RJF/sd

enc.

ADOPTED REGS/
RECOMMENDATIONS
#166

April 23, 1975

Mr. F. E. Ouellette
New York State American Revolution
Bicentennial Commission
Office of State History
State Education Department
99 Washington Avenue
Albany, New York 12230

Dear Mr. Ouellette:

Thank you for submitting a copy of the Commission's regulations on public access to records. The regulations conform with the Committee's general regulations.

If you have any questions regarding the Freedom of Information Law or regulations, please feel free to contact me.

Sincerely,

Robert J. Freeman
Deputy Counsel

RJF:lbb

ADOPTED REGS/
RECOMMENDATIONS
#167

April 23, 1975

Mr. Carroll Bickford
Town Supervisor
Town of Caledonia
3109 Main Street
Caledonia, New York 14423

Dear Mr. Bickford:

Thank you for your interest in complying with the Freedom of Information Law.

After having reviewed the regulations adopted by the Town, it is recommended that they be substantially amended. In some instances, greater specificity is required; in others, changes in substance are necessary (for example, the fee of fifty cents).

I am enclosing copies of the Committee's general regulations and model regulations. By using the model as a basis for amending your regulations, your task will be simplified and compliance with the Law will be ensured.

I hope that I have been of some assistance. Should any questions arise regarding the Law, please feel free to contact me.

Sincerely,

Robert J. Freeman
Deputy Counsel

Enclosures

RJF:lbb

ADOPTED REGS/
RECOMMENDATIONS
#163

April 23, 1975

Anthony S. Cantore, Esq.
Senior Attorney
Board of Social Welfare
Office Tower
Empire State Plaza
Albany, New York 12223

Dear Mr. Cantore:

Thank you for submitting a copy of the Board's regulations on public access to records. Based on a review of these regulations, I am pleased to inform you that they conform to the Freedom of Information Law and the Committee's general regulations.

Sincerely,

Robert J. Freeman
Deputy Counsel

RJF:DJD:lbb

ADOPTED REGS/
RECOMMENDATIONS
#169

April 23, 1975

Honorable Robert A. Pratt
Mayor
Village of Greenwich
Community Center
Greenwich, New York 12834

Dear Mayor Pratt:

Many of the requirements embodied in the Committee regulations are lacking in the regulations drafted by the Village of Greenwich.

I am enclosing copies of the regulations and model regulations, which may assist you in complying with your duties under the Freedom of Information Law. In using the model as a basis for your regulations, you need only fill in the appropriate information to comply with the Law.

I hope that I have been of some assistance. Should any questions arise, please feel free to contact me.

Sincerely,

Robert J. Freeman
Deputy Counsel

Enclosures

RJF:lbb

VITAL STATS.

#170

April 23, 1975

Mr. Robert B. Dietz
Corporation Counsel
Municipal Building
Poughkeepsie, New York 12602

Dear Mr. Dietz:

The problem of what is considered a "proper purpose" has arisen persistently regarding public disclosure of particular records. The same language appears in Section 4174 of the Public Health Law, relating to birth and death records.

An interpretation of "proper purpose" regarding public access to marriage records has not yet been judicially rendered. However, an Opinion of the Attorney General stated thatbooks in custody of city and town clerks outside of New York City in which marriages are indexed and recorded are public records [1969 Ops Atty Gen Feb. 13].

Moreover, there is case law dealing with access to death records. Since the Public Health Law employs the same standard, the analogy can be made. In Rome Sentinel Company v. Boustedt, (43 252 NYS 2d 10, 13) the Court held that

> "[S]ection 66 of the Public Officers Law still expresses a strong legislative polidy to make available to the public inspection of records or other papers kept in the public offices, subject only to those exceptional circumstances where secrecy is enjoined by Statute or Rule or other over-riding consideration...This policy, in favor

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> of full publicity, demands the broadest possible interpretation of the scope and content of section 66...The records kept pursuant to the provisions of Public Health Law, §4174, have been defined as those public records which are available to all persons, including a newspaper, for inspection" [emphasis added].

Although Section 66 of the Public Officers Law was repealed by enactment of the Freedom of Information Law, the force of the statement quoted above remains ineeffect. Section 88(10) of the Law provides:

> "[N]othing in this article shall be construed to limit or abridge any existing right of access at law or in equity of any party to public records kept by any agency or municipality."

Therefore, rights of access granted by statutory and decisional law are preserved in the Freedom of Information Law.

Consequently, although courts have not determined the extent to which marriage records are accessible to the public, there are strong indications that the public does indeed have a right of access to the records in question.

I hope that I have been of some assistance. Should any further questions arise, please feel free to call me.

Very truly yours,

Robert J. Freeman
Deputy Counsel

RJF/sd

#171

April 24, 1975

Mr. John J. Mooney
Administrative Director
New York State
Department of Civil Service
State Office Building Campus
Building #1
Albany, New York 12226

Dear Mr. Mooney:

Thank you for sending a copy of a letter from the President of the Civil Service Commission regarding the negative impact that public access to examination questions and answers will have on the Civil Service testing program. I will forward a copy of the letter to Assemblyman Joseph Lisa who has introduced amendments to the Freedom of Information Law similar to those proposed by the Committee.

Please note that Section 88(1)(i) in Mr. Lisa's bill (A-7502) does not "exempt" examination questions and answers but permits agencies to deny access to records or portions thereof that are examination questions and answers. Proposed Section 88(1)(i) permits agency discretion in determining whether or not examination questions and answers are accessible.

Your additional information justifying the inclusion of Section 88(1)(i) in the proposed amendments to the Freedom of Information Law is greatly appreciated.

Sincerely,

Louis R. Tomson
Executive Director

LRT:DMO'L:lbb

DENIAL
APPEALS OFFICER
POWER TO PROMULGATE REGS.
#172

April 24, 1975

Mr. Mike Meyers
The Press
Vestal Parkway East
Binghamton, New York 13902

Dear Mr. Meyers:

Thank you for your interest in the Freedom of Information Law.

Your letter raises three questions: can the Broome County Legislature authorize its clerk to deny access if disclosure "would adversely affect the public interest"; cantthe County Attorney be designated the appeals officer and; does the County Legislature have the power to promulgate regulations regarding access to records of Broome Community College?

First, the state's highest court recently held that government may withhold information if disclosure would adversely affect the public interest [Cirale v. 80 Pine Street Corp., 35 NY 2d 113 (1974)]. However, the Court stated that

> "[T]here must beespecific support for the claim of privilege. Public interest is a flexible term and what constitutes sufficient potential harm to the public interest so as to render the privilege operable must of necessity be determined on the facts of each case. Such a determination is a judicial one and requires that the governmental agency come forward and show that the public interest would indeed be

> jeopardized by a disclosure of the information. Otherwise, the privilege could be easily abused, serving as a cloak for official misconduct" (Dirale, supra, 118-119).

Further, although the Cirale case was decided prior to the effective date of the Freedom of Information Law, the Court indicated that passage of the Law did not abolish the governmental privilege (see footnote, Cirale, supra, 117).

Therefore, an agency may deny access based on potential detriment to the public interest. But if the denial is challenged in court, the agency has the burden of proving its argument. In all other instances in which access is denied under the Law, the person requesting records has the burden of proving that the agency acted arbitrarily and capriciously in denying access.

Second, the County Attorney may be designated to hear appeals. Section 88(8) of the Law provides that appeals shall be directed to

> "the head or heads, or an authorized representative, of the agency or municipality."

Similarly, Section 1401.7(a) of the regulations adopted by the Committee states:

> "[T]he head or heads of each agency and municipality shall designate a person or persons or body to hear appeals..."

Therefore, the County Legislature did not act inappropriately in authorizing the County Attorney to hear appeals.

Third, Section 88(2) of the Law provides that the

> "governing body of a municipality may make and publish uniform rules for any group or all agencies in that municipality."

Since the County Legislature is the governing body of a municipality [see definition of "municipality", Section 87(2)], it has the authority to regulate access to records of the Community College, which is an agency within the County.

I am enclosing for your perusal copies of the Freedom of Information Law and the regulations promulgated by the Committee.

I hope that I have been of smme assistance. Should any further questions arise, please feel free to contact me.

Very truly yours,

Robert J. Freeman
Deputy Counsel

RJF/sd

enc.

ADOPTED REGS/
RECOMMENDATIONS

#173

April 24, 1975

Ms. Annabelle Lombaugh
Town Clerk
Town of Pavilion
Pavilion, New York 14525

Dear Ms. Lombaugh:

Thank you for a copy of the Town Board's resolution adopting rules and regulations governing access to records of the Town of Pavilion.

The following changes in your regulations should be made to conform them to general regulations of the Committee, which have the force and effect of law.

A records access officer, designated by name or job title and business address, should be appointed to coordinate the town's response to public requests for access to records [Committee Regulations, Section 1401.2(a)]. He should assure that town personnel carry out the duties listed in Section 1401.2(b) of Committee regulations. A fiscal officer, charged with certifying the payroll and responding to requests for itemized payroll information, should be designated by name or job title and business address [Committee Regulations, Section 1401.3].

Committee regulations require agencies which have daily regular business hours to accept requests and produce records during <u>all</u> hours they are regularly open for business.

Committee regulations require that the fiscal officer make payroll items available to <u>any person</u>, including bona fide members of the news media as required under Sections 88(1)(g), 1(i), and (10) of the Freedom of Information Law [Committee Regulations,

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Section 1401.3(b)]. But, members of the news media may be required to fill out a form specified by the State Comptroller to obtain access to itemized payroll information pursuant to Section 88(1)(g) of the Freedom of Information Law.

Town regulations should state that requests for records may be oral or in writing, and that written requests shall not be required for records customarily available without written request [Committee Regulations, Section 1401.6(a)]. Failure to use a prescribed form or to give the requester's name and address are not valid grounds for denial of access. The Committee has resolved that records available pursuant to the Freedom of Information Law shall be accessible to any person without regard to status or interest.

Section 5 of your Town's regulations erroneously refers to Section 88(3) of the Freedom of Information Law. The proper citation is Section 88(4).

Under Section 1401.8(a)(3) of Committee regulations, it is improper to require a fee for certification of a copy except where fees have been established by law, rule, or regulation prior to September 1, 1974.

Town regulations should require that the records access officer respond to oral or written requests for records within five days of such request, or, if extraordinary circumstances delay a reply beyond five days, provide a written explanation of the reasons for the delay and estimate the date production or denial will be forthcoming [Committee Regulations, Section 1401.6(b)].

The procedure through which denial of access to town records may be appealed should be more detailed. It should be noted that access to records may be denied in whole or in part. Denial of access must be in writing, advising the person denied access of his right to appeal and to whom the appeal is to be directed. The person, persons, or body established to hear appeals must be designated by name or job title and business address and business telephone number [Committee Regulations, Section 1401.7].

According to Committee Regulations, Section 1401.9, the town must publicize by posting in a conspicuous location wherever records are kept and/or by publication in a local newspaper of general circulation: a) the place where records shall be made available for inspection and copying, b) the name, title, business address, and business telephone numbers of the records access officer and fiscal officer, and c) appeals procedures and the name and business address of the person to whom an appeal is to be directed.

Enclosed are a copy of the general regulations of the Committee and model regulations governing access to records, which may assist you in amending your regulations. If you have any questions, please call (518) 474-2791.

Sincerely,

Robert J. Freeman
Deputy Counsel

Enclosures

RJF:PSH:lbb

ADOPTED REGS/
RECOMMENDATIONS

#174

April 24, 1975

Ms. Claire Leschot
District Clerk
Hyde Park Central School District
South Albany Post Road
Hyde Park, New York 12538

Dear Ms. Leschot:

Thank you for submitting a copy of the District's regulations on public access to records. Based on a review of these regulations, the following changes are recommended:

Section 1(a) - The duties of the records access officer should be listed in accord with Section 1401.2 of the Committee Regulations.

Section 3 - The District must accept requests for public access to records and produce records during all hours its offices are regularly open for business.

Section 4 - While written requests may be required pursuant to the Committee's Regulations, failure to use a prescribed form for submitting a request is not a valid reason for denying access to records.

An individual requesting records need not state who he or she represents [Freedom of Information Law, Section 88(6)].

The District must respond to a request for access to records within five days by either granting or denying access or acknowledging the request in writing and explaining the reason for delay [Committee Regulations, Section 1401.6(b)]. Failure to respond within this time period shall constitute a denial of access [Committee Regulations, Section 1401.7(c)].

R/

Section 5 - Neither the Freedom of Information Law nor the Committee's Regulations authorize any time limit for appealing a denial of access. Also, both the Law and the regulations require that appeals be decided within seven days of the receipt thereof [Freedom of Information Law, Section 88(8); Committee Regulations, Section 1401.7(c)].

Section 6 - The fee for copying any record, including initial computer printouts, should be no more than the actual cost of copying, unless another fee was established by law, rule or regulation of the Board prior to September 1, 1974 [Committee Regulations, Section 1401.8(c)]. The District's regulations should also provide for a subject matter list of records to be updated semi-annually [Committee Regulations, Section 1401.6(c)], and a listing of records access officers, fiscal officer, appeals officer and locations where records can be seen or copied which must be posted everywhere records are kept [Committee Regulations, Section 1401.9].

Enclosed are copies of the Committee's general regulations and model regulations which may be of assistance in amending your regulations. If you have any questions, please feel free to call me at (518) 474-2791.

Sincerely,

Robert J. Freeman
Deputy Counsel

Enclosures

RJF:DJD:lbb

ADOPTED REGS/
RECOMMENDATIONS
#175

April 24, 1975

Ms. Dorothy S. Miller
Town Clerk
740 West Boston Post Road
Mamaroneck, New York 10543

Dear Ms. Miller:

Thank you for your interest in complying with the Freedom of Information Law. Having reviewed the regulations adopted by the Town, the following changes are recommended:

Section 5

Requests for records should be accepted during all regular business hours. If the hours reflected in your regulations are indeed the regular business hours, the Town's regulations are proper.

Section 7

The regulations should note that failure to comply with the time limitations in Section 6(b) shall constitute a denial of access [see Committee regulations, 1401.7(c)].

Also, the appeals procedure adopted by the Town is inappropriate. Section 1401.7 of the Committee regulations and 88(8) of the Law provide that a denial of access may be appealed to an authorized individual or body. The two-tier appeal process contained in the Town's regulations is improper. As provided in the Town's regulations, judicial review is unavailable until the Board, a second appellate body, renders a decision. It is recommended that Section 1401.7 of the Committee regulations be carefully reviewed.

Further, the Law and regulations require that an appeal be decided within seven days of its receipt. This too should be stated in the regulations.

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Other Recommendations:

There appears to be a conflict between the regulations and the subject matter list. Section 6(d)(1) appropriately provides that the list refer to the subject matter of all records in possession of the Town. The list itself, however, is entitled "Records Available for Public Inspection." The list should reflect all records, including those that are unavailable. Otherwise, the right to appeal would be constructively denied.

With reference to the application form, since the Committee has resolved that accessible records shall be made equally available to any person [see attached resolution and Section 88(6) of the Law], failure to provide information on the form (i.e., who a person is representing) cannot be a valid ground for denial of access.

I am enclosing a copy of model regulations, which should prove helpful in modifying the Town's regulations.

I hope that I have been of some assistance. Should any further questions arise, please feel free to contact me.

Very truly yours,

Robert J. Freeman
Deputy Counsel

RJF/sd

enc.

ADOPTED REGS/ RECOMMENDATIONS

#176

April 24, 1975

Mr. Perry W. Shelton
Chairman, Town Board
Town of Tompkins
Route 206
Trout Creek, New York 13847

Dear Mr. Shelton:

Thank you for a copy of the Town Board's resolution adopting rules and regulations governing access to records of the Town of Tompkins.

The following changes in your regulations should be made to conform them to general regulations of the Committee, which have the force and effect of law:

Town regulations should stipulate the duties of the records access officer and the fiscal officer. These duties are enumerated in Sections 1401.2 and 1401.3 of the Committee regulations.

Committee regulations require agencies which have regular daily business hours to accept requests and produce records during all hours they are regularly open for business. Agencies which do not have daily regular business hours may establish a procedure in writing for arranging an appointment to inspect and copy records [Committee Regulations, Section 1401.5].

Town regulations should state that requests for records may be oral or in writing, and that written requests shall not be required for records customarily available without written request [Committee Regulations, Section 1401.6(a)].

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Because the history of access to government records in New York State reveals a continual broadening of the class of citizens entitled to inspect records, Committee regulations require any person, including members of the news media, to be granted access to itemized payroll information. The Town may require bona-fide members of the news media to fill out a form specified by the State Comptroller to obtain access to itemized payroll information pursuant to Section 88(1)(g) of the Freedom of Information Law.

Town regulations should require officials to respond to an oral or written request for records within five days of such request, or, if extraordinary circumstances delay a reply beyond five days, provide a written explanation estimating when a reply to the request will be made [Committee Regulations, Section 1401.6(b)].

The procedure through which denial of access to town records may be appealed should be more detailed. It should be noted that access to records may be denied in part or in whole. Denial of access must be in writing, advising the person denied access of his right to appeal and to whom that appeal is to be directed. The person, persons, or body established to hear appeals must be designated by business address and business telephone number as well as by name or job title. The appeals unit must inform the appellant in writing of its decision within seven days of receipt of the appeal [Committee Regulations, Section 1401.7].

Committee regulations require that town officials must, upon request, certify that a transcript is a true copy of records copied. Unless established by law, rule, or regulation of the Town Board prior to September 1, 1974, Committee regulations allow no fee to be charged for any certification [Committee Regulations, Section 1401.8(a)].

Town personnel shall furnish to the public the records required by the Freedom of Information Law and those which were furnished to the public prior to its enactment.

Enclosed are a copy of the general regulations of the Committee, and the model regulations governing access, which may assist you in amending your regulations. If you have any questions, please call (518) 474-2791.

Sincerely,

Robert J. Freeman
Deputy Counsel

Enclosures

RJF:PSH:lbb

ADOPTED REGS/
RECOMMENDATIONS
#177

April 24, 1975

Mr. George R. Blair
Town of Elma Attorney
Elma Shopping Center
Bower Road
Elma, New York 14059

Dear Mr. Blair:

Thank you for submitting a copy of regulations governing access to records of the Town of Elma.

The following changes should be made in your regulations to conform with Committee regulations, which have the force and effect of law.

A records access officer, who shall have the duty of coordinating agency response to requests for access to records, should be designated by name or job title and business address [Committee Regulations, Section 1401.2].

A fiscal officer, responsible for certifying the payroll and responding to requests for payroll information, should be designated by name or job title and business address [Committee Regulations, Section 1401.3].

Although the Town may, pursuant to Section 4 of its regulations, deny access to material which is privileged, such as "work product" of its attorney, (Civil Practice Law and Rules, Section 3101), it should be noted that many records involving a legal proceeding to which the Town is a party are accessible, such as the pleadings and motions [See Section 255 of the Judiciary Law].

RJ

Town regulations should require agencies which do not have regular business hours to establish written procedures to inspect and copy records. The procedures should include the name, position, address and telephone number of the party to be contacted for the purpose of making an appointment [Committee Regulations, Section 1401.5].

Town regulations should note that requests for records may be oral or in writing and written requests shall not be required for records customarily available without written request [Committee Regulations, Section 1401.6(a)].

Town regulations should require that, except under extraordinary circumstances, officials should respond to an oral or written request for records within five days of such a request, or in extraordinary circumstances provide a written explanation estimating when a reply to the request will be made [Committee Regulations, Section 1401.6(b)].

Because any changes to the list of records in Section 6 of Town regulations would necessitate amending the regulations, it is recommended that a subject matter list of Town records be separate from the body of regulations. The list may, however, be attached to the regulations for the convenience of members of the public seeking access to records. The list should be updated semi-annually and made available for public inspection [Committee Regulations, Section 1401.6(c)].

Town regulations must establish a procedure to appeal denial of access to records. Access to records may be denied in part, or in whole. Denial of access must be in writing. A person, persons, or body designated by business address and business telephone number as well as by name or job title, must be authorized to hear appeals. The appeals unit must inform the requester in writing of its decision within seven business days of receipt of the appeal [Committee Regulations, Section 1401.7].

A listing of records access officers, fiscal officer, appeals person or persons or body and location where records can be seen or copied should be posted wherever records are kept [Committee Regulations, Section 1401.9].

It is not necessary to list the specific examples of unwarranted invasion of personal privacy contained in the Freedom of Information Law in regulations. If such a list is used, it should include all the examples of unwarranted invasion of privacy in Section 88(3) of the Freedom of Information Law.

Enclosed are copies of Committee general regulations and model regulations governing access to records which may assist you in amending your regulations. If you have any questions, please do not hesitate to call (518) 474-2791.

Sincerely,

Robert J. Freeman
Deputy Counsel

Enclosures

RJF:LZ:lbb

ADOPTED REGS/
RECOMMENDATIONS
#178

April 24, 1975

Mr. Arthur H. Whaley
Supervising Principal
Oppenheim-Ephratah Central School
R.D. #2
St. Hohnsville, New York 13452

Dear Mr. Whaley:

Thank you for your interest in complying with the Freedom of Information Law. Having reviewed the regulations adopted by your school district, the following modifications are recommended:

Section Ia

Form AC 375 relates only to members of the news media seeking payrolllinformation. Please note that the form requires certification that the individual requesting the information be a member of the news media.

Section 1401.6 of the regulations provides that a request may be oral or in writing. Although you may require that a request be in writing, it need not be on a prescribed form.

Section Ib

If the regular business hours are 9 a.m. to 3pp.m., your regulations are in compliance. Otherwise, information should be made available during regular business hours (see 1401.5).

Section Ic

It is unclear whether this provision implies that records larger than 8 1/2 by 14 inches will not be copied. If that is the case, your regulations should include a provision in the nature of Section 1401.8(c)(3).

Section IIa

The duties of the High School principal as records access officer should be specified in greater detail (see 1401.2).

Section IIb

Similarly, there should be greater detail regarding requests for records. For example, the regulations should include a five day time limit to respond to a request, unless there are "extraordinary circumstances" (see 1401.6).

In addition, there should be a provision regarding the duties of the fiscal officer (see 1401.3).

Section Vc

With reference to privacy, although you may deny access if disclosure would constitute an unwarranted invasion of personal privacy, you need not deny access to the entire record. Instead, you may in your discretion "delete identifying details" [see Section 88(3) of the Freedom of Information Law].

Section VI

The provision dealing with denial of access and appeal should be more specifically delineated (see 1401.7).

Also, please note the posting requirements contained in Section 1401.9.

I am enclosing copies of the Freedom of Information Law, the general regulations adopted by the Committee, and model regulations. By using the model as a basis for amending your regulations, your duties as well as compliance with the Law will be greatly simplified.

I hope that I have been of some assistance. Should any questions arise, please feel free to contact me.

Very truly yours,

Robert J. Freeman
Deputy Counsel

RJF/sd

enc.

S51 GML

#179

April 25, 1975

Victor A. Lord, Esq.
McNamee, Lochner, Titus & Williams, P.C.
75 State Street
Albany, New York 12201

Dear Mr. Lord:

Your interest in complying with the Freedom of Information Law is much appreciated.

Your letter raises two questions. Is the work product of an attorney which served as the basis for an oral report made privately to the Cohoes Common Council accessible? Are the recommendations presented in writing by the Cohoes Common Council to the Mayor accessible?

With regard to the report, if, as you state to the best of your knowledge, only you possess the report, the Freedom of Information Law is not applicable. The Law provides access to records in possession of government. Since you acted as a private consultant on a contractual basis, and since no public officer has custody of the report, there is no right of access under the Law.

If, however, a public officer, such as a member of the Common Council, does indeed have a copy of the report, it may be accessible. However, there may be several potential grounds for denial of access, which are discussed herein.

The Law grants access to certain categories of records, one of which includes those records made available by other provisions of law. One such law granting rights of access is Section 51 of the General Municipal Law, which grants access to:

> "[A]ll books of minutes, entry or accou or account and the books, bills, vouchers, checks, contracts or other papers connected with or filed in the office of or with any officer, board or commission acting for or on behalf of any

> county, town, village or municipal corporation in this state... to...any taxpayer or registered voter."

Since the City of Cohoes is a municipal corporation within the scope of General Municipal Law, virtually all of its records are accessible. However, the access provisions of Section 51 must be read in conjunction with the Freedom of Information Law, which is a general law of statewide application.

First, in Section 88(7)(a), the Law provides that its access provisions shall not apply to information that is "specifically exempted by statute." If the report is considered the work product of an attorney or is subject to the attorney-client privilege, pursuant respectively to Sections 3101 and 4503 of the Civil Practice Law and Rules, it may be exempt from disclosure under those provisions. If so, the Freedom of Information Law has no application.

Second, the report may be withheld pursuant to Sections 88(3) and 7(c) of the Law. These provisions enable government to withhold information which, if disclosed, would constitute an unwarranted invasion of personal privacy. Since the Committee has not adopted guidelines pertaining to protection of privacy, the custodian of a record, in his discretion, may withhold information if in his judgment disclosure would constitute such an invasion.

Third, Section 88(7)(d) of the Law permits an agency to deny access to information that is "part of investigatory files compiled for law enforcement purposes." Although I am unaware of the specific purposes of the report in question, it may have been compiled for law enforcement purposes. However, it is noted that, since the investigation has terminated, a court could find that the report has lost its "investigatory" character and that disclosure could serve to enlighten the public. [See Winston v. Mangan, 338 NYS 2d 654 (1973); Scott v. County of Nassau, 252 NYS 2d 135 (1964)].

Fourth, as the Court of Appeals recently held, government may withhold information, if on balance, disclosure would be detrimental to the public interest [Cirale v. 80 Pine Stree Corp., 35 NY 2d 113 (1974)]. However, the information may not be withh

withheld by a "mere assertion of privilege." The Court stated that:

> "[T]here must be specific support for the claim of privilege. Public interest is a flexible term and what constitutes sufficient potential harm to the public interest so as to render the privilege operable must of necessity be determined on the facts of each case. Such a determination is a judicial one and requires that the governmental agency come forward and show that the public interest would indeed be jeopardized by a disclosure of the information" (Cirale, supra, 118-119).

To reiterate, the propriety of assertion of the governmental secrecy privilege can be determined only by the courts.

In sum, there is no prohibition in the Freedom of Information Law requiring that the report be withheld; any record in possession of government may be made available. However, it appears that the report or portions thereof [e.g., see Section 88(3) of the Law] may be withheld within the framework of the Law.

With reference to the recommendations presented in writing by the Common Council to the Mayor, in my opinion, they are accessible pursuant to both Section 51 of the General Municipal Law and the Freedom of Information Law. Under Section 51, the recommendation made in writing is a "paper" and is thereby accessible. Under the Freedom of Information Law, the right of access under Section 51 is preserved, and the recommendations may also be accessible as statements of policy [Section 88(1)(b)] as part of the minutes of the Common Council [See Sections 88(1)(c) and 88(5)], or as the final determination of members of the Common Council [Section 88(1)(h)].

I hope that I have been of some assistance. Should any further questions arise, please feel free to contact me.

Very truly yours,

Robert J. Freeman
Deputy Counsel

RJF/sd

cc: Mr. Ralph Miccio
Deputy Corporation Counsel
City Hall
Cohoes, New York

AGENCY

#F180

April 25, 1975

Mr. Herb Field
Editor
The Catskill Daily Mail
391 Main Street
Catskill, New York 12414

Dear Mr. Field:

Your interest in the Freedom of Information Law is much appreciated.

Your letter raises two issues. First, do you have a right of access to the minutes of meetings of the Board of Managers of the Greene County Memorial Hospital? And second, is the minimum fee of fifty cents for copying a record adopted by the Greene County Legislature in compliance with the Law?

With respect to the minutes, since the Hospital is owned by the County and the Board of Managers is appointed by and responsible to the County Legislature, the Hospital is an agency within the scope of the Law [see Section 87(1) of the Law]. Further, Section 88(1)(c) of the Law provides that an agency shall make available for public inspection and copying "minutes of meetings of the governing body, if any, of the agency..." Therefore, if the Board of Managers has compiled minutes of its meetings, they are accessible to any person. However, since the Law grants access tooexisting records, if minutes have not been written, there is no duty to prepare them to comply with a request. In sum, if the minutes do exist, they are accessible to you and you may report or publish them as you see fit.

Additionally, although an agency need not compile a record to meet a request, Section 88(5) provides that agencies controlled by

> "a board, commission or other group having more than one member shall maintain and make available for public inspection a record of the final votes each member in every agency proceeding in which he votes."

Consequently, even if minutes have not been prepared, a record of votes of the members of the Board must be compiled and provided to you on request.

The minimum copying fee of fifty cents per page adopted by the County Legislature is improper, unless such a fee had been established by law, rule or regulation prior to September 1, 1974 [see Committee Regulations, Section 1401.8]. If the fee was not adopted prior to September 1, 1974

> "[T]he fee for copying records shall not exceed twenty-five cents per page for photocopies not exceeding 8 1/2 by 14 inches" [Committee regulations, Section 1401.8(c)(1)].

Since the County Legislature adopted the fees in question on December 30, 1974 and the regulations promulgated by the Committee have the force and effect of law, the twenty-five cent fee adopted by the Committee is controlling. Consequently, the County Legislature should modify its regulations to conform with those of the Committee.

I hope that I have been of some assistance. Should any further questions arise, please feel free to contact me.

Very truly yours,

Robert J. Freeman
Deputy Counsel

RJF/ed

cc: Greene County Legislature
Greene County Memorial Hospital
Board of Managers

ADOPTED REGS / RECOMMENDATIONS

#181

April 25, 1975

Mrs. Marguerite Plato
Clerk
Village of Central Square
111 North Main Street
Central Square, New York 13036

Dear Mrs. Plato:

Thank you for submitting the Village's regulations on public access to records. Based on a review of these regulations, the following changes are recommended:

The responsibilities of the records access officer should be more clearly delineated and include an obligation to assist a requester in identifying requested records, maintaining a subject matter list, updating it semi-annually and certifying, upon request, that any copies made are true copies of the records copied [Committee Regulations, Section 1401.2].

While written requests may be required pursuant to the Committee's regulations, failure to use a prescribed form for submitting a written request is not a valid ground for denying access to records [Committee Regulations, Section 1401.6(a)].

As the Village has recognized in the clarification of its regulations, public records must be available during all regular business hours [Committee Regulations, Section 1401.5(a)]. However, if a request is received outside of the regular processing time, the records access officer cannot refuse service or inquire as to why the record is needed. The records access officer must reply to any request within five days by either granting access, denying access or explaining in writing the reason for the delay and the estimated time when the record will be made available [Committee Regulations, Section 1401.6(b)]. Failure to reply within the time set forth above is considered a denial of access [Committee Regulations, Section 1401.7(c)].

P/

Denials of access must be in writing, stating the reason therefore and giving the name, title, business address and business telephone number of the appeals officer [Committee Regulations, Section 1401.7(b)]. In appealing a denial of access, the requester must state in writing the date and location of the request, the records which were denied, and the name and address of the requester. The appeals officer is required to inform the requester of his decision in writing within seven days of receipt of the appeal [Committee Regulations, Section 1401.7(e)].

The Village may not charge a search fee or processing fee unless such fee was established by law, rule or regulation prior to September 1, 1974 [Committee Regulations, Section 1401.8]. If the Village does not have photocopying equipment, or if the record is larger than 8 1/2 by 14 inches, the Village should follow the procedure described in Committee Regulations, Section 1401.8(c).

The public notice required by Committee Regulations, Section 1401.9, must be posted in a conspicuous location wherever records are kept and/or by publication in a local newspaper of general circulation.

Enclosed are copies of the general regulations of the Committee and model regulations. If you have any further questions, please feel free to call me at (518) 474-2791.

Sincerely,

Robert J. Freeman
Deputy Counsel

Enclosures

RJF:DJD:lbb

ADOPTED REGS/
RECOMENDATIONS
#182

April 25, 1975

Mr. Lee V. Poupore
Supervisor
Town of Clinton
Town Hall
Churubusco, New York 12923

Dear Mr. Poupore:

Thank you for submitting a copy of the Town's regulations on public access to records. Based on a review of these regulations, the following changes are recommended:

1. The Town must designate a records access officer and a fiscal officer by business address and name or job title. Their duties should be outlined in accordance with Committee Regulations, Sections 1401.2 and 1401.3.

2. The Town must specifically designate the locations where records shall be available for public inspection and copying [Committee Regulations, Section 1401.4]. Providing addresses of these locations will assist the public.

3. The Town must accept requests for public access to records and produce records during all hours the Town's offices are regularly open for business [Committee Regulations, Section 1401.5(a)].

4. While written requests may be required pursuant to the Committee's regulations, failure to use a prescribed form for submitting a written request is not a valid reason for denying access to records. The State Comptroller's form may be used only by members of the news media, because the form requires that the applicant certify that he or she is a member of the news media. Payroll information should be provided to the public in the same fashion as other records.

R1

5. Although the Freedom of Information Law and the Committee regulations permit fees for copies, they do not permit fees for certification unless they are established by law, rule or regulation prior to September 1, 1974 [Committee Regulations, Section 1401.8(a)].

6. A procedure to appeal denial of access to records must be established. Access to records may be denied in whole or in part. Denial of access must be in writing. A person, persons or body, designated by business address and business telephone as well as by name or job title, should be authorized to hear appeals. The appeals unit must inform the requester in writing of its decision within seven business days of receipt of the appeal [Committee Regulations, Section 1401.7].

7. A listing of records access officers, fiscal officer, appeals person or persons or body and location where records can be seen or copied, should be posted everywhere records are kept [Committee Regulations, Section 1401.9].

Enclosed are copies of the general regulations of the Committee and model regulations, which should be of assistance in amending the Town's regulations. If you have any further questions, please call me at (518) 474-2791.

Sincerely,

Robert J. Freeman
Deputy Counsel

Enclosures

RJF:DJD:lbb

ADOPTED REGS/
RECOMMENDATIONS

#183

April 25, 1975

Mr. George J. Yamin
Department of Social Services
1450 Western Avenue
Albany, New York

Dear Mr. Yamin:

Having reviewed the Department's regulations, the following modifications are recommended:

Section 340.2(b)

"Record" is defined neither in the Freedom of Information Law (hereinafter "the Law") nor in the regulations promulgated by the Committee. Since the definition adopted by the Department includes only those records generated or received after September 1, 1974, it is overly restrictive. The date to which you have referred relates to records reflected in the subject matter list [see Section 88(4) of the Law].

The Committee has resolved that the provisions of Section 88(4) apply only to the subject matter list and that all records in possession of an agency are subject to the mandates of the Law without regard to the date of production, filing or promulgation (see attached Resolution: Retrospective Application of the Freedom of Information Law).

Section 340.2(c)

The Department's regulations provide that the subject matter list pertains only to those records accessible under the Law. However, Section 88(4) of the Law states that the list pertains to all records produced, filed or first kept or promulgated after the effective date of the Law. Without references in the list to all records in possession of the Department, the ability to seek a record and the right to appeal denial of access may be constructively denied.

Section 340.4(b)

The form prescribed by the Comptroller requires certification by the applicant that he or she is a member of the news media.

Consequently, members of the public seeking payroll information may request this information in the same manner asall other records are requested.

When subdivision (b) is modified, the first sentence of Section 340.4(d) may becmme unnecessary.

Section 340.4(e)

Whether the privacy provisions of the Law [see Section 88(3)] are applicable to requests for payroll records has not yet been determined. The conflict is in the Law itself. While Section 88(6) provides access to "any persons" [see also attached Resolution: Access to Records by Any Person], Section 88(3)(d) requires that an interest be demonstrated.

When the issue is determined judicially or by the Committee pursuant to its statutory authority [see Section 88(3)], the Department will be notified.

Section 340.7(2)

This section conflicts with Section 340.9(a). The latter appropriately provides that denial of access shall be stated in writing. The section in question, however, states that the response "may be either written or oral if the request was made orally."

Section 340.10(b)

There is no statute of limitations in either the Law or Committee regulations for appealing to the haad of an agency. Therefore, references to thirty and forty days for appealing should be omitted. Even if there were a statute of limitations, it could be overcome merely be requesting the same information at a latter date.

General Recommendation

fisc The regulations require that the records access and fiscal officers be designated by name or title [see Committee Regulations, Sections 1401.2 and 3]. Also, please note the public notice and posting requirements set forth in Section 1401.9 of the Committee Regulations.

I hope that I have been of some assistance. Should any further questions arise, please feel free to call me.

Very truly yours,

Robert J. Freeman
Deputy Counsel

RJF/sd

enc.

FOIL-AO-184

April 28, 1975

Mr. Lawrence.A. Tufts
Supervisor
Town House
Somers, New York 10589

Dear Mr. Tufts:

Thank you for your concern in complying with the Freedom of Information Law.

The facts as stated in your letter are that you publicly read aloud information at a town meeting regarding the employment history of a former town employee. Your question is whether you acted within the scope of the Freedom of Information Law in disclosing this information.

The Law pertains to public inspection and copying of records. Since you did not provide access to a record, i.e. inspection and copying, the provisions of the Law are inapplicable.

Even if you had disclosed the record for public inspection and copying, Section 88(3) of the Law gives public officials the power to prevent unwarranted invasions of privacy, but it does not force them to do so. The Law states that the Committee on Public Access to Records "may promulgate guidelines for deletion of identifying details" [emphasis added]. To date, the Committee has not adopted guidelines of this nature. Further, the Law states that "[I]n the absence of such guidelines, an agency or municipality may delete identifying details" [emphasis added].

Therefore, in my opinion, an official may permit access to any record in his possession within the framework of the Law. However, in his discretion, the official may act to prevent unwarranted invasions of personal privacy by deletion of details or by withholding records [See Section 88(7)(c)], but he has no statutory duty to do so.

I hope that I have been of some assistance. Should any further questions arise, please feel free to call me.

Very truly yours,

Robert J. Freeman
Deputy Counsel

RJF/sd

request record

#185

April 29, 1975

Mr. Mickey Mayes
[redacted]

Dear Mr. Mayes:

Your letter raises several questions. First, was the Supervisor obligated to confirm a reservation for a meeting room in the Town Hall by letter or memorandum within five days of your request? Second, are you entitled to inspect records of expenditures regarding the Town Hall? Third, is the Day Book a public record? And fourth, can the Supervisor refuse to accept a request for a reservation for a room more than thirty days in advance of the date requested?

First, your request for a letter of confirmation of a reservation did not involve access to an existing record, but creation of a record on your behalf. The Freedom of Information Law permits access to the existing records of government. Under the Law, a public officer has no duty to compile a record to comply with a request. Since the letter of confirmation was not an existing record, the five day time limit expressed in the regulations is not applicable [See Section 1401.6 of the regulations, a copy of which is enclosed].

Second, you are entitled to inspect and copy information regarding the expenditure of funds relating to the Town Hall. Section 88(1)(d) of the Law provides access to audits and statistical or factual tabulations made by or for the town. Moreover, Section 88(1)(i) of the Law preserves rights of access granted by other laws. In this instance, you also have a right of access under Section 51 of the General Municipal Law, which enables you to inspect and copy

> "[A]ll books of minutes, entry or account, and the books, bills, vouchers, checks, contracts or other papers connected with or used or filed in the office of, or with any officer, board or co-

behalf of any county, town, village or municipal corporation in this state which possesses the power to levy taxes..."

Please note that the newspaper clipping that you attached stated that a detailed report of expenditures dealing with the A.L. Emerson Fund is on file with the Town Clerk and is available for public inspection.

With regard to the Day Book, since it is a paper used in the office of a municipality, it should be made available for public inspection and copying pursuant to the General Municipal Law.

Finally, the Freedom of Information Law in no way deals with the power of the Supervisoryto take or refuse reservations within a certain time period. He has the authority to regulate the operation of his office reasonably. I am not in a position to ascertain the reasonablemess of the policy.

I am enclosing copies of both the Law and the regulations as requested.

I hope that I have been of some assistance. Should any further questions arise, please feel free to contact me.

Very truly yours,

Robert J. Freeman
Deputy Counsel

RJF/sd

enc.

cc: Mr. Charles E. Hastings
Supervisor
Town Hall
Warrensburg, NY 12885

STATE OF NEW YORK
COMMITTEE ON PUBLIC ACCESS TO RECORDS FOIL-AO-186

DEPARTMENT OF STATE, 162 WASHINGTON AVENUE, ALBANY, NEW YORK 12231
(518) 474-2518, 2791

COMMITTEE MEMBERS
ELIE ABEL - Chairman
T. ELMER BOGARDUS
MARIO M. CUOMO
PETER C. GOLDMARK, JR.
JAMES C. O'SHEA
GILBERT P. SMITH

EXECUTIVE DIRECTOR
ROBERT J. FREEMAN

April 30, 1975

Mr. Walther Monahan
[redacted]

Dear Mr. Monahan:

Your letter has been sent to the Committee which has the responsibility of rendering advice regarding New York's new Freedom of Information Law. The statute to which you referred in your letter is the federal Freedom of Information Act, which applies only to federal agencies.

The information that you are seeking involves investigatory records compiled by a law enforcement agency. Although the Freedom of Information Law provides access to some police records, others are excluded from the scope of the Law.

The Law specifically grants access to police blotters and booking records [Section 88(1)(f)], but it does not apply to information that is "part of investigatory files compiled for law enforcement purposes" [Section 88(7)(d)].

Because the records that you have requested are not within the scope of the Law, it appears that denial of access to the records sought was proper.

I am enclosing for your perusal a copy of the Freedom of Information Law.

Should any further questions arise, please feel free to contact me.

Very truly yours,

Robert J. Freeman
Deputy Counsel

RJF/sd

Enc.

GENERAL REQUEST

#187

April 30, 1975

Mr. Paul Sevigny
[redacted]

Dear Mr. Sevigny:

Your letter addressed to the Secretary of State requesting your "Civil Service file" has been forwarded to this Committee, which has the responsibility of advising with regard to the Freedom of Information Law.

Since you were formerly employed by the Department of Audit and Control, the Office of the Secretary of State does not have your personnel file in its possession. However, I have contacted the Records Access Officer of your former employer, who suggested that you request the information from him. He added that it would be helpful to include the dates of your employment, where you worked and your position.

The gentleman to whom the request should be made is:

Mr. Walter Holmes
Office of Public Information
Department of Audit and Control
Alfred E. Smith Office Building
Albany, New York 12242

I hope that I have been of smme assistance. Should any further questions arise, please feel free to contact me.

Very truly yours,

Robert J. Freeman
Deputy Counsel

RJF/sd

cc: Mr. Walter Holmes

Misc
#188

April 30, 1975

Mr. Leonard B. Wachsman
Research Director
Civil Service Merit Council
3535 DeKalb Avenue
Bronx, New York 10467

Dear Mr. Wachsman:

I thank you once again for your interest in the Freedom of Information Law. Mr. Tomson has transmitted your letter of April 25 to me.

With regard to enforcement of the Law, Section 88(8) provides for an appeals procedure and judicial review via Article 78 of the Civil Practice Law and Rules. Moreover, the Committee, pursuant to its statutory duty, has promulgated regulations which have the force and effect of law throughout the state.

Therefore, while the City of New York has a legal duty to effectuate the provisions of the Law and the regulations, enforcement rests on the shoulders of the public.

I hope that I have been of some assistance. Should any further questions arise, please feel free to contact me.

Very truly yours,

Robert J. Freeman
Deputy Counsel

RJF/sd

R

ADOPTED REGS/
RECOMMENDATIONS

#189

April 30, 1975

Mrs. Shirley Dills, Secretary
Pavilion Board of Fire Commissioners
Pavilion, New York 14525

Dear Mrs. Dills:

Thank you for submitting a copy of the Board's regulations on public access to records. Based on a review of the regulations, the following changes are recommended:

1. The duties of the records access officer should include the updating of the subject matter list at least every six months [Committee Regulation 1401.2(b), 1401.6 (c)] and the obligation to assist in identifying requested records [Committee Regulation 1401.2(b)(2)].

2. Payroll records are to be made available to any person including bona fide members of the news media as required under sections 88(1)(g), (1)(i) and (10) of the Freedom of Information Law [Committee Regulation 1401.3(b)].

3. The Secretary should accept requests for public access to records and produce records during all hours her office is regularly open. [Committee Regulations 1401.5].

4. Unless established by law, rule or regulation prior to September 1, 1974, no fee may be charged for certification [Committee Regulation 1401.8(a)(3)]. The general provision in the Board's regulations concerning copying is vague and should be changed. As it is presently written, it could be interpreted to permit the records access officer to charge up to $5.00 for a single copy not exceeding 8 1/2 by 14 inches [Committee Regulation 1401.8(c)].

5. While written requests may be required pursuant to the Committee's regulations, failure to use a prescribed form for submitting a written request cannot be a valid reason for denying access.

6. The subject matter list should refer to all records produced, filed, or first kept or promulgated after September 1, 1974, rather than only the records deemed accessible. [Committee Regulation 1401.6(c)(1) and Section 88(4) of the Law].

7. The records access officer must respond to a request within five days of receipt of the request. She may grant or deny access or in the case of an extraordinary circumstance, acknowledge receipt of the request and include a brief explanation of the reason for delay and an estimate of the date production or denial will be forthcoming [Committee Regulation 1401.6(b)]. Failure to respond within the time limit set forth above shall constitute a denial of access [Committee Regulation 1401.7(c)].

8. The appeals procedure must be in writing and the appeals unit must be identified by business address and business telephone [Committee Regulation 1401.7].

9. A listing of records access officers, fiscal officer, appeals person or persons or body and location where records can be seen or copied should be posted everywhere records are kept [Committee Regulation 1401.9].

Enclosed are copies of the Committee's general regulations and model regulations. If you have any further questions, please call me at (518) 474-2791.

Very truly yours,

Robert J. Freeman
Deputy Counsel

RJF/sd

enc.

Fees
#190

April 30, 1975

George C. Teall, Esq.
County Attorney
Livingston County
Geneseo, New York 14454

Dear Mr. Teall:

Thank you for your letter of April 25, 1975, requesting comments on the application of Civil Practice Law and Rules Section 8021(c)(9) to the Committee's regulations on fees.

Section 1401.8 of the Committee's regulations establishes the fees for copying, inspecting, certifying and searching for records "except where fees or exemptions from fees have been established by law, rule or regulation prior to September 1, 1974." Civil Practice Law and Rules Section 8021(c)(9) is such a law, but it applies only to those papers which are filed with the County Clerk. It does not apply to the papers or records of other departments, offices, commissions or agencies which are available through the County Clerk in his capacity as records access officer. Therefore, although the County Clerk may charge $1.00 for photocopies of records filed in his office, he can charge only $.25 for photocopies of records of other county agencies, unless a different fee or exemption from fees was established by a prior law, rule or regulation other than Civil Practice Law and Rules Section 8021(c)(9).

If you have any further questions, please do not hesitate to call me.

Sincerely,

Robert J. Freeman
Deputy Counsel

RFJ:DJD:lbb

ADOPTED REGS/
RECOMMENDATIONS

#191

May 1, 1975

Mr. Clayton L. Dans, Jr.
Office of the Mayor
Village of Freeville
Freeville, New York 13068

Dear Mr. Dan:

Thank you for submitting a copy of the Village's regulations on public access to records. Basdd on a review of these regulations, the following changes are recommended:

1. While written requests may be required pursuant to the Committee's regulations, failure to use a prescribed form should not be a valid reason for denying access to records. Since the Committee has resolved that accessible records should be made available to any person regardless of status or interest (See attached Resolution: "Access to Records by Any Person") an individual requesting records need not provide information as to the person he or she represents.

2. The duties of the records access officer should be more detailed (See Committee Regulation 1401.2).

3. The records access officer must accept all requests for public access to records and produce records during all hours his or her office is regularly open for business (Committee Regulation 1401.5(a)].

4. The records access officer must resppnd to a request for access to records within five days of receipt of the request by granting access, denying access, or intthe case of extraordinary circumstances, acknowledging the request if more than five days are required to produce a record or deny access [See Committee Regulation 1401.6(b)]. The acknowledgment should include a brief explanation of the reason for delay and an estimate of the date production or denial will be forthcoming. Failure to respond within the time limit set out above shall constitute a denial of access [Committee Regulation 1401.7(c)].

R

5. A more specific procedure to appeal denial of access to records must be established. Access to records may be denied in whole or in part and denial must be in writing. A person, persons or body designated by business address and business telephone as well as by name or job title, should be established to hear appeals. The appeals unit must inform the requester in writing of the decision within seven business days of receipt of the appeal [Committee Regulation 1401.7].

6. A subject matter list of all Village records, to be updated at least semi-annually, must be available for public inspection and copying [Committee Regulation 1401.6 (c)].

7. The regulations should provide for a listing of records access officers, fiscal officer, appeals person, persons or body and location where records can be seen or copied shall be posted everywhere records are kept [Committee Regulation 1401.9].

I have enclosed copies of the Committee's general regulations and model regulations using the model as a basis for modifying your regulations would ensure compliance with the Law.

I hope that I have been of some assistance. Should any questions arise, please feel free to call me.

Very truly yours,

Robert J. Freeman
Deputy Counsel

RJF/sd

enc.

ADOPTED REGS./
RECOMMENDATIONS

#192

May 1, 1975

Mr. Joseph Martorana
Records Access Officer
New York State Assembly
State Capitol, Room 148
Albany, New York 12224

Dear Mr. Martorana:

Thank you for your interest in complying with the Freedom of Information Law. Having reviewed the Assembly's regulations governing access to records, the following modifications are recommended:

Section 2. Index of Available Records

The regulations as written provide that the index, or subject matter list, pertains only to those records made available by the Freedom of Information Law (hereafter "the Law"). However, Section 88(4) of the Law states that the list shall make reference to all records generated or received after September 1, 1974. Without reference in the index to all records in possession of the Assembly, the ability to seek records and the right to appeal denial of access may in effect be thwarted.

Section 6. Form of Request

Although a written request may be required, failure to use a prescribed form cannot be a valid ground for denial of access.

Section 8. Number of Records Permitted
AND
Section 11. Limitation of Examination Time

There is no provision in the Law or regulations stating that access may be denied because of the number of items requested even though compliance may result in hardship to the office.

At common law, under previous access statutes, and under Section 88(2) of the Law, agency officials have been authorized to promulgate rules and regulations governing procedures for granting access. However, case law holds that it is proper for an official to use his rule-making authority to prevent disruption of the orderly functioning of his office (Sears Roebuck & Co. v. Hoyt, 107 NYS 2d 756, 1951). The courts have generally held that examination of records should proceed in "orderly and chronological fashion" (Sorley v. Lister, 218 NYS 2d 215, 1961) and that "mere inconvenience" is not so detrimental to the government as to preclude access (New York Post v. Moses, 12 A.D. 2d 243, Rev'd on other grounds, 10 NY 2d 199, 1961).

Section 11. Limitation of Examination Time
AND
Section 12. Temporary Unavailability of Records

Section 1401.6 of the Committee's regulations provides more specific time limitations regarding production of records for inspection and copying. For example, agency officials must respond to a request within five days. However, if extraordinary circumstances arise and more than five days are required to produce records, the official must acknowledge receipt of the request, including a brief explanation of the reason for delay and an estimate of the date production or denial will be forthcoming [See Committee Regulations, Section 1401.6(b)].

Section 15. Denial of Access

The procedure for appealing a denial of access should be more specifically delineated [See Committee Regulations, Section 1401.7].

I am enclosing copies of the Committee's general regulations and model regulations. Using the model as a basis for modifying the Assembly's regulations will aid in ensuring compliance with the Law.

I hope that I have been of some assistance. Should any questions arise, please feel free to call me.

Sincerely,

Robert J. Freeman
Deputy Counsel

Enclosures

RJF:lbb

STATE OF NEW YORK
COMMITTEE ON PUBLIC ACCESS TO RECORDS FOIL-AO-193

DEPARTMENT OF STATE, 162 WASHINGTON AVENUE, ALBANY, NEW YORK 12231
(518) 474-2518, 2791

COMMITTEE MEMBERS
[illegible]E ABEL - Chairman
[illegible]ELMER BOGARDUS
MARIO M. CUOMO
PETER C. GOLDMARK, JR.
JAMES C. O'SHEA
GILBERT P. SMITH

EXECUTIVE DIRECTOR
ROBERT J. FREEMAN

May 2, 1975

Mr. Earl Ubell
Director
Television News-New York
NBC News
30 Rockefeller Plaza
New York, New York 10020

Dear Mr. Ubell:

The report of the Organized Crime Task Force relating to former Secretary of State Lomenzo may have been properly denied under the current Freedom of Information Law.

Although it is impossible to ascertain its contents, the document in question presumable represents an investigation made to determine whether or not criminal proceedings should be initiated. Section 88(7) of the Law provides that:

> "Notwithstanding the provisions of subdivision one of this section, this article shall not apply to information that is: d. part of investigatory files compiled for law enforcement purposes."

If the report reflects findings made during an investigation and was compiled for law enforcement purposes, the Freedom of Information Law is not applicable, and there is no right of access.

The Committee on Public Access to Records has recommended a complete revision of the Law which clarifies and broadens its application. Bills amending the Law based upon our proposals have been introduced by Senator Ralph Marino (S.5580) and Assemblyman Joseph Lisa (A.7502) [copies of both bills are attached].

With regard to your inquiry, in my opinion, most of the report would be accessible if the amendments are enacted because the exemption for law enforcement records would be more precisely defined.

If enacted, the Law would provide that:

> "All agency records shall be available for public inspection and copying except that an agency may deny access to records or portions thereof that...
> e. are compiled for criminal law enforcement purposes which if disclosed would; (i) interfere with judicial proceedings; or (ii) deprive a person of a right to a fair trial or impartial adjudication; or (iii) identify a confidential source or disclose confidential information relating to a criminal investigation; or (iv) reveal investigative techniques or procedure except routine techniques and procedures."

While the portions of the report identifying confidential sources or containing confidential information could be denied, I believe that the substance of the report would be accessible.

Sincerely,

Louis R. Tomson
Executive Director

cc: Dean Elie Abel, Chairman
Committee on Public Access to Records

Honorable Mario M. Cuomo
Secretary of State

Attachments

LRT:RJF:lbb

Misc.
#194

May 2, 1975

Mr. Herbert J. Kirshner
The Seagrave Corporation
350 Fifth Avenue
New York, New York 10001

Dear Mr. Kirshner:

Although the Committee on PUbiic Access to Records has the authority to advise with respect to the Freedom of Information Law and regulate the procedural aspects of the Law, it is not a depository of records maintained by state agencies.

Each agency must adopt regulations consistent with those promulgated by the Committee and designate records access officers who must respond appropriately when records are requested.

The official to whom your request should be directed is:

Mr. Walter Holmes
Office of Public Information
Department of Audit and Control
Alfred E. Smith Office Building
Albany, New York 12242.

I hope that I have been of some assistance. Should any questions,arise, please feel free to call me.

Very truly yours,

Robert J. Freeman
Deputy Counsel

RJF/sd

ADOPTED REGS/
RECOMMENDATIONS
#195

May 9, 1975

Mr. John H. Cosgrove
[redacted]

Dear Mr. Cosgrove:

As you have described the situation to me, the Town of Canaan has in many instances acted in violation of the letter and spirit of the Freedom of Information Law and the regulations promulgated by the Committee on Public Access to Records.

First, having reviewed the regulations adopted by the Town, there are several provisions which are not in accord with those adopted by the Committee, which have the force and effect of law throughout the state.

Section 3 of the Town regulations grants access to payroll records only to bona fide members of the news media. Committee regulations, however, provide that payroll information shall be made available to any person [Section 1401.3(b)]. The right of access to this information was established by judicial decision prior to enactment of the Freedom of Information Law, and this right is preserved by the Law [Section 88(10)]. In Winston v. Mangan [338 NYS 2d 656, 662 (1973)], the court held that:

> "[T]he names and pay scales of... employees, both temporary and permanent, are matters of public record and represent important fiscal as well as operational information. The identity of the employees and their salaries are vital statistics kept in the proper recordation of departmental functioning and are the primary sources of protection against employment favoritism. They are subject therefore to inspection."

Section 5 requires that requests to inspect records must be in writing on a form prescribed by the Town. While Committee regulations permit oral or written requests, a request need not be in writing for records customarily available without a written request [see Committee Regulations, Section 1401.6(b)]. Moreover, although the Town may require that some requests be made in writing, failure to use a prescribed form is not a valid basis for denial of access.

Section 6 of the Town regulations provides that the records access officer shall respond to a request within seven days of its receipt. Committee regulations, however, provide that responses shall be made promptly and may exceed five days only in cases of extraordinary circumstances. When extraordinary circumstances do arise, the records access officer must acknowledge the receipt in writing, briefly explaining the reason for the delay and estimating the date when production or denial of the records will be forthcoming [see Section 1401.6(b)(2)].

Also, in Section 6, the records access officer, upon failure to locate records must certify that his office does not have custody of the records requested or that the records of which the agency is a custodian cannot be found [see Section 1401.2(b)(6)].

Section 7 of the Town's regulations permit inspection of records by appointment only and during specified hours. Committee regulations provide that requests must be accepted during all regular business hours the Town office is open [Section 1401.5]. Unless the office has no regular business hours, the requirement that an appointment be made is contrary to Committee regulations.

Section 9 of the Town regulations regarding fees is in violation of Committee regulations, unless the fees had been officially established by law or regulation prior to September 1, 1974 [see Section 1401.8]. If fees had not been adopted by law or regulation prior to the date cited, the Town may charge up to twenty-five cents per copy and may not charge for certification.

I will forward a copy of model regulations to the Town. The model will assist the Town in ensuring its compliance with the Law.

With regard to your requests for records, Section 88(1)(i) of the Freeodm of Information Law provides access to:

> "any other files, records, papers or documents required by any other provision of law to be made available for public inspection and copying."

One such provision of law is Section 51 of the General Municipal Law, which grants access to:

> "[A]ll books of minutes, entry or account, and the books bills, vouchers, checks, contracts or other papers connected with or used or filed in the office of, or with any officer, board or commission acting for or an behalf of any county, town, village or municipal corporation in this state..."

Consequently, virtually all records in possession of a municipality, such as the Town of Canaan, are accessible, unless exempt by other statute or otherwise affected by judicial pronouncement.

I hope that I have been of some assistance. Should any further questions arise, please feel free to call me.

Sincerely,

Robert J. Freeman
Deputy Counsel

cc: Ms. Martha Lagerwall w/Enclosure
Town Clerk
Town of Canaan
Canaan, New York 12029

RJF:lbb

Misc
#196

May 9, 1975

Mr. Leonard B. Wachsman
Research Director
Civil Service Merit Council
3535 DeKalb Avenue
Bronx, New York 10467

Dear Mr. Wachsman:

Your letter of May 3, 1975, addressed to Mr. Tomson has been forwarded to me for consideration.

To reiterate, the Committee on Public Access to Records has no power to enforce the Freedom of Information Law. Although the Committee has promulgated regulations to which all units of government must adhere, it does not have the authority to compel units of government to comply with the Law or the regulations.

If you feel that the Freedom of Information Law is being violated in New York City, perhaps you should contact the Office of the Attorney General.

Should any further questions arise, please feel free to contact me.

Sincerely,

Robert J. Freeman
Deputy Counsel

RJF:lbb

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#197

May 9, 1975

Mrs. Shirley Lorimer
Mrs. Sharon Steward
[redacted]

Dear Mrs. Lorimer and Mrs. Steward:

I apologize for the delay in responding to your letter.

The facts as I understand them are that for several months you have made oral and written requests to the Supervisor of the Town of North Norwich for the following information: mileage logs of Town vehicles, work logs of the Town highway crew, gasoline and fuel oil purchases and consumption, a breakdown of hours worked on Town highways and the Town dump, and payroll records from 1970 to the present. To date, you have received only records of gasoline and fuel oil purchases.

If the information sought exists in the form of a record, it should be made available to you.

The Freedom of Information Law provides that each agency shall designate a fiscal officer who must compile and provide access to payroll information which includes the name, address, title and salary of all public employees, except law enforcement officers, whose names and addresses need not be disclosed. The right of access to payroll information is also established in case law, which holds that:

> "[T]he names and pay scales of the park district employees, both temporary and permanent, are matters of public record and represent important fiscal as well as operational information. The identity

R/

> of the employees and their salaries are vital statistics kept in the proper recordation of departmental functioning and are the primary sources of protection against employment favoritism. They are subject therefore to inspection.
>
> The employees' home addresses, however, do not carry the same prima facie public importance and unless a specific 'private' need is shown for them, they need not be disclosed... In such instances, the strength of the competing consideration of employee privacy must be balanced against the marginal benefit in the public's knowledge of this specific information..." [Winston v. Mangan, 338 NYS 2d 656, 662 (1973)].

The Freedom of Information Law does not state whether the home address or business address should be provided [see Section 88(1)(g)]. Therefore, if in the judgment of Town officials, disclosure of home addresses would constitute an "unwarranted invasion of personal privacy" [see Section 88(3)], they may in their discretion provide employees' business addresses.

The remainder of the information requested is statistical or factual in nature. It may be accessible pursuant to two statutes. First, the Freedom of Information Law provides access to "statistical or factual tabulations" [see Section (1)(d)]. Second, the Freedom of Information Law preserves access to records made available by other provisions of law. One such provision is Section 51 of the General Municipal Law, which provides access to:

> "[A]ll books of minutes, entry or account, and the books, bills, vouchers, checks, contracts or other papers connected with or used or filed in the office of, or with any officer, board or commission acting for or on behalf of any county, town, village or municipal corporation..."

Since the Town is within the scope of Section 51, virtually all of its records are accessible.

It is noted, however, that if records containing the information sought do not exist, the Town has no duty to create a record to meet a request.

With regard to information specifying the number of working hours spent on a particular project, again, if the records exist, they are accessible. If Town officials consider that disclosure of the names of the employees concerned would constitute an unwarranted invasion of privacy, the identifying details, i.e. the employees' names, may be deleted before making the records available.

I am enclosing a copy of the regulations promulgated by the Committee which delineate the procedural requirements to which the Town must adhere. With respect to your right to appeal, please note Section 1401.7.

I hope that I have been of some assistance. Should any further questions arise, please feel free to contact me.

Sincerely,

Robert J. Freeman
Deputy Counsel

Enclosures

cc: Mr. Wesley R. Aldrich
Supervisor
Town of North Norwich
R.D. #2
Norwich, New York 13815

RJF:lbb

privacy
#198

May 12, 1975

Joseph D. Stim, P.C.
Attorney at Law
640 Fulton Street
Farmingdale, New York 11735

Dear Mr. Stim:

As requested, please find enclosed copies of the regulations promulgated by the Committee and resolutions adopted pursuant to its advisory authority.

The Committee has not yet adopted guidelines with respect to "deletion of identifying details" to protect personal privacy. Currently, when making records available, an agency official has discretion to delete such details if in his judgment disclosure would constitute an unwarranted invasion of personal privacy.

I hope that I have been of some assistance. Should any further questions arise, please feel free to contact me.

Sincerely,

Robert J. Freeman
Deputy Counsel

Enclosures

RJF:lbb

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#199

[redacted]

Mr. Borys Korcyn-Zukowski

[redacted]

Dear Mr. Korcyn-Zukowski:

I apologize for the delay in responding to your letter.

With regard to your request for information from the New York City Law Department pertaining to the condition of your sidewalks, your rights of access relate to Section 1113 of the New York City Charter, which states that:

> "[T]he heads of all administrations and departments, except the police and law departments, and the chiefs of each and every division or bureau thereof and all bureau presidents, shall with reasonable promptness, furnish to any taxpayer desiring the same, a true and certified copy of any book, account or paper kept by such administration, department, bureau or officer, or such part thereof as may be demanded, upon payment in advance of ten cents for every hundred words thereof by the person demanding the same. The provisions of this section shall not apply to any papers prepared by or for the comptroller for use in any proceeding to adjust or pay a claim against the city or any agency or by or for counsel for use in actions or proceedings to which the city or agency is a party or for use in any investigation authorized by this charter" (emphasis supplied).

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Under the Charter, the records of the police and law departments, as well as those prepared by or for the Comptroller relating to a claim against the City, are exempt from disclosure.

The effect of the Freedom of Information Law on the provisions of the City Charter is unclear and has not yet been determined by the courts. However, to reiterate, pursuant to the Charter, the records kept by the Law Department are not accessible.

I hope that I have been of some assistance. Should any further questions arise, please write again.

Sincerely,

Robert J. Freeman
Deputy Counsel

RJF:lbb

misc
#200

May 13, 1975

Ms. Ann S. Sand
[redacted]

Dear Ms. Sand:

The Committee on Public Access to Records is responsible for regulating and advising with regard to the Freedom of Information Law. I am enclosing copies of the Law and the regulations promulgated by the Committee, which have the force and effect of law throughout the state.

With reference to recipients of public assistance, Section 88(7)(a) of the Law provides that its access provisions shall not apply to information specifically exempted by statute. One such statute is Section 136(2) of the Social Services Law, which states that

> "[A]ll communications and information relating to a person receiving public assistance or care obtained by any social services official, service officer, or employee in the course of his work shall be considered confidential..."

I hope that I have been of some assistance. Should any further questions arise, please feel free to contact me.

Very truly yours,

Robert J. Freeman
Deputy Counsel

RJF/sd

enc.

RECOMMENDATIONS
#201

May 13, 1975

Mr. Paul B. Bergins
Corporation Counsel
Department of Law
Municipal Building
255 Main Street
White Plains, New York 10601

Dear Mr. Bergins:

I apologize for the delay in responding to your inquiry. Generally, your proposed regulations are in compliance with those promulgated by the Committee. However, I offer these few recommendations:

Section 6

(a) Although an agency may require that requests be made in writing, failure to use a prescribed form cannot be a valid ground for denial of access. Any written request should suffice. Further, since the Committee has resolved that accessible records shall be made equally available to any person without regard to status or interest [see attached Resolution: Access to Records by Any Person], a person requesting records need not provide his signature, name and address. In the case of an appeal however, name and address must be given.

(c) In some circumstances, a person requesting records may be unable to revise and narrow a request due to lack of knowledge of specific details. In such cases, the records access officer should assist the individual in specifying the records sought.

(d) An appellant need not furnish a copy of a denial or the reasons for a denial.

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Section 9

(a) What is established practice? If a fee was not established by law, rule or regulation prior to the effective date of the Law, the fees adopted by the Committee govern. If "established practice" refers to fees "at the rate allowed to a county clerk" pursuant to Section 66 of the Public Officers Law, since that provision has been repealed, the right to charge at the same rate as a county clerk has been removed [see, however, CPLR Section 8021].

I hope that I have been of some assistance. Should any further questions arise, please feel free to contact me.

Very truly yours,

Robert J. Freeman
Deputy Counsel

RJF/sd

enc.

RECOMMENDATIONS

#202

May 13, 1975

Mr. Thomas C. Brady
County Attorney
Cattaraugus County
303 Court Street
Little Valley, New York 14755

Dear Mr. Brady:

I apologize for the delay in responding to your inquiry.

Having reviewed the regulations adopted by Cattaraugus County, the following modifications are recommended:

Section 2(b)

"Record" is defined in neither the Freedom of Information Law nor in the regulations promulgated by the Committee. The requirement that records be in writing may not be appropriate in some instances. For example, tape recordings, computer discs or photographs in some instances are accessible to the public [see e.g. Section 66 a, Public Officers Law; Fox v. City of New York, 280 NYS 2d 1001 (1967)].

Also, in my opinion, the intent of the Law is to provide access to statistics and facts, regardless of the form in which they appear on a printed page. Consequently, statistical or factual material should be available even when not arranged in tabular form [see Marino, The New York Freedom of Information Law, 43 Fordham Law Review 83, 86 (1974)].

Section 3(a)

Although the regulations may require that requests be made in writing, failure to use a prescribed form cannot be a ground for denial of access. A written request in any form should be suffice.

Second, County regulations provide that requests may be submitted from 9 a.m. to 3:30 p.m. If those hours are the regular business hours of County offices, the regulations are in compliance with those adopted by the Committee. Otherwise, requests should be accepted during all business hours the offices are open [see Committee Regulations, Section 1401.5(a)].

Section 3(b)

Section 1401.3(b) of the Committee regulations provides that the fiscal officer shall make payroll information available to any person, and not only to bona fide members of the news media. This provision of the regulations is based upon Section 88(10) of the Freedom of Information Law which preserves existing rights of access granted by statute or by decisional law. With regard to payroll information, the right of public access is established in case law [see Winston v. Mangan, 338 NYS 2d 656 (1973)]. Further, the Committee has resolved that information accessible under the Law shall be made equally available to any person without regard to status or interest [see enclosed Resolution: Access to Records by Any Person].

Section 7

While records may be withheld when disclosure would adversely affect the public interest, please note that such a determination must be made judicially, and that in such case, the burden of proving detriment to the public interest is on the agency [see Cirale v. 80 Pine Street Corp., 35 NY 2d 113 (1974)].

Section 8

When appealing denial of access, a person need not state the reasons for the denial [see Committee Regulations, Section 1401.7].

General Comment

The responsibilities of the records access officer should be more specifically delineated [see Committee Regulations, Sections 1401.2, 1401.6 and 1401.7(c)].

I thank you for your interest in complying with the Freedom of Information Law, and I hope that I have been of some assistance. Should any further questions arise, please feel free to contact me.

Sincerely,

Robert J. Freeman
Deputy Counsel

Enclosure

RJF:lbb

VITAL STATS.
#203

May 13, 1975

Mrs. Ethelyn M. Hawkins
Otsego County Historian
Otsego County
Richfield Springs, New York 13439

Dear Mrs. Hawkins:

Access to death records is governed by Section 4174 of the Public Health Law. Pursuant to this provision, the Commissioner of the Department of Health or any person authorized by him shall provide copies of death records upon a showing of a "proper purpose."

Although "proper purpose" is not defined in the statute, the courts have held that an individual seeking to inspect records must show some "legitimate and specific purpose and not merely the gratification of idle curiosity" [Rome Sentinel Company v. Boustedt, 252 NYS 2d 10 (1964)].

Apparently, the Clerk in the Village of Otsego felt that your request to inspect all death records bordered on the "gratification of idle curiosity."

In any case, I have called the Department of Health on your behalf. The Department possesses the original records of death since 1880. It was suggested that you request the records from the Department, specifying as many details as possible, including at least the county and the years for which you are seeking the records. Also, by requesting the records from the Department, the costs may be less prohibitive.

The person whom your request should be addressed is:

Mr. Joseph Sterzinger
Department of Health
Tower Building
Empire State Plaza
Albany, New York 12242

I hope that I have been of some assistance. Should any further questions arise, please feel free to contact me.

Sincerely,

Robert J. Freeman
Deputy Counsel

cc: Mr. Joseph Sterzinger
Department of Health

Mr. Bruce Phillips
Department of Health

RJF:lbb

XF 204

May 14, 1975

Robert B. Tierney

Robert J. Freeman

H.R. 1984

H.R. 1984 (the Koch-Goldwater bill) seeks to protect personal privacy by regulating the practices of state and local government and commercial entities with respect to maintenance, use and dissemination of personal information, which means any information that "describes, locates or indexes anything about an individual...or that affords a basis for inferring personal characteristics..." [Section 3(2)]. The bill would also permit individuals to examine records pertaining to them and to be notified of the existence, dissemination and uses of information pertaining to them. If enacted, a Federal Privacy Board would be created to oversee implementation of the act. In great measure, H.R. 1984 is based on the Privacy Act of 1974 (P.L. 93-579), which applies only to federal agencies.

Generally, the purpose of the bill is to provide safeguards for personal privacy pursuant to the following principles [see Section 2(b)]:

Personal information "should" [see Section 2(b)(1) through (5) and (10)]:

-- not be kept secretly;

-- not be collected unless clearly necessary;

-- be appropriate and relevant to the purposes for which it is collected;

-- not be obtained fraudulently or unfairly;

-- not be used or maintained unless accurate and current; and

-- not be collected by government except as expressly authorized by law.

Procedures "should" [see Section 2(b)(6), (7) and (9)] be adopted whereby individuals can:

-- learn of information pertaining to them, the purposes for which it is recorded, and its use and dissemination;

-- examine, correct, erase and amend information pertaining to them; and

-- prevent information collected for one purpose from being used for another without their consent.

Any organization which maintains, uses or disseminates personal information should assure its accuracy and prevent its misuse [see Section 2(b)(8)].

I. H.R. 1984 in Relation to New York Law

Existing New York law does not meet the requirements of H.R. 1984. There is no obligation to account for disclosure of personal information or the collection, use and maintenance of personal information by agencies.

New York's Freedom of Information Law [Sections 85 - 89, Public Officers Law] became effective September 1, 1974. Like the Federal Freedom of Information Act [5 U.S.C. 552], the New York statute authorizes, but does not require, units of government to "delete identifying details" in records when disclosure would constitute an "unwarranted invasion of personal privacy." Neither statute requires that individuals be notified when information pertaining to them is disclosed.

The Privacy Act of 1974 prohibits federal agencies from disclosing personal information unless prior written consent is obtained from the individual to whom the information pertains, except under certain specified conditions [5 U.S.C. 552a(b)]. One of the excepted conditions relates to disclosures made pursuant to the Freedom of Information Act [5. U.S.C. 552 a(b)(2)].

H.R. 1984, however, does not provide an analogous exception for disclosure made pursuant to state access statutes [see Section 4(d)(2)]. Therefore, if H.R. 1984 is enacted, units of government in New York would be required to obtain written consent from individuals before records are made available, even when disclosure of information would not constitute an "unwarranted invasion of personal privacy."

Second, the New York Freedom of Information Law provides public access to "statistical or factual tabulations made by or for the agency" [Section 88(1)(d)]. H.R. 1984 [Section 4(b)(2)(C)] provides that:

> "[N]o State or local government in collecting personal information shall... (c) make available to any non-State or local government person any statistical studies or reports or other compilations of information derived by mechanical or electronic means from files containing personal information, or no manual or computer material relating thereto, except those prepared, published and made available for general public use..."

Under the Freedom of Information Law, although statistical information may not have been prepared for "general public use," it is nonetheless accessible. Therefore, H.R. 1984 would abridge an existing right of access.

H.R. 1984 requires that organizations disclosing personal information:

> "maintain a complete and accurate record, including identity, purpose and date, of every access to any personal information in a system by persons or organizations not having regular access authority..." [Section 4(a)(9)]

The Freedom of Information Law, however, provides that accessible records shall be made available to any person, without regard to status or interest [See Section 88(6) and attached resolution by Committee on Public Access to Records].

H.R. 1984 provides criminal penalties for issuing personal information in violation of its provisions [Section 10(2)]. However, case law in New York has consistently held that a public officer is immune from liability when disclosures are made while acting within the scope of his official duties, regardless of the contents of the material [See, e.g. Cheatum v. Wehle, 5 N.Y. 2d 585 (1959); Sheridan v. Crisona, 14 N.Y. 2d 108 (1964); Kurat v. County of Nassau, 264 NYS 2d 126 (1965); Follendorf v. Brei, 272 NYS 2d 128 (1966); see also Barr v. Matteo, 360 U.S. 564 (1960), regarding federal officials].

II. Problems of Implementation

Some of the provisions of H.R. 1984 are so broad or administratively burdensome that their effective implementation would be next to impossible.

"Disseminate" as defined in H.R. 1984 [Section 3(4)] means "release, transfer or otherwise communicate information orally, or in writing, or by electronic means or by other means..." While the phrase "personal information" is defined [Section 3(2)] and is used throughout the bill, the dissemination sanction applies to any information.

The scope of H.R. 1984 includes personal information pertaining to foreign nationals residing in the United States or in their own countries [Section 4(a)(7)]. Consequently, the notice requirements [Sections 4(e) and (d)] and the right to judicial review [Section 11] apply equally both inside and outside of the United States.

H.R. 1984 would require that every organization notify each individual in writing of the nature of personal information in its possession and the expected uses of the information [Section 4(e)]. It is likely that these requirements would result in substantial expense and severe administrative burden.

H.R. 1984 would prohibit the use of social security numbers as a means of identification, unless authorized by federal law, except to the extent necessary for the administration of the social security program [Section 6(a) and (b)]. In New York, several state agencies use social security numbers for purposes of identification. Alteration of their identification systems would result in unnecessary duplication and expenditure of time and money.

Attachment

PRINCIPALS OF PRIVACY: AGENCY COMMENTS

The responses of the eight state agencies that answered the Koch-Goldwater Privacy Survey were rather diverse. In most instances, the agencies reported that the ten "Principles of Privacy" embodied in the questionnaire (see attached) are either currently in effect or could be easily effected. However, a number of common administrative and technical difficulties in implementing the proposed act were raised by several of the agencies.

A. Inability to Comply (see Column C)

The Department of Civil Service reported that it would be extremely burdensome, if not impossible, to transform its means of identification to a system keyed to something other than social security numbers (Principle #10). The Education Department noted that the use of social security numbers is a practical means of positive identification and that alteration of its present system would pose administrative and technical problems. The Division of Criminal Justice Services stated that legislation would be required to prohibit use of the social security number as an identifier.

The Department of Health stated that the right of an individual to amend a record (Principle #2) would conflict with Public Health Law, Section 4176, which permits alteration of a vital record only under specified circumstances.

The Education Department also stated that it could neither notify agencies or individuals to whom information had been previously transferred of removal of erroneous or irrelevant material (Principle #3), nor could it maintain a record of all persons inspecting personal information (Principle #5). In both cases, the Department stated that implementation of these requirements would be unnecessary and unduly burdensome to an agency which maintains numerous types of records pertaining to thousands of individuals.

B. Difficulty in Complying (see Column D)

Effectuation of several of the principles would be technically or administratively difficult, although not insuperable, for some of the agencies.

Principle #1

Generally, each agency currently permits any person to inspect and copy his own file. However, several agencies reported that confidential or investigatory information is not disclosed.

Principle #2

The Department of Social Services stated that information recorded on paper could easily be supplemented. However, technical problems would arise with respect to automated records, which of necessity must be brief and contain information subject to pre-defined limits (e.g. coding rather than narrative).

Principle #3

Several agencies stated that notification of removal of erroneous or irrelevant information to prior recipients of the information would create substantial administrative difficulties. The Department of Social Services stated that it could not appropriately respond because "irrelevant" is not defined.

Principle #4

The Education Department would face difficulty in prohibiting disclosure of information to individuals other than those who need to examine a file in the performance of their duties. Currently, only confidential material in possession of the Department is withheld. All other records, including those containing non-confidential information relating to individuals, are publicly accessible.

Principle #5

Maintenance of a record of all persons inspecting personal information and their identity and purpose would present considerable administrative burdens to the Education Department and the Division of Criminal Justice Services.

Principle #7

The Education Department and the Department of Social Services noted that the result of a failure to provide information may be unknown, since it may depend upon the collection of other material. Consequently, it would be difficult to implement such a requirement.

Principle #10

Prohibition of usage of social security numbers as a means of identification would result in administrative and technical problems for several agencies.

Attachment

SUPPLEMENTAL AGENCY COMMENTS

1. Greater consideration should be given to state law and procedure.

2. The requirement that one agency request information from another in writing would discourage interagency cooperation.

3. "Law enforcement purposes" [in Privacy Act of 1974, Section 552 a(j)(2); in H.R. 1984, Section 5] is defined too narrowly. For example, it does not include investigative reports of the moral character of an applicant for a professional license. These reports should remain inaccessible to the individuals to whom they pertain.

4. Maintenance of records concerning the exercise of First Amendment rights would be prohibited unless within the scope of a law enforcement activity [H.R. 1984, Section 4(a)(12)]. However, since First Amendment rights are not entirely clear, maintenance of some kinds of records might be unduly hindered.

5. The proposed legislation would force government to keep and generate an inordinate number of records. Except in extraordinary circumstances, most material is either a matter of public record, is supplied by the individual, or is already confidential by statute or practice.

6. There is no provision for conflicts of laws between the states.

7. There are no standards governing further dissemination of a record after it has been released.

8. There are no provisions governing federal-state or interstate exchanges of information.

9. The constitutionality of regulating in an area of traditional state concern is questionable.

10. There may be conflicts between the Family Educational Rights Act [P.L. 93 - 380 amended by Senate Joint Resolution 40] and the Koch-Goldwater legislation.

11. Individuals are statutorily prohibited from inspecting records pertaining to them in connection with information received through the State Employment Security Program. The program involves claims for unemployment insurance and applications for manpower services.

any person
#205

May 16, 1975

Mr. Matthew B. Clark
Clerk
Town of North Elba
Lake Placid, New York 12946

Dear Mr. Clark:

Thank you for your interest in complying with the Freedom of Information Law.

There is no specific form used for requesting records under the Law. Since records accessible under the Law should be made equally available to any person without regard to status or interest [see attached resolution] neither his identity nor his reasons for seeking the records are required to be provided.

Section 1401.6(a) of the regulations promulgated by the Committee state that:

> "Where a request for records is required, such request may be oral or in writing. However, written request shall not be required for records that have been customarily available without written request" [see attached].

Therefore, although you may require that requests for records not customarily available be made in writing, failure to use a prescribed form cannot be a valid basis for denial of access.

In short, any request for identifiable records [see Section 88(6) of the Law] made in writing should suffice.

I hope that I have been of some assistance. Should any further questions arise, please feel free to contact me.

Very truly yours,

Robert J. Freeman
Deputy Counsel

RJF/sd

enc.

Access of School District personnel files

FOIL-AO-206

May 16, 1975

Mr. Morris Kestenbaum
[redacted]

Dear Mr. Kestenbaum:

As I understand the facts, you are an employee of a school district and on two occasions you have been denied access to your personnel files. In both instances, the personnel director failed to provide a reason for the denial.

There is no specific right of access to the information sought in the Freedom of Information Law. However, the Law preserves rights of access to records made available by other provisions of law. One such provision is Section 2116 of the Education Law, which states that:

> "[T]he records, books and papers belonging or appertaining to the office of any officer of a school district are hereby declared to be the property of such district and shall be open for inspection by any qualified voter of the district at all reasonable hours, and any such voter may make copies thereof."

The Freedom of Information Law affects the provision quoted above in several ways. First, the Committee on Public Access to Records, which has the responsibility of advising with respect to the Law, has resolved that information accessible under the Law 'shall be made equally available to any person, without regard to status or interest' [see attached resolution]. Therefore, a person need not be a 'qualified voter of the district" to inspect and copy records.

Second, there are four categories of information to which the access provisions of the Law do not apply [Section 88(7)]. These categories include information that is exempt from disclosure by statute, confidential information relating to commercial enterprise and licensing, information which if disclosed would constitute an unwarranted invasion of personal privacy, and investigatory files compiled for law enforcement purposes. In my opinion, to the extent that your personnel records do not contain information included within the four categories, they should be made available to you.

Further, the Committee has promulgated regulations to which all units of government with the state, including school districts, must adhere. Relevant to your inquiry, the regulations provide that:

> "[D]enial of access shall be in writing stating the reason therefor and advising the requester of his right to appeal to the individual or body established to hear appeals..." [see attached Committee Regulations, Section 1401.7(b)].

I hope that I have been of some assistance. Should any further questions arise, please feel free to contact me.

Very truly yours,

Robert J. Freeman
Deputy Counsel

RJF/sd

enc.

cc: Lawrence Reich, Esq.
Office of Counsel
State Department of Education

RECOMMENDATIONS

#207

May 16, 1975

Mr. Michael McNulty
Supervisor
Town of Green Island
Green Island, New York

Dear Mr. McNulty:

Thank you for forwarding a copy of the Town's regulations governing public access to records. Generally, the regulations are in compliance with those promulgated by the Committee. However, the following modifications are recommended:

Section 2

The duties of the records access officer should be more specifically delineated [see Committee Regulations, Section 1401.2(b)].

Section 3

Although a written request may be required for records not readily or customarily available, failure to use a prescribed application form cannot be a valid basis for denial of access. Any written request for an identifiable record should suffice [see Committee Regulations, Section 1401.6(a)].

Sections 7 and 8

Both of these sections of the Town's regulations appear to envision what could be described as extraordinary circumstances. Committee regulations provide that a response to a request must be made no more than five days after receipt of the request, except under extraordinary circumstances. In such circumstances, the request must be acknowledged in writing, briefly explaining the reason for delay and estimating when production or denial will be forthcoming [Section 1401.6(b)].

R

Section 9

The appeal procedure should be more precisely outlined. Committee regulations provide that a denial of access shall be in writing, stating the reason for the denial and advising the requester of his right to appeal [Committee regulations, Section 1401.7(b)]. Further, the Town Board as the appeals body must inform the requester of its decision in writing within seven business days of receipt of an appeal [Committee Regulations, Section 1401.7(e); Freedom of Information Law, Section 88(8)].

Additional Recommendations

The Town's regulations do designate a fiscal officer who is in charge of compiling and providing payroll information to the public and the news media [see Committee Regulations, Section 1401.3].

Also, please take cognizance of the public notice requirements as provided in Section 1401.9.

I am enclosing a copy of model regulations, which may be helpful in ensuring compliance with the Law and regulations.

I hope that I have been of some assistance. Should any questions arise, please feel free to call me.

Very truly yours,

Robert J. Freeman
Deputy Counsel

RJF/sd

enc.

ADOPTED REGS/
RECOMMENDATIONS
#208

May 20, 1975

Mr. Patrick Fish
Acting Counsel
Department of Correctional
Services
State Office Building Campus
Albany, New York 12226

Dear Mr. Fish:

On February 19, 1975, the Committee received from Mr. Donnino a copy of the Department's regulations governing public access to records. Having reviewed the regulations, the following modifications are recommended:

Section 5.5 (b), (d), (e) and (f)

Although Department regulations define several categories of records, neither the Freedom of Information Law nor the regulations promulgated by the Committee define the term "record".

"Information record" is defined too narrowly in that it lists only five of the nine categories of records accessible under the Law [see Section 88(1)]. Also, if the Board of Parole is a governing body, minutes of its meetings should be made available [see Department Regulations, Section 5.5(d)(4); Freedom of Information Law, Section 88(1)(c)].

Moreover, the definitions of "statistical tabulation" and "factual tabulation" may be overly restrictive. In my opinion, the intent of the Law is to grant access to statistical and factual material, regardless of the form in which it appears on a printed page. Consequently, access should not be denied on the ground that statistical or factual information has been compiled in a form other than tabular [see also Marino, The New York Freedom of Information Law, 9 Ford. L. Rev. 83 (1974)].

Section 5.5 (c)

Department regulations permit access to payroll information (i.e. name, address, title and salary) pertaining only to officers of the Department. For all other employees, only titles and salaries are accessible.

Section 88(1)(g) of the Law provides that payroll information relating to "every officer or employee of an agency except officers and employees of the state law enforcement agencies" shall be made available. Since the Department might in some respects be considered a "law enforcement agency", perhaps only the titles and salaries of some employees should be disclosed. Assistance might be provided by Section 1.20 (33) of the Criminal Procedure Law, which includes in its definition of "peace officer":

> "(b) An attendant, or an official, or guard of any state prison or any penal correctional institution..."

and

> "(i) A parole officer or warrant officer in the department of correctional services."

Section 5.15(b)

The "current index" referred to in the Department regulations pertains only to accessible records. However, Section 88(4) of the Law provides that each agency shall maintain and make available a current list by subject matter "of any records which shall be produced, filed or first kept or promulgated " (emphasis added) after September 1, 1974. Without references in the index to all Department records, the ability to seek records as well as the right to appeal a denial of access would be constructively abridged.

Sections 5.20 and 5.25

These two sections, dealing respectively with health records and identification records, appear to be in conflict with the regulations promulgated by the Department prior to the enactment of the Freedom of Information Law. The two provisions specify the agencies and individuals which have a right of access. However, Section 51.14(a) of the published regulations of the Department states that:

> "[T]he following data regarding inmates or parolees may be provided: name, age, birth place, city of previous residence, physical description, commitment information, criminal record, institutions to which committed, institutional assignments and behavior, state of general health, cause of death, nature of injury or critical illness, and actions regarding sentence or release."

The language quoted makes no reference to the categories of individuals to whom the information may be provided. Since several other provisions relating to disclosure of information pertain to members of the news media only [see e.g. Sections 51.11, 12 and 13], presumably Section 51.14 pertains to any person seeking the information described in that provision.

Section 5.35

Department regulations state that requests shall be answered "within a reasonable period of time." It is likely that in most instances this standard would comply with Committee regulations. However, it should be noted that Committee regulations require that a response be made within five days, except under extraordinary circumstances, in which case the Department must acknowledge the request in writing, including a brief explanation for the delay and an estimate of the date production or denial will be forthcoming [Committee Regulations, Section 1401.6(h)(2)].

Section 5.40

Unless established by law, rule or regulation prior to September 1, 1974, a fee cannot be charged for a certification made pursuant to the Freedom of Information Law [Committee Regulations, Section 1401.8].

Section 5.45

First, a person appealing a denial need not state the reasons for the denial given by the Department. Second, the Commissioner must decide the appeal in writing within seven business days of its receipt [see Committee Regulations, Section 1401.7; Freedom of Information Law, Section 88(8)].

General Recommendations

The Department must designate a records access officer and fiscal officer pursuant respectively to Sections 1401.2 and 1401.3 of the Committee regulations. Also, please note the public notice requirements as contained in Committee regulations, Section 1401.9.

I am enclosing copies of the Committee regulations and model regulations which may be helpful in ensuring compliance with the Freedom of Information Law.

I hope that I have been of some assistance. Should any questions arise, please feel free to call me.

Sincerely,

Robert J. Freeman
Deputy Counsel

Enclosures

RJF:lbb

ADOPTED REGS/
RECOMMENDATIONS
#209

May 21, 1975

Mr. Richard E. DePetris
Town Attorney
Town of Southampton
Town Hall
Hampton Road
Southampton, New York 11968

Dear Mr. DePetris:

Thank you for forwarding a copy of the regulations governing public access to records adopted by the Town of Southampton. Generally, the Town's regulations are in accord with those promulgated by the Committee.

I have but two comments to offer. First, the Town's regulations do not provide any time limitations for responding to a request. Committee regulations hold that officials shall respond "promptly" and within five days of receipt of a request except in "extraordinary circumstances" [Section 1401.6(b)(1)]. In such circumstances, an official must acknowledge the receipt in writing, briefly explaining the reason for the delay and estimating the date when production or denial will be forthcoming [Section 1401.6(b)(2)].

Second, other than providing for updating of the subject matter list [Section 1401.2(b)(1)], the Committee has not yet adopted rules or regulations with respect to the list. To date Section 88(4) of the Freedom of Information Law provides the only substantial direction regarding the subject matter list.

I hope that I have been of some assistance. Should any questions arise, please feel free to contact me.

Sincerely,

Robert J. Freeman
Deputy Counsel

RJF:lbb

RJ

May 21, 1975

Mr. Lewis C. DiStasi, Jr.
Law Offices
Stewart T. Schantz, P. C.
5-7 Milton Avenue
Highland, New York 12528

Dear Mr. DiStasi:

As you have described the facts, a request has been made for the names of possible violators of zoning ordinances and investigatory records regarding possible violations of zoning ordinances in possession of the Town Zoning Inspector.

Under Section 268 of Town Law, a Town Inspector may be invested by the Town Board with authority to enforce its building code and zoning ordinances by instituting proceedings to enjoin violators [Willets v. Quinto, 225 NYS 2d 301 (1962)].

As such, the records in question in possession of the Zoning Inspector may be considered "investigatory files compiled for law enforcement purposes." Therefore, the access provisions of the Freedom of Information Law [Section 88(1)] do not apply [see Section 88(7)(d)], and the Zoning Inspector need not disclose investigative material.

With regard to privacy, Section 88(3) of the Freedom of Information Law gives discretion to municipal officials to "delete identifying details" from records the disclosure of which would constitute an unwarranted invasion of personal privacy. Therefore, if in the judgment of the Zoning Inspector disclosure of names of possible violators would result in an unwarranted invasion of personal privacy, the names may be withheld.

I hope that I have been of some assistance. Should any further questions arise, please feel free to call me.

Very truly yours,

Robert J. Freeman
Deputy Counsel

RJF/sd

ADOPTED RULES/
RECOMMENDATIONS

#211

May 21, 1975

Mr. Frances S. Barnes
Clerk
Board of Legislators
Belmont, New York 14813

Dear Mr. Barnes:

Thank you for forwarding a copy of Allegany County's regulations governing public access to records. Having reviewed the regulations, the following modifications are recommended:

Sections 1401.2 and 1401.3 require that the records access and fiscal officers be designated by name or job title and business address. Similarly, Section 1401.7(b) requires that the appeals officers be identified by name, title, business address and business telephone number.

The duties of the records access officers should be more specifically delineated [see Committee Regulations, Section 1401.2(b)].

County regulations should include provisions regarding the locations where records are made available [Committee Regulations, Section 1401.4] and the hours during which records may be inspected and copied [Committee Regulations, Section 1401.5].

County regulations do not include time limits for responding to requests. Committee regulations provide that a response shall be made promptly and within five days, except under extraordinary circumstances. In such circumstances, the official must acknowledge the request and include a brief explanation for the delay and an estimate of when production or denial will be forthcoming [see Section 1401.6(b)].

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The appeals procedure should be more precisely outlined. Please note that a denial of access must be in writing, stating the reasons for the denial, and advising the requester of his right to appeal to the head of the agency [Committee Regulations, Section 1401.7(b)]. Further, the head of the agency or his designate must inform the requester of his decision within seven business days of receipt of the appeal [Committee Regulations, Section 1401.7(e); Freedom of Information Law, Section 88(8)].

Also, Section 1401.9 of the Committee regulations prescribes public notice requirements to which all agencies must adhere.

I am enclosing a copy of model regulations, which may be helpful in ensuring compliance with the Law and regulations.

I hope that I have been of some assistance. Should any questions arise, please feel free to contact me.

Very truly yours,

Robert J. Freeman
Deputy Counsel

RJF/sd

enc.

ADOPTED REGS/
RECOMMENDATIONS
#212

May 21, 1975

Mr. Gilbert Harwood
Counsel
Department of State
162 Washington Avenue
Albany, New York 12231

Dear Mr. Harwood:

Thank you for forwarding a copy of the Department's regulations governing public access to records. Having reviewed the regulations, the following modifications are recommended:

144.2

Department regulations provide for an index listing available records. However, Section 88(4) of the Freedom of Information Law directs agencies to compile a list by subject matter of "any records which shall be produced, filed, or first kept or promulgated" (emphasis added) after the effective date of the Law. By making reference in the list only to accessible records, the public is unable to know of the existence of other records and thereby could be constructively denied the right to appeal a denial of access.

144.4

Section 1401.5(a) of the Committee regulations provides that requests for records shall be accepted during all regular business hours.

144.5

Department regulations should include the names or job titles of the designated records access officers for each division. Further, the responsibilities of the records access officers should be more specifically delineated [see Committee Regulations, Section 1401.2(a) and (b)].

144.6

The requirement that a person requesting records provide proof of identity when inspecting an original record may be reasonable for the purposes of security. However, since the Committee has resolved that records accessible under the Law shall be made equally available to any person, without regard to status or interest, failure to provide identification cannot be a valid ground for denial of access when physical security of the records is not a consideration [see attached Resolution and Section 88(6) of the Freedom of Information Law].

144.13 and 144.14

These sections of the Department regulations deal with what might be considered "extraordinary circumstances." In this regard, Committee regulations provide that requests shall be answered promptly, and that except under extraordinary circumstances, responses shall be made no more than five working days after receipt of a request. When extraordinary circumstances arise, the official must acknowledge the request in writing, briefly explaining the reason for the delay and estimating when production or denial will be forthcoming [see Committee Regulations, Section 1401.6(b)].

144.16

The responsibilities of the Department regarding denials of access should be more precisely outlined. For example, a denial must be in writing stating the reasons therefor. Also, the person designated to hear appeals must inform the appellant of his decision within seven business days of receipt of the appeal [see Committee Regulations, Section 1401.7 (b) through(e)].

Additional Recommendations

Department regulations do not provide for a fiscal officer who is responsible for compiling and providing access to payroll information [see Freedom of Information Law, Section 88(1)(g); Committee Regulations, Section 1401.3].

Also, please take cognizance of the posting requirements as required by Section 1401.9 of the Committee regulations.

I am enclosing copies of Committee regulations and model regulations, which may be helpful in ensuring the Department's compliance with the Freedom of Information Law.

I hope that I have been of some assistance. Should any questions arise, please feel free to call me.

Sincerely,

Robert J. Freeman
Deputy Counsel

Enclosures

RJF:lbb

Erie District
#213

May 21, 1975

Kenneth W. Kitzinger, Esq.
Attorney at Law
165 Merrymont Drive
Cheektowaga, New York 14225

Dear Mr. Kitzinger:

Thank you for your interest in complying with the Freedom of Information Law.

The public notice provisions in the regulations promulgated by the Committee do not require an agency to publish its regulations in a newspaper. Section 1401.9 states that each agency

> "shall publicize by posting in a conspicuous location wherever records are kept and/or by publication in a local newspaper of general circulation:
>
> (a) The location where public records shall be made available for inspection and copying.
>
> (b) The name, title, business address and business telephone number of the designated records access officer and fiscal officer.
>
> (c) The right to appeal by any requester denied access to a record for whatever reason and the name and business address of the person or persons or body to whom an appeal is to be directed."

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Consequently, if the Fire District publicizes by posting in the manner described above, there is no additional requirement that the same information be published in a newspaper. Further, if the Fire District chooses to place a notice in a newspaper, the notice need not include the regulations as a whole, but only the information prescribed by Section 1401.9.

The use of Fire District officials' home addresses and telephone numbers may be avoided if indeed there is a person available at the Fire District office to accept telephone calls and transmit messages to the appropriate officials. Please note, however, that when records are requested, a response must be made promptly and within five working days of receipt of the request, except under extraordinary circumstances [see Committee Regulations, Section 1401.6(b)(1)]. In such circumstances, the request must be acknowledged in writing breifly explaining the reason for the delay and estimating the date when production or denial will be forthcoming [see Committee Regulations, Section 1401.6(b)(2)].

Section 6 of the Fire District regulations, regarding denial of access, should be more precisely delineated. Most important, a denial of access must be in writing stating the reasons for the denial [Committee Regulations, Section 1401.7(b)], and the Chairman of the Board, as the appeals officer, must inform the appellant of his decision within seven business days of receipt of an appeal [Committee Regulations, Section 1401.7(e)].

I am enclosing a copy of model regulations which may be helpful in ensuring compliance with the Freedom of Information Law and Committee regulations.

I hope that I have been of some assistance. Should any further questions arise, please feel free to contact me.

Sincerely,

Robert J. Freeman
Deputy Counsel

Enclosure

RJF:lbb

ADOPTED REGS/
RECOMMENDATIONS

#214

May 21, 1975

Mr. Edward W. Norton
General Counsel
New York City Housing Authority
250 Broadway
New York, New York 10007

Dear Mr. Norton:

Thank you for forwarding a copy of the Housing Authority's regulations governing public access to records. Having reviewed the regulations, I offer the following recommendations:

Section II A

The list of disclosable records in the Authority regulations includes eight of the nine categories made available by Section 88(1) of the Freedom of Information Law. If this format is to be used, all nine categories should be reflected, including Section 88(1)(h), which grants access to final determinations and dissenting opinions of members of the governing body of an agency. In addition, please note that Section 88(5) requires that a record of votes be compiled and made available to the public.

Sections II A (7), II C and III C

Authority regulations would enable only bona fide members of the media to gain access to payroll information. However, the Committee pursuant to its advisory authority [Section 88(9)(a)(i)] has resolved that information accessible under the Law "shall be made equally available to any person without regard to status or interest" [see attached resolution]. Further, Section 88(10) preserves

R1

existing rights of access granted under statutory or decisional law. With regard to payroll information, case law established a right of public access prior to the enactment of the Freedom of Information Law. In Winston v. Mangan, the court held that:

> "The names and pay scales of ... employees, both temporary and permanent, are matters of public record and represent important fiscal as well as operational information. The identity of employees and their salaries are vital statistics kept in the proper recordation of departmental functioning and are the primary sources of protection against employment favoritism. They are subject therefore to inspection.
>
> The employees home addresses, however, do not carry the same prima facie public importance and unless a specific 'private' need is shown for them, they need not be disclosed" [338 NYS 2d 656, 662 (1973)].

Consequently, payroll information should be made available to any person, as the regulations promulgated by the Committee so provide [see Committee Regulations, Section 1401.3]. However, since Section 88(1)(g) of the Freedom of Information Law does not specify which address, home or business, shall be made available, you may in your discretion furnish either. If in your judgment disclosure of employees' home addresses would constitute an "unwarranted invasion of personal privacy" [see Section 88(3) of the Law], the business address may be provided.

Also, Authority regulations [Section III B (c)] provide that payroll records "may include one or more of the following: name, address, title and salary..." However, Committee regulations, which have the force and effect of law, provide that name, address, title and salary shall be provided, except in the case of law enforcement officials.

Please note that members of the public seeking payroll information cannot use the form prescribed by the Comptroller (AC-375) or the Authority (NYCHA Form 005.007), since both forms require certification that the applicants are bona fide members of the news media.

Section II E

If the regular business hours of the Authority are 10 a.m. to 4 p.m., Authority regulations are in compliance with those promulgated by the Committee. Otherwise, Section 1401.5 of the Committee regulations provides that requests shall be accepted during all regular business hours.

Section II F (b)

With respect to oversize pages, Authority regulations provide that the fee shall be based upon the actual cost including "administrative costs." What are "administrative costs"? Section 1401.8(c)(3) of the Committee regulations provides that the fee in such instances

> "shall not exceed the actual copying cost which is the average unit cost for copying a record excluding fixed costs of the agency such as operator salaries" [emphasis added].

If the 'administrative costs" are reflective of "fixed costs of the agency", the Authority's regulations are inconsistent with those adopted by the Committee.

Section III A

Although an agency may require that requests be made in writing [see Committee Regulations, Section 1401.6(a)], failure to use a prescribed form in making a request cannot be a valid ground for denial of access. Any request for identifiable records made in writing should suffice. When such a written request is received, the records access officer may find it expenditious to transfer the information in the request to the form used by the Authority.

Section III B

Authority regulations contain no specific time limitations for responding to a request. Committee regulations provide that a response shall be made "promptly" and within five working days, except under extraordinary circumstances. In such circumstances, the request must be acknowledged in writing, briefly explaining the reason for the delay and estimating the date when production or denial will be forthcoming [see Committee Regulations, Section 1401.6(b)]. In addition to extraordinary circumstances relating to a voluminous request or a large number of requests, the provision dealing with "Conditional Approval Pending Reveiw" [Authority regulations, Section III B (2)(c)] might appropriately reflect an extraordinary circumstance.

It should also be noted that failure to respond as provided by Section 1401.6(b) of the Committee regulations may be deemed a constructive denial of access [see Committee Regulations, Section 1401.7(c)].

Section III B (2)

The duties of the records access officer should include the requirement that, on request, he must certify that the Authority is not a custodian of the records or that the records of which the Authority is a custodian cannot be found.

Finally, please take cognizance of the public notice and posting requirements provided in Section 1401.9 of the Committee regulations.

I am enclosing a copy of model regulations which may be helpful in ensuring your compliance with the Freedom of Information Law.

I hope that I have been of some assistance. Should any questions arise, please feel free to call me.

Sincerely,

Robert J. Freeman
Deputy Counsel

Enclosure
RJF:lbb

#215

May 21, 1975

Mr. Carl W. Peterson, Jr.
Hancock, Estabrook, Ryan, Shove & Hust
Counselors at Law
One Mony Plaza
Syracuse, New York 13202

Dear Mr. Peterson:

Public access to the criminal dockets of Justices of the Peace is governed by Section 2019-a of the Uniform Justice Court Act.

In relevant part, this provision states that the justices' criminal docket

> "shall be at all tines open for inspection to the public. Such docket shall be and remain the property of the village or town of the residence of such justice, and at the expiration of the term of office of such justice shall be forthwith filed by him in the office of the clerk of such village or town, provided, however, that if such dockets are transferred pursuant to section twenty hundred twenty-one of the uniform district court act, the responsibility for such dockets by the city, village or town shall cease and they shall be the property of the district court to which they are transferred."

R1

There are several public offices which may have possession of certificates of conviction. First, if the issuance of the certificate predated enactment of the Criminal Procedure Law, the certificate is in possession of a county clerk. Since the passage of the Criminal Procedure Law, the Attorney General, in an informal opinion, stated that it is no longer necessary or required for justice courts to file the certificates with the county clerk [1972 Ops Atty Gen June 12 (informal)]. Second, if a justice is no longer in office, and the certificates were issued after enactment of the Criminal Procedure Law, the certificates are in possession of the town clerk. Third, if a justice is still in office, he has possession of the certificates as well as the criminal dockets. And fourth, if a particular justice court is part of a district court system [see Section 2021, Uniform District Court Act], the justice's criminal dockets and certificates of conviction are in possession of the clerk of the district court.

I hope that I have been of some assistance. Should any further questions arise, please feel free to contact me.

Sincerely,

Robert J. Freeman
Deputy Counsel

RJF:lbb

ADOPTED REGS/
RECOMMENDATIONS

#216

May 23, 1975

Mr. Howard L. Dorland
Records Access Officer
Temporary State Commission
to Study the Catskills
Rexmere Park
Stamford, New York 12167

Dear Mr. Dorland:

Thank you for your interest in complying with the Freedom of Information Law. I apologize for the delay in communicating with you.

On September 19, 1974, the Committee received a copy of the Commission's regulations governing public access to records. At that time, the Committee was unable to offer advice or commentary with respect to your regulations because official Committee regulations had not yet been adopted.

As you know, the Committee has since promulgated regulations, which have the force and effect of law. Having reviewed the regulations adopted by the Commission, the following modifications are recommended:

Section III

Although an agency may require that requests be made in writing, failure to submit a request on a prescribed form cannot be a valid ground for denial of access [see Committee Regulations, Section 1401.6(a)]. Any request for identifiable records made in writing should suffice.

2/

Commission regulations state that the "right to make a request shall be limited to adult individuals deemed to have a reasonable right to such information." However, pursuant to its statutory authority to advise [Freedom of Information Law, Section 88(9)(a)(i)], the Committee has resolved that records accessible under the Law "shall be made equally available to any person, without regard to status or interest" [see attached resolution; also Freedom of Information Law, Section 88(6)].

Although your regulations may provide that a response to a request must be made within three working days, Committee regulations permit as long as five working days to respond to a request, unless more time is needed due to extraordinary circumstances [Section 1401.6(b)(1)]. In such circumstances, the request must be acknowledged in writing, briefly stating the reason for the delay and estimating the date when production or denial will be forthcoming [Committee Regulations, Section 1401.6(b)(2)].

Section IV

When a request is denied, the reasons for the denial must be stated in writing [Committee Regulations, Section 1401.7(b)].

Subject Matter List

The Commission's subject matter list pertains only to records available for inspection. However, Section 88(4) of the Law states that the list must make reference "by subject matter," to "any records which shall be produced, filed, or first kept or promulgated" (emphasis added) after the effective date of the Law.

Once again, I apologize for the delay in responding to your initial letter.

I hope that I have been of some assistance. Should any questions arise, please feel free to contact me.

Sincerely,

Robert J. Freeman
Deputy Counsel

Attachment
RJF:lbb

Privacy
#217

May 23, 1975

Ms. Charlotte H. Fuchs
Secretary - Treasurer
Arnold Road, Box 246
Preston Hollow, New York 12469

Dear Ms. Fuchs:

Your letter of May 17 addressed to the Attorney General has been forwarded to the Committee on Public Access to Records. The Committee has the responsibility of advising with respect to the Freedom of Information Law.

Mr. John Davison, Associate General Counsel to the State Power Authority, informed me that your request for names and addresses of property owners situated on the route of a proposed power line was denied because disclosure would constitute an unwarranted invasion of personal privacy.

Under the Freedom of Information Law, an agency official may in his discretion delete identifying details [Section 88(3)] or deny access [Section 88(7)(c)] when in his judgment disclosure would result in such an unwarranted invasion. Further, Section 88(3)(d) of the Law states that an unwarranted invasion of personal privacy includes:

> "(d) The sale or release of lists of names and addresses in the possession of any agency or municipality if such lists would be used for private, commercial or fund-raising purposes..."

Consequently, it appears that the Power Authority acted within the scope of the Freedom of Information Law in denying access to the information sought.

However, the information that you are seeking may be accessible via a different route. Sections 88(1)(i) and 88(10) of the Freedom of Information Law preserve existing rights of

access to information made available by other provisions of law, both statutory and decisional. One such provision is Section 51 of the General Municipal Law, which provides access to:

> "[A]ll books of minutes, entry or account, and the books, bills, vouchers, checks, contracts, or other papers cconnected with or used or filed in the office of, or with any officer, board or commission acting for or on behalf of any county, town, village or municipal corporation in this state..."

Therefore, virtually all records in possession of a municipal office are available for public inspection. Relevant to your inquiry, the assessment rolls or cards in possession of your local assessor are available for inspection and copying. In construing Section 51 of the General Municipal Law, the courts have held that records concerning assessments are accessible [Sanchez v. Papontas, 303 NYS 2d 711 (1969); Sears Roebuck & Co. V. Hoyt, 107 NYS 2d 756 (1951)]. Generally, the assessment roll is compiled based upon location. Thus, it is likely that you will be able to discover the names and addresses of property owners in a particular location by inspecting the assessment rolls.

I hope that I have been of some assistance. Should any further questions arise, please feel free to contact me.

Very truly yours,

Robert J. Freeman
Deputy Counsel

RJF/sd

cc: Hon. Donald Hirshorn
Assistant Attorney General

Mr. John Davison
Associate General Counsel
New York State Power Authority
10 Columbus Circle
New York, New York 10019

ADDED RECORD/
RECOMMENDATION
#218

May 23, 1975

Ms. Joyce Fitzgerald
Clerk of Board
Board of Supervisors
Livingston County
Court House
Geneseo, New York 14454

Dear Ms. Fitzgerald:

Thank you once again for your efforts in complying with the regulations promulgated by the Committee on Public Access to Records.

I have but two comments to offer. The form prescribed by the Comptroller can be used only by members of the news media. Since the form requires that the applicant certify that he or she is a member of the news media, members of the public should be able to request payroll information in the same manner as requests are made for all other records.

Second, it is noted for purposes of clarification that when information is denied based upon potential detriment to the public interest, although a government official has the burden of proving the detriment in court, such a determination can be made only by a court [see Cirale v. 80 Pine Street Corp., 35 NY 2d 113 (1974)].

I hope that I have been of some assistance. Should any further questions arise, please feel free to contact me.

Sincerely,

Robert J. Freeman
Deputy Counsel

RJF:lbb

FF 219

May 23, 1975

Mr. Arthur B. Levine
Counsel
Board of Zoning Appeals
Nassau County
Town Hall
Hempstead, New York 11551

Dear Mr. Levine:

Your letter of May 6, 1975, addressed to the Office of the Attorney General has been forwarded to the Committee on Public Access to Records. The Committee has the responsibility of advising with respect to the Freedom of Information Law.

The categories of accessible records listed in Section 88(1) of the Law do not make reference to surveys or architects' and engineers' structural plans in possession of a zoning board of appeals. However, Section 88(1) of the Law provides access to

> "any other files, records, papers or documents required by any other provision of law to be made available for public inspection and copying."

One such provision is Section 51 of the General Municipal Law, which provides that

> "[A]ll books of minutes, entry or account, and the books, bills, vouchers, checks, contracts or other papers connected with or used or filed in the office, or with any officer, board or commission acting for or on behalf of any county, town, village or municipal corporation in this state...are hereby declared to be public records, and shall be open...to the inspection of any taxpayer or registered voter..."

Consequently, virtually all "papers used or filed" by a municipal board are accessible.

The Freedom of Information Law affects the provision quoted above in several ways. First, the Committee, pursuant to its advisory authority [Section 88(9)(a)(i)], has resolved that information accessible under the Law "shall be made equally available to any person, without regard to status or interest" [see attached resolution; Section 88(6)]. Therefore, a person need not be a "taxpayer or registered voter" of a municipality to inspect and copy records.

Second, there are four categories of information to which the access provisions of the Law do not apply [Section 88(7)]. These categories include information that is exempt from disclosure by statute, confidential information relating to regulation of commercial enterprise and licensing, information which if disclosed would constitute an unwarranted invasion of personal privacy, and investigatory files compiled for law enforcement purposes.

In my opinion, to the extent that the records do not contain information included within the four categories, they should be made available. It is doubtful that the records relevant to your inquiry in fact reflect information contained in any of the four categories.

Additionally, since Section 267 of the Town Law requires that a zoning board of appeals meet publicly, and that "any party may appear," public access to the records in question is necessary for the public to be adequately informed.

The existence of a seal or lack thereof on plans or surveys has no bearing on rights of access.

I hope that I have been of some assistance. Should any further questions arise, please feel free to contact me.

Sincerely,

Robert J. Freeman
Deputy Counsel

cc: Mr. William F. Sheehan
Deputy Assistant Attorney General

Mr. Frederick Nack
Assistant Attorney General

Attachment

PRIVACY
#220

May 27, 1975

Mr. Kenneth R. Wolff
Village Attorney
Village of Mount Kisco
Mount Kisco, New York 10549

Dear Mr. Wolff:

The position adopted by the American Library Association, favoring the confidentiality of names and addresses of library card holders and borrowers, is in accord with the provisions of the Freedom of Information Law.

The Law gives government officials discretion to "delete identifying details" [Section 88(3)] or withhold information [Section 88(7)] if in their judgment disclosure would result in an "unwarranted invasion of personal privacy." More specifically, Section 88(3) provides

> "an unwarranted invasion of personal privacy includes, but shall not be limited to:
>
> a. disclosure of such personal matters as may have been reported in confidence to an agency or municipality and which are not relevant or essential to the ordinary work of the municipality..."

and

> "d. the sale or release of lists of names and addresses in the possession of any agency or municipality if such lists would be used for private, commercial or fund-raising purposes..."

Consequently, under the Freedom of Information Law, library officials may withhold information the disclosure of which would constitute an unwarranted invasion of personal privacy, such as identifying details concerning library registrants and borrowers.

I am enclosing a copy of regulations governing the procedural aspects of the Law which may be helpful in ensuring compliance.

I hope that I have been of some assistance. Should any further questions arise, please feel free to contact me.

Sincerely,

Robert J. Freeman
Deputy Counsel

Enclosure

RJF:lbb

ADOPTED REGS/
RECOMMENDATIONS
#221

May 27, 1975

Ms. Cecile Chambers
Village Clerk
Village of Greenwich
Greenwich, New York 12834

Dear Ms. Chambers:

Thank you for forwarding a copy of the regulations governing public access to records adopted by the Village of Greenwich.

The regulations comply with those promulgated by the Committee in all respects.

Respectfully yours,

Robert J. Freeman
Deputy Counsel

RJF:lbb

ADOPTED REGS/
RECOMMENDATIONS
#222

May 27, 1975

Mr. Nicholas Marchase
District Principal
Spencer - Van Etten Central School
Dartt Crossroad
Spencer, New York 14883

Dear Mr. Marchase:

Thank you for forwarding a copy of your school district's regulations governing public access to records.

In my opinion, the regulations are excellent in all respects but one. In the addendum dealing with fees, a search fee has been added with regard to records in existence prior to 1938. Committee regulations, however, do not permit fees for searches,

> "[E]xcept where fees or exemptions from fees have been established by law, rule or regulation prior to September 1, 1974..." [Committee Regulations, Section 1401.8].

Therefore, unless fees for searching records had been established as described above, the provision in question is inconsistent with Committee regulations.

I hope that I have been of some assistance. Should any questions arise, please feel free to contact me.

Sincerely,

Robert J. Freeman
Deputy Counsel

RJF:lbb

RECOMMENDATION

R

#223

May 30, 1975

Board of Supervisors
Warren County Municipal Center
Queensburry, New York

Gentlemen:

Mr. George Mayes has requested that the Committee on Public Access to Records review the regulations governing access to records adopted by the Warren County Board of Supervisors. Having reviewed the regulations, the following modifications are recommended:

Section 2(a)

Neither the Freedom of Information Law nor the regulations promulgated by the Committee define the term "record". The requirement in County regulations that a record consist of a writing may be inappropriate in some instances. For example, photographs and computer tapes or discs might in some cases be accessible to the public [see e.g. Section 66-a, Public Officers Law; Fox v. City of New York, 280 NYS 2d 1001 (1967)].

Section 3(b)

Although a written request for records may be required, failure to use a prescribed form cannot be a valid ground for denial of access [see Committee regulations, Section 1401.6(a)]. Any request for identifiable records made in writing should suffice.

Further, upon failure to locate requested records, the records access officer must certify that the agency is not a custodian of the records or the records of which the agency is a custodian cannot be found [Committee regulations, Section 1401.2(b)(6)(i) and (ii)].

Section 3(c)

County regulations provide that payroll information is available only to bona fide members of the new media. However, the Committee, pursuant to its advisory authority [Section 88(9)(a)(i), Freedom of Information Law], has resolved that information available under the Law "shall be made equally accessible to any person, without regard to status or interest" [See attached resolution; also Section 88(6), Freedom of Information Law]. Moreover, Section 88(10) of the Law preserved existing rights of access to records made available by statutory and decisional law. In the case of payroll information, case law established the right of public access prior to the enactment of the Freedom of Information Law. In construing Section 51 of the General Municipal Law, the court in Winston v. Mangan held that

> "[T]he names and pay scales of... employees, both temporary and permanent, are matters of public record and represent important fiscal as well as operational information. The identity of the employees and their salaries are vital statistics kept in the proper recordation of departmental functioning and are the primary sources of protection against employment favortism. They are subject therefore to inspection" [338 NYS 2d 656, 662 (1973)].

Consequently, payroll information is accessible to any person, and the Committee regulations so provide [see Section 1401.3].

Section 5

The fee of one dollar per page for photocopies is inconsistent with the regulations adopted by the Committee, which enable an agency to charge no more than twenty-five cents per page [Section 1401.8(c)],

> "[E]xcept where fees or exemptions from fees have been established by law, rule or regulation prior to September 1, 1974..." [Section 1401.8].

Therefore, unless the County had officially adopted a fee of a dollar per page as described in the provision quoted above, County regulations are in violation of those promulgated by the Committee.

Section 7

An agency may deny access to records, the disclosure of which would be detrimental to the public interest. However, it is noted that the Court of Appeals recently held that

> "[S]uch a determination is a judicial one and requires that the governmental agency come forward and show that the public interest would indeed be jeopardized by a disclosure of the information" [Cirale v. 80 Pine St. Corp., 35 NY 2d 113, 119 (1974)].

Thus, although access may be denied based upon assertion of the governmental privilege, the burden of proof in a judicial proceeding would rest on the agency, not on the seeker of records, as in a proceeding under Article 78 of the Civil Practice Law and Rules [see also, Section 88(8), Freedom of Information Law].

Also in Section 7, County regulations provide that in denying access, the Records Access Officer shall indicate his reason for the denial. However, the regulations should specify that the reasons for denial must be stated in writing [Committee regulations, Section 1401.7(b)]. Further, Committee regulations provide that the appeals officer, in this instance, the Chairman of the Board of Supervisors, shall inform the appellant of his decision within seven business days of the receipt of the appeal. County regulations provide for notification only in cases of modification or affirmation of the initial denial [see Committee regulations, Section 1401.7(e).

I am enclosing a copy of model regulations which may be helpful in ensuring the County's compliance with the Freedom of Information Law.

I hope that I have been of some assistance. Should any questions arise, please feel free to contact me.

Very truly yours,

Robert J. Freeman
Deputy Counsel

RJF/sd

enc.

cc: Mr. George Mayes
[redacted]

ADOPTED REG'S RECOMMEND.

#224

June 2, 1975

Mr. George R. Blair
Town Attorney
Town of Elma
Elma Shopping Center
Bowen Road
Elma, New York 14059

Dear Mr. Blair

Thank you for your interest in complying with the Freedom of Information Law.

The regulations adopted by the Town Board of Elma are now fully in compliance with those promulgated by the Committee.

Should any questions arise regarding the Law or regulations, please feel free to contact me.

Sincerely,

Robert J. Freeman
Deputy Counsel

RJF:lbb

Freedom of Info
Copy

STATE OF NEW YORK
COMMITTEE ON PUBLIC ACCESS TO RECORDS FOIL-A0-225

COMMITTEE MEMBERS
\E ABEL - Chairman
ELMER BOGARDUS
MARIO M. CUOMO
PETER C. GOLDMARK, JR.
JAMES C. O'SHEA
GILBERT P. SMITH

EXECUTIVE DIRECTOR
ROBERT J. FREEMAN

DEPARTMENT OF STATE, 162 WASHINGTON AVENUE, ALBANY, NEW YORK 12231
(518) 474-2518, 2791

June 2, 1975

Mr. Walter Monahan
[redacted]

Dear Mr. Monahan:

The Freedom of Infomation Law grants public access to many categories of records. However, the information that you are seeking, investigatory material, is not available under the Law.

Relevant to your inquiry, Section 88(7) of the Law states that the access provisions of the Freedom of Information Law

> "shall not apply to information that is...
>
> d. part of investigatory files compiled for law enforcement purposes."

Therefore, the denials of access by the agencies noted in your letter appear to have been consistent with the Freedom of Information Law.

You mentioned that one of the cases in which you are interested has been disposed of judicially and that some of the material that you are seeking was filed with the court. If this is the case, you may be able to obtain information under Section 255 of the Judiciary Law, which provides that

> "[A] clerk of a court must, upon request, and upon payment of, or offer to pay, the fees allowed by law, fees at the rate allowed to a county clerk for a similar service, diligently search the files, paper, records, and dockets in his office, and either make one or more transcripts or certificates of change therefrom and certify to the correctness thereof, and to the search, or certify that a document or paper, of which the custody legally belongs to him, cannot be found."

Therefore, a court clerk must make available to you any papers filed in his office relating to the case.

With regard to appeals, the Freedom of Information Law provides that

> "[A]ny party denied access to a record or records of an agency or municipality may appeal such denial to the head or heads, or an authorized representative, of the agency or municipality. If that person further denies such access, his reasons therefore shall be explained fully in writing within seven business days of the time of each appeal" [Section 88(8)].

The regulations adopted by the Committee further specify rights of individuals and duties of agencies with respect to denials of access [see Committee Regulations, Section 1401.7].

I am enclosing for your perusal copies of the Freedom of Information Law and regulations.

I hope that I have been of some assistance. Should any further questions arise, please feel free to contact me.

Sincerely,

Robert J. Freeman
Deputy Counsel

Encl.

RJF:lbb

ADOPTED REGS/
RECOMMENDATIONS
#226

June 3, 1975

Mr. Frederick J. Hmiel
Attorney
Counsel's Office
Department of Labor
State Office Building Campus
Albany, New York 12201

Dear Mr. Hmiel:

Thank you for forwarding a copy of the regulations governing access to records adopted by the Department of Labor. Department regulations are in substantial compliance with those promulgated by the Committee, with two exceptions.

First, payroll information should be made available to any person, and not only to bona fide members of the news media. Pursuant to its authority to advise agencies [Section 88(9)(a)(i) of the Freedom of Information Law], the Committee has resolved that information accessible under the Law "shall be made equally available to any person, without regard to status or interest" [see Committee Regulations, Section 1401.3(b)]. Further, Section 88(10) of the Law preserves rights of access granted by statutory or decisional law. With regard to payroll information, case law established a right of access prior to enactment of the Freedom of Information Law. In Winston v. Mangan, the court held that

> "[T]he names and pay scales of... employees, both temporary and permanent, are matters of public record and represent important fiscal as well as operational information. The identity of the employees and their salaries are vital statistics kept in the proper recordation of departmental functioning and are the primary source of protection against employment favoritism. They are subject therefore to inspection" [338 NYS 2d 656, 662 (1973)].

Second, Department regulations [Section 5] provide that requests for access to records shall be accepted from 9 a.m. to 4 p.m. If those are the regular business hours of the Department, the regulations are consistent with those adopted by the Committee. Otherwise, the regulations should provide that requests will be accepted and records produced during all hours the Department is regularly open for business [see Committee Regulations, Section 1401.5(a)].

I hope that I have been of some assistance. Should any questions arise, please feel free to call me.

Sincerely,

Robert J. Freeman
Deputy Counsel

RJF:lbb

MISC
#227

June 4, 1975

Ms. Loretta McDonald
[redacted]

Dear Ms. McDonald:

The Committee on Public Access to Records is not a depository of the records of government, nor is it an investigatory body. The Committee has the responsibility of advising with respect to the Freedom of Information Law. The Law deals with rights of the public to inspect and copy records and has no bearing on mortgages, real property or the alteration of public records.

If you have questions about the contents of records in Genesee and Wyoming Counties, I suggest that you obtain local legal assistance.

I regret that the Committee is unable to assist you.

Very truly yours,

Robert J. Freeman
Deputy Counsel

RJF/sd

RECOMMENDATIONS

#228

June 6, 1975

Ms. Grace A. Neylon
Public Information Officer
Elmira Urban Renewal Agency
307 East Church Street
Elmira, New York 14901

Dear Ms. Neylon:

I thank you and Mr. Pacitto for forwarding a copy of the Agency's amended regulations governing public access to records, as well as the interesting memoranda.

Having reviewed the regulations, I find that they are in compliance with those promulgated by the Committee in all respects.

I hope that I have been of some assistance. Should any questions arise regarding the Freedom of Information Law or the regulations, please feel free to contact me.

Very truly yours,

Robert J. Freeman
Deputy Counsel

RJF/sd

L

#29

June 6, 1975

Assemblyman Eugene Levy
State of New York Assembly
Legislative Office Building
Empire State Plaza
Albany, New York 12223

Dear Assemblyman Levy:

Thank you for your interest in the Freedom of Information Law.

The local law governing public access to records adopted by the Town of Orangetown is in compliance with the regulations promulgated by the Committee. In fact, the Town's enactment is substantially a word for word adoption of the Committee's regulations.

It is true that some of the provisions in the regulations are somewhat vague. However, it is noted that the regulations were devised to consider the needs of the public as well as those of every unit of government in the state, both large and small.

I would like to comment upon those sections of the regulations which have been questioned by Mr. Roujansky.

Section 2(3)(b) states that a records access officer may deny access to records in whole or in part, explaining the reasons for the denial. In some instances, portions of a record may be accessible under the Law, while others may be denied. For example, Section 88(3) of the Law permits agency officials to "delete identifying details" when disclosure would result in an "unwarranted invasion of personal privacy." Individual rights of privacy are thereby protected, and the seeker of records must be notified of the reasons for the denial.

Section 2(6)(a) and (b) envisions the situation whereby a request is made and the records cannot be found, or the agency does not have the records in its possession. The public is protected because the records access officer must certify either that he cannot find the records or that the agency does not have them.

1R

Section 6(b)(1) states that agency officials must respond to requests "promptly." Although this standard is not specific, the duty of the agency is quite specific. The regulations provide that an agency must respond to a request within five days, except under extraordinary circumstances. In such circumstances, the agency must acknowledge the request in writing, stating the reasons for the delay and estimating the date when a reply will be made.

Mr. Roujansky objected to Section 7 in its entirety. However, the public is amply protected. When a denial is made, the reasons must be given. If a request is made and no response given, it is considered an appealable denial. Appeals are heard by the head of the agency or whomever he designates. If a citizen is still dissatisfied, his next step is to the courts in an Article 78 proceeding.

Section 8 deals with fees for copies. The objection is directed at subdivision 2, which states an agency need not charge for copies, while subdivision 3 states that up to 25 cents may be charged. In some instances, records may be readily available and may have been printed for public distribution, or they may be customarily available to the public at no charge. Subdivision three permits an agency to charge for photocopies of records which may not be readily available.

Again, it is emphasized that the Committee attempted to protect the interests of both the public and units of government in a reasonable fashion. If you have any criticism of the regulations or recommendations for improving them, your comments will be gratefully received.

I hope that I have been of some assistance. Should any further questions arise, please feel free to contact me.

Sincerely,

Robert J. Freeman
Deputy Counsel

cc: Mr. Ben Roujansky
Roujansky Insurance Associates
2 Cypress Lane
Orangeburg, New York 10962

RJF:lbb

Adopted regs/
Recommendations

#232

June 9, 1975

Mr. Anthony J. Caracciolo
Executive Director
Port Chester Housing Authority
125 North Main Street
Port Chester, New York 10573

Dear Mr. Caracciolo:

Thank you for forwarding a copy of the Authority's regulations governing access to records. Having reviewed the regulations, the following modifications are recommended:

Paragraph 2(a)

Authority regulations provide that a "reasonable time be allowed" for location, copying and delivery of records. Although this standard may be in compliance in most instances, it is noted that Committee regulations state that records must be produced promptly and no longer than five days after a request is made, except under extraordinary circumstances. In such circumstances, the request must be acknowledged in writing, stating the reason for the delay and estimating the date when a reply will be made [Committee Regulations, Section 1401.6(a) & (b)].

Paragraph 3

Subparagraph (b) provides that the fees for copies of oversize pages shall be "determined on application." Committee regulations provide that the fees for copies of records exceeding 8 1/2 by 14 inches

> "shall not exceed the actual copying cost which is the average unit cost for copying a record, excluding fixed costs of the agency such as operator salaries" [Section 1401.8(3)].

Subparagraph (c) imposes a fee of one dollar per page for certification. Unless this fee was established by law or regulation prior to September 1, 1974, it is violative of Committee regulations [Section 1401.8(a)]. If no fee for certification was established before the effective date of the Freedom of Information Law, certification must be provided free of charge.

Paragraph 4

Authority regulations provide that payroll information, i.e. name, address, title and salary of officers and employees, shall be made available only to bona fide members of the news media. The Committee, however, has resolved pursuant to its authority to advise [Freedom of Information Law, Section 88(9)(a)(i)] that information accessible under the Law "shall be made equally available to any person, without regard to status or interest" [see attached resolution]. Consequently, payroll information is accessible to the public, as well as members of the news media. Further, Section 88(10) of the Law preserves existing rights of access granted by statutory and decisional law. In this regard, the public right of access to payroll information was established prior to enactment of the Freedom of Information Law. In Winston v. Mangan, the court held that

> "[T]he names and pay scales of... employees, both temporary and permanent, are matters of public record and represent important fiscal as well as operational information. The identities of the employees and their salaries are vital statistics kept in the proper recordation of departmental functioning and are the primary sources of protection against employment favoritism. They are therefore subject to inspection" [338 NYS 2d 656,662 (1973)].

General Recommendations

Authority regulations should delineate the responsibilities of the records access officer more fully. Also, the regulations lack provisions governing denial of access, appeals to the head of the agency and public notice.

I am enclosing a copy of model regulations which will be most helpful in amending the Authority's regulations and ensuring compliance with the Freedom of Information Law.

I hope that I have been of some assistance. Should any questions arise, please feel free to contact me.

Sincerely,

Robert J. Freeman
Deputy Counsel

Enclosures

RJF:lbb

#231

June 11, 1975

Mr. Donald Macharg
Counsel
Department of Health
Tower Building - 12th Floor
Empire State Plaza
Albany, New York 12237

Dear Mr. Macharg:

Thank you for submitting a copy of the Department's regulations governing public access to records. I would like to comment on the following provisions:

Section 50.2(a)

"Statistical tabulation" is defined neither in the Freedom of Information Law nor in the regulations promulgated by the Committee. The definition contained in Department regulations reflects the form in which statistical information is compiled and is consistent with a dictionary definition. However, in my opinion, the intent of the Law is to grant access to statistical or factual material, regardless of the form in which the information appears on a printed page [see Marino, The New York Freedom of Information Law, 43 Ford. L. Rev. 83, 86 (1974)].

Section 50.2(d)

As we discussed in your office June 9, the courts have not yet delineated the scope of the exemption for "investigatory files compiled for law enforcement purposes" [Section 88(7)(d)]. The applicability of the exemption as it relates to "investigations, reports, and surveys prepared for the purpose of conducting an administrative hearing" is, in my view, questionable.

Section 50.6(f)

The Law recognizes no distinction between an "originating agency" of records and a receiving agency, and there is no case law on the matter. If an agency is one of two or more legal custodians of a record, it has the same duties under the Law as the other agencies. In the event that consultation with officials of another agency is desirable, a decision to grant or deny access may be delayed [see Committee Regulations, Section 1401.6(b)].

Section 50.6(g)

Department regulations provide that employment information, i.e. name, address, title and salary, be made available to members of the news media and "any other persons entitled thereto by law." It is emphasized that any person has a right of access to this information. Pursuant to its advisory authority [Section 88(9)(a)(i), Freedom of Information Law], the Committee has resolved that information available under the Law "shall be made equally accessible to any person, without regard to status or interest" (see attached resolution). Moreover, Section 88(10) of the Law preserves existing rights of access granted under statutory or decisional law. In this regard, a public right of access to payroll information was established prior to the enactment of the Freedom of Information Law [see Winston v. Mangan, 338 NYS 2d 656 (1973)].

It is also noted that the form prescribed by the Comptroller (AC-375) may be used only by members of the news media, since it requires certification by the requester that he or she is a member of the news media. Therefore, public requests for employment information should be accepted in the same fashion as other requests for records.

Section 50.7(k)

The records access officer must respond to a request within five days, unless extraordinary circumstances arise, in which case the response may be delayed. In such instances, the request must be acknowledged in writing, stating the reason for the delay and estimating the date when a reply will be made [Committee Regulations, Section 1401.6(b)].

General Recommendation

Please take cognizance of the public notice requirements contained in Section 1401.9 of the Committee Regulations.

I am enclosing for your perusal copies of the Committee regulations and model regulations, which may be helpful in ensuring compliance with the Freedom of Information Law.

I hope that I have been of some assistance. Should any questions arise, please feel free to contact me.

Sincerely,

Robert J. Freeman
Deputy Counsel

Enclosures

RJF:lbb

Student Record
#232

June 11, 1975

Mr. Robert Walk
School Psychologist
City School District of Olean
Psychological Services
Olean, New York 14760

Dear Mr. Walk:

Thank you for your interest in the Freedom of Information Law.

The provisions of the Freedom of Information Law may be interpreted consistently with case law in New York and the new federal law with regard to student records.

Prior to enactment of the Freedom of Information Law, case law (VanAllen v. McCleary, 27 Misc. 2d 81) and an opinion of the Commissioner of the State Education Department (Matter of Thibadeau, 1 Ed. Dept. Rep. 607) provided that student records may be made available only to parents of students. Similarly, Sections 88(3)and (7) of the Freedom of Information Law enable government officials, including school district officials, to withhold information when in their judgment disclosure would result in an unwarranted invasion of personal privacy.

Most important, however, as you correctly intimated, is the new federal law. An addition to the General Education Provisions Act (Title IV of Pub. L. 90 - 247, as amended) is Public Law 93 - 380 (enacted August 21, 1974), also known as the Family Educational Rights and Privacy Act of 1974 or the "Buckley Amendment." The Buckley Amendment also has since been amended [Sen. J. Res. 40 (1974)].

As stated in the Federal Register (Vol. 40, No. 3 - Monday, January 6, 1975), the federal enactment

> "sets out requirements designed to protect the privacy of parents and students. Specifically, the statute governs (1) access to records maintained by certain educational institutions and agencies, and (2) the release of such records. In brief, the statute provides: that such institutions must provide parents of students access to official records directly related to the students and an opportunity for a hearing to challenge such records on the grounds that they are inaccurate, misleading or otherwise inappropriate; that institutions must obtain the written consent of parents before releasing personally identifiable data about students from records to other than a specified list of exceptions; that parents and students must be notified of these rights; that these rights transfer to students at certain points; and that an office and review board must be established in HEW to investigate and adjudicate violations and complaints of this section."

The State Education Department has prepared a memorandum concerning student records including federal act as amended and proposed rules and regulations. I have contacted the Department on your behalf, and you will be receiving a copy of the information.

I hope that I have been of some assistance. Should any further questions arise, please feel free to contact me.

Sincerely,

Robert J. Freeman
Deputy Counsel

RJF:lbb

Index
AUDITS
#233

June 12, 1975

Mr. Kenneth L. Adams
Dickstein, Shapiro & Morin
The Octagon Building
1735 New York Avenue, N.W.
Washington, D.C. 20006

Dear Mr. Adams:

I have been informed that your appeal from the denial of access to audits of the Smithtown Nursing Home has been formally denied by Robert Whalen, M.D., Commissioner of the Department of Health.

As such, the advisory role of the Committee is, in effect, moot.

Nevertheless, I trust that our conversations were of some value in identifying and clarifying the issues involved.

Sincerely,

Robert J. Freeman
Deputy Counsel

cc: Mr. Donald Macharg, Counsel
Department of Health

RJF:lbb

R

denial
#234

June 16, 1975

Ms. Valerie Mace
Town Attorney
Town of Kent
280 Smadbeck Avenue
Carmel, New York 10512

Dear Ms. Mace:

I believe that the statement made at the Conference of the Association of Towns was directed toward denial of access to records related to an incomplete transaction. In this regard, denial of access is appropriate only under particular circumstances.

The Freedom of Information Law grants access to nine categories of records. With respect to towns and other municipalities, perhaps most important is Section 88(1)(i), which grants access to:

> "any other files, records, papers or documents required by any other provision of law to be made available for public inspection and copying."

One such provision of law is Section 51 of the General Municipal Law, which provides access to

> "[A]ll book of minutes, entry or account, and the books, bills, vouchers, checks, contracts or other papers connected with or used or filed in the office of, or with any officer, board or commission acting for or on behalf of any county, town, village, or municipal corporation in this state..."

Therefore, virtually all "papers connected with, used or filed" by a town planning board should be made available.

Rights of access under Section 51 are restricted only by case law and exemptions from disclosure found in other statutes. Relevant to your inquiry, Sorley v. Village of Rockville Centre [30 A.D. 2d 822 (1968)] held that "urban renewal correspondence, data and valuations" related to an "inchoate and uncompleted" transaction

> "should be treated as confidential communications and items of evidence, which, in the public interest, ought not to be disclosed before the transactions in which they are involved are consummated " (id, 823).

Consequently, withholding of files of the Planning Board would be proper if they relate to an inchoate transaction and if disclosure would be detrimental to the public interest. It is noted that a mere assertion of potential detriment to the public interest is insufficient. As the Court of Appeals held,

> "[S]uch a determination is a judicial one and requires that the governmental agency come forward and show that the public interest would indeed be jeopardized by a disclosure of the information. Otherwise, the privilege could be easily abused, serving as a cloak for official misconduct" [Cirale v. 80 Pine Street Corp., 35 NY 2d 113, 119 (1974)].

Therefore, although it is true that records involving an incomplete transaction may be withheld, the agency has the burden of proving that disclosure would adversely affect the public interest.

I hope that I have been of some assistance. Should any further questions arise, please feel free to contact me.

Sincerely,

Robert J. Freeman
Deputy Counsel

RJF:lbb

#235

June 17, 1975

Mr. George Glover, Special Assistant for
Housing and Community Development

Mr. Robert J. Freeman, Deputy Counsel

H.R. 4415 (IPA Amendments) and the New York
Freedom of Information Law

The following is an analysis of the relationship between rights of access that would be granted to public employee unions pursuant to H.R. 4415 and the New York Freedom of Information Law [see enclosed Public Officers Law, Sections 85 - 89].

A. Rights of Access

H.R. 4415 would provide that the state office designated by the Governor having responsibility for implementation of an approved IPA project shall make available to an employee organization a summary of the project and

> "all records (such as reports, survey results, survey data, manuals, document collections and models) regarding such program or project" [Section 202 (b)(7)].

In relevant part, the Freedom of Information Law [Section 88(1)] states that agencies must provide access to:

> "b. those statements of policy and interpretations which have been adopted by the agency and any documents, memoranda, data, or other materials constituting statistical or factual tabulations which led to the formulation thereof...
>
> d. internal or external audits and statistical or factual tabulations made by or for the agency..."

and

> "e. administrative staff manuals and instruction to staff that affect members of the public."

Therefore, it appears that much of the material that would be available to public employee organizations pursuant to H.R. 4415 is currently accessible to any person, including members of public employee organizations, under the Freedom of Information Law. It is noted that Section 88(1)(b) of the Law, dealing with statements of policy, grants rights of access only to statistical materials which led to formulation of policy. The proposed legislation, however, would enable public employee organizations to copy any records dealing with an IPA project, including advisory or deliberative materials. It is also noted, however, that the Freedom of Information Law is permissive; it does not exempt advisory records from disclosure. Under the Law, agency officials may permit inspection and copying of such communications, but they need not.

B. Fees for Search and Duplication

H. R. 4415 would provide that the agency designated by the Governor

> "shall specify a uniform fee schedule applicable to requests for records under subsection (b)(7) of this section. Such fees shall be limited to reasonable standard charges for document searches and duplication and provide for recovery of only the direct costs of such searches and duplication" [Section 202(c)].

The Committee on Public Access to Records, created by Section 88(9) of the Freedom of Information Law, promulgated regulations [see attached] pursuant to its statutory duty [Section 88(9)(a)(1i)] which became effective statewide November 29, 1974.

With respect to fees, Section 1401.8 of the regulations provides:

> "[E]xcept where fees or exemptions from fees have been established by law, rule or regulation prior to September 1, 1974:
>
> (a) There shall be no fee charged for...
>
> (2) Search for records...

(c) An agency may charge a fee for copies of records provided that:

(1) The fee for copying shall not exceed 25 cents per page for photocopies not exceeding 8 1/2 by 14 inches."

Since search fees are not permitted by the regulations and much of the material pertaining to IPA projects is available under the Freedom of Information Law, it is possible that a representative of a public employee organization could evade payment of search fees by seeking access to the records pursuant to the Freedom of Information Law. Like the federal Freedom of Information Act, the New York statute does not require a demonstration of interest or need to know as a condition precedent to access [see Kreindler v. Department of Navy of United States, 363 F. Supp. 611 (1973); Hawkes v. I.R.S., 467 F. 2d 787 (1972)]; rather, as the Committee has resolved pursuant to its advisory authority [Section 38(9)(a)(1)],

"information accessible under the Freedom of Information Law shall be made equally accessible to any person, without regard to status or interest" [see attached Resolution; also Burke v. Yudelson, Supreme Court, Monroe County; decided May, 1975].

Consequently, requests for records related to an IPA project may often be made pursuant to the Freedom of Information Law at a lesser cost than that prescribed by H.R. 4415.

C. Policy Determination

The public policy of the State, as reflected by the Freedom of Information Law, makes public records equally available to any person. As stated previously, rights of access accorded under the Law to the public, which includes public employee organizations, are substantial. The only materials that would be made available to these organizations by H.R. 4415 in excess of the Freedom of Information Law are in the nature of inter-agency or intra-agency advisory memoranda.

As such, there appears to be no justifiable reason for permitting public employee organizations to gain unrestricted access to records which might otherwise be deemed inaccessible or privileged. Similarly, notwithstanding the relationship between government and such organizations, there is no justifiable ground for granting a superior right of access to a specified class of the public than to the public at large.

Therefore, to the extent that H.R. 4415 deals with access to government records, its passage would be undesirable.

cc: Leonard Schwartz, Deputy Secretary of State
Louis R. Tomson, Counsel, Division of Community Affairs

Enclosures

RJF:lbb

denial

#236

June 18, 1975

Mr. Virgil Pontone
[redacted]

Dear Mr. Pontone:

Your letter addressed to Secretary of State Cuomo has been forwarded to the Committee on Public Access to Records, which has the responsibility of advising with respect to the Freedom of Information Law.

As stated in your letter of appeal, access to the records of the Division of Housing and Community Renewal was denied on the ground that the request was "not specific as to particular documents." On your behalf, I telephoned Mr. Edmund Davis, Counsel to the Division, who informed me that your requests were too broad to respond appropriately.

In this regard, the regulations promulgated by the Committee provide that agency personnel assist a requester in identifying requested records [Section 1401.2(b)(2)] and maintain an up-to-date subject matter list [Section 1401.2(b)(1)]. Pursuant to the Freedom of Information Law, Section 88(4), each agency

> "must maintain and make available for public inspection and copying...a current list, reasonably detailed, by subject matter of any records which shall be produced, filed or first kept or promulgated..."

aftor September 1, 1974.

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Mr. Davis further informed me that he is currently preparing a letter to you in which he will invite you to inspect the Division's subject matter list. After you have perused the list, he anticipates that you will be able to specify and narrow your requests, and that the Division will provide you with any identifiable records accessible under the Freedom of Information Law.

I am enclosing copies of the Freedom of Information Law and the regulations promulgated thereunder, both of which will aid you in understandigg your rights and the duties of the Division.

I hope that I have been of some assistance. Should any further questions arise, please feel free to contact me.

Very truly yours,

Robert J. Freeman
Deputy Counsel

enc.

RJF/sd

cc: Hon. Mario M. Cuomo
Secretary of State

Mr. Edmund R. Davis
Counsel
Division of Housing
and Community Renewal

privacy
#237

June 19, 1975

Hon. Lawrence Herbst
Member of Assembly
Room 548
Legislative Office Building
Albany, New York

Dear Assemblyman Herbst:

As I understand the facts, you are seeking a list of names and addresses of graduating seniors from a high school in your district for the purpose of sending congratulatory messages. The Superintendent has denied your request pursuant to Section 88(3) of the Freedom of Information Law on the ground that release of such a list would constitute an unwarranted invasion of personal privacy and is, therefore, prohibited.

Section 88(3) provides that the Committee has the authority to "promulgate guidelines for the deletion of identifying details for specified records which are to be made available." To date, the Committee has not done so. However, the provision also states that in the absence of such guidelines, an agency or municipality, which includes a school district [see Section 87(2)], may delete identifying details when it makes records available.

Therefore, the Superintendent may, in his discretion, withhold records when in his judgment disclosure would constitute an unwarranted invasion of personal privacy. It is emphasized that the Freedom of Information Law is permissive. There is no compulsion or direction in the Law to withhold any information; rather, government officials are given discretion to grant or deny access with regard to disclosure of personal information.

R

It is noted that Section 88(3) provides five examples of unwarranted invasions of privacy. In relevant part, the Law states that

> "[A]n unwarranted invasion of personal privacy includes, but shall not be limited to...
>
> d. The sale or release of lists of names and addresses in the possession of an agency or municipality if such lists would be used for private, commercial or fund-raising purposes..."

It appears that the list, in this instance, is not intended to be used for any of the purposes so stated.

Therefore, in my opinion, under the Freedom of Information Law, the Superintendent may provide access to the list requested, but he need not if in his judgment disclosure would result in an unwarranted invasion of the students' privacy.

I hope that I have been of some assistance. Should any further questions arise, please feel free to call me.

Very truly yours,

Robert J. Freeman
Deputy Counsel

RJF/sd

cc: Dr. William Moran
Superintendent of Schools
Valley Central School District
R. D. 1
Montgomery, New York

Dennis O'Leary, Esq.
Counsel
Assembly Committee on Governmental Operations

Louis R. Tomson

#238

June 23, 1975

Mr. John A. Glendinning
Records Access Officer
The State Insurance Fund
199 Church Street
New York, New York 10007

Dear Mr. Glendinning:

Having reviewed Commissioner Millus' letter of August 5, 1974, there can be no doubt as to the "uniqueness" of the Fund among state agencies. However, in my opinion, the Fund is within the scope and coverage of the Freedom of Information Law.

The Law defines "agency" as

> "any state...board, bureau, commission, council, department, public authority, public corporation, division, office..." [Section 87(1)].

Since the Fund is a state office, it is an agency as defined by the Law. As such, the Fund has a duty to adhere to the Law and the regulations promulgated thereunder by the Committee.

Although availability of the records categorized in Section 88(1) of the Law may be destructive to the Fund, as Commissioner Millus impliedly pointed out, the provisions of Section 88(7) effectively protect the Fund.

Section 88(7) states that, notwithstanding the provisions of Section 88(1), there is no right of access to certain kinds of information, including material exempted from disclosure by other statutes, information confidentially disclosed and maintained for the regulation of commercial enterprise, such as trade secrets, which if disclosed would permit an unfair advantage to business competitors, and information which if disclosed would constitute an unwarranted invasion of personal privacy.

As stated by the Commissioner, Section 98 of the Workmen's Compensation Law prohibits disclosure of information gathered by the Fund from employers and employees. This prohibition is preserved by Section 88(7)(a) as information exempted by other statute. Next, information pertaining to the regulatory functions and insurance policy handling and decision making would be inaccessible pursuant to Section 88(7)(b) because it is confidentially disclosed, contains trade secrets, and would place the Fund at a disadvantage vis-a-vis its competitors. Third, the Fund may deny access to personal information related to policy holders and potential policy holders. Section 88(3) of the Law permits agency officials discretion to "delete identifying details" when in their judgment disclosure would constitute an unwarranted invasion of personal privacy. In the alternative, Section 88(7)(c) provides that there is no right of access when disclosure of information would result in such an invasion.

Further, as stated in Commissioner Millus' letter, the Court of Appeals has held that government may deny access to information

> "[O]nce it is shown that disclosure would be more harmful to the interests of the government than the interests of the party seeking the information..." [Cirale v. 80 Pine Street Corporation, 35 NY 2d 113, 118 (1974)].

It also noted, however, that

> "[S]uch a determination is a judicial one and requires that the governmental agency came forward and show that the public interest would indeed be jeopardized by a disclosure of the information" [Cirale, supra, 119].

In view of the preceding, the framework of the Freedom of Information Law provides the Fund with ample protection against disclosure of information which would be inimical to the effective operation of

the Fund. Therefore, in my opinion, the Fund is within the scopo of the Law, and the provisions of the Law can be applied without adversely affecting the interests of the Fund.

I hope that I have been of some assistance. Should any questions arise, please feel free to contact me.

Sincerely,

Robert J. Freeman
Deputy Counsel

RJF:lbb

#239

June 23, 1975

Mr. Harry A. Pulver
Mayor
Village of Kinderhook
Village Hall
Kinderhook, New York 12106

Dear Mayor Pulver:

Thank you for your interest in complying with the Freedom of Information Law.

Letters sent by members of the public to village boards, planning boards and zoning boards of appeal are included within the scope of the Freedom of Information Law. The Law lists nine categories of records which agencies and municipalities must provide for inspection and copying [see Section 88(1)].

Perhaps the most important category with repsect to municipalities is Section 88(1)(i), which provides access to

> "any other files, records, papers or documents required by any other provision of law to be made available for public inspection and copying."

One such provision of law is Section 51 of the General Municipal Law, which grants access to

> "[A]ll books of minutes entry or account, and the books, bills, vouchers, checks, contracts or other papers connected with or used or filed in the office of, or with any officer, board or commission acting for or on behalf of any county, town, village or municipalityrporation in this state..."

Therefore, virtually all "papers connected with or used or filed" by a village office or officer are accessible to the public.

One of your concerns, however as expressed in your letter of June 17, is that

> "in certain cases, providing the names on letters...could have lasting effect on the relationship between neighbors which could be considered an invasion of privacy."

In such circumstances, Section 88(3) of the Law provides:

> "[T]o prevent an unwarranted invasion of personal privacy... an agency or municipality may delete identifying details when it makes records available."

Consequently, an official of a municipality, such as the village of Kinderhook, has discretionary authority to "delete identifying details" when in his judgment disclosure would constitute an unwarranted invasion of personal privacy.

With regard to minutes of meetings, there is no discretion in Village Law that letter writers be named or even that reference be made to receipt of letters. Village Law, Section 4-402 provides:

> "[T]he clerk of each village shall, subject to the discretion and control of the mayor:
>
> a. have custody of the corporate seal, books, records, and papers of the village and all the official rpports and communications of the board of trustees;
>
> b. act as clerk of the board of trustees and of each board of village officers and shall keep a record of their proceedings;
>
> c. keep a record of all village resolutions, ordinances and local laws..."

There is nothing in the provision quoted that directs the clerk to include specific iters or events in the minutes. The Freedom of Information Law does however, require that a "record of final votes of each member" be compiled and made available.

Therefore, in my opinion, names of members of the public who correspond with a board need not beentered into the minutes.

I hope that I have been of some assistance. Should any further questions arise, please feel free to call me.

Very truly yours,

Robert J. Freeman
Deputy Counsel

RJF/sd

[redacted]
Recommended
#240

June 30, 1975

Frederick J. Hmiel, Esq.
Department of Labor
State Office Building Campus
Albany, New York 12201

Dear Mr. Hmiel:

Thank you for your interest in complying with the Freedom of Information Law and regulations promulgated thereunder.

The regulations adopted by the Department of Labor are in compliance with those of the Committee in all respects but one.

Department regulations provide for specific fees "unless otherwise fixed by law, regulation or custom" [Section 8(b); emphasis added]. The intent of the Committee regulations is to continue the application of fees officially and legally established prior to the effective date of the Freedom of Information Law; "custom", in my opinion, does not reflect this intent.

I hope that I have been of some assistance. Should any questions arise, please feel free to call me.

Very truly yours,

Robert J. Freeman
Deputy Counsel

RJF/sd

ADOPTED REGS/
RECOMMENDATIONS

#241

June 30, 1975

Mr. Myron C. Dascomb
Steuben County Attorney
23 E. Morris Street
Bath, New York 14810

Dear Mr. Dascomb:

Thank you for your interest in complying with the Freedom of Information Law and the regulations promulgated thereunder.

The model regulations remain unchanged since they were forwarded to you in March. Although bills have been introduced in the Legislature that would substantially amend the Freedom of Information Law no amendments to the Law have been enacted as yet.

In any event, the bills before the Legislature if enacted would have little if any effect upon the regulations, which govern the procedural aspects of the Law.

Therefore, in my opinion, adoption of a resolution by the County based on the model regulations would be appropriate and timely.

I hope that I have been of some assistance. Should any further questions arise, please feel free to contact me.

Very truly yours,

Robert J. Freeman
Deputy Counsel

RJF/sd

votes

#242

June 30, 1975

Mr. Raymond S. Sant
County Attorney
County Office Building
160 Genesee Street
Auburn, New York 13021

Dear Mr. Sant:

Thank you for your interest in complying with the Freedom of Information Law.

The Freedom of Information Law is directed toward public access to records; it pertains only tangentially to meetings of public bodies. In this regard, Section 88(5) of the Law provides that

> "each agency or municipality controlled by a board, commission or other group having more than one member shall maintain and make available for public inspection a record of the final votes of each member in every agency proceeding in which he votes."

Although county legislatures and boards of supervisors must meet publicly [see County Law, Sections 150-a, 152], there is no requirement that committee meetings of a county legislature be open to the public.

R

I hope that I have been of some assistance. Should any further questions arise, please feel free to contact me.

Very truly yours,

Robert J. Freeman
Deputy Counsel

RJF/sd

cc: Hon. Donald Hirshorn
Assistant Attorney General

SUBJECT MATTER

#243

June 30, 1975

Mr. Richard E. Stern
[redacted]

Dear Mr. Stern:

Thank you for your interest in the Freedom of Information Law.

Pursuant to Section 88(4) of the Law:

> "[E]ach agency or municipality shall maintain and make available for public inspection and copying...a current list, reasonably detailed, by subject matter of any records which shall be produced, filed, or first kept or promulgated after the effective date of this article..."

Therefore, it is clear that New York City and each department thereof must provide public access to their subject matter lists.

I am unfamiliar with New York City procedure with regard to submission of the lists to the Municipal Reference and Research Library. If there is no requirement to transfer the lists to the Library, it is likely that the departments have possession of the lists.

There is no "deadline" for issuance of an initial subject matter list; rather, all agencies and municipalities were required to compile the lists by the effective date of the Law, September 1, 1974. Further,

R

the regulations promulgated by the Committee, which have the force and effect of law provide that the list must be up-to-date [see enclosed Committee regulations, Section 1401.2(b)(1)]. As such, the list should be revised periodically.

The Law contains no requirement that agencies report to the Committee. Consequently, the Committee does not have in its possession information pertaining to agencies that have issued subject matter lists nor does it have a list of all New York City agencies.

Similarly, the Committee has no authority to enforce the Freedom of Information Law. The burden of enforcement rests on the public.

I hope that I have been of some assistance. Should any further questions arise, please feel free to contact me.

Very truly yours,

Robert J. Freeman
Deputy Counsel

Enc.

RJF/sd

STATE OF NEW YORK
COMMITTEE ON PUBLIC ACCESS TO RECORDS FOIL-AO-244

DEPARTMENT OF STATE, 162 WASHINGTON AVENUE, ALBANY, NEW YORK 12231
(518) 474-2518, 2791

July 8, 1975

Mr. Arthur S. Harris, Jr.
[redacted]

Dear Mr. Harris:

Thank you for your interest in the Freedom of Information Law.

I am enclosing copies of the Freedom of Information Law, regulations promulgated by the Committee, which have the force and effect of law, and resolutions adopted by the Committee.

It is noted that the New York statute applies only to state and local government. With regard to federal agencies, such as the Federal Bureau of Investigation, it would be more appropriate to refer to the Federal Freedom of Information Act (5 United States Code 552) and the Privacy Act of 1974 (5 United States Code 552a), which generally gives individuals an opportunity to examine records pertaining to them in possession of federal agencies.

Relevant to your inquiry, the Freedom of Information Act

> "does not apply to matters that are... investigatory records compiled for law enforcement, but only to the extent that the production of such records would (A) interfere with enforcement proceedings, (B) deprive a person of a right to a fair trial or an impartial adjudication, (C) constitute an unwarranted invasion of personal privacy, (D) disclose the identity of a confidential source and, in the case of

> a record compiled by a criminal law enforcement authority in the course of a criminal investigation, or by an agency conducting a lawful national security intelligence investigation, confidential information furnished only by the confidential source, (E) disclose investigative techniques and procedures, or (F) endanger the life or physical safety of law enforcement personnel..." [5 U.S.C. 552(b)(7)].

Also, the Privacy Act exempts from disclosure records that are

> "maintained by an agency or component thereof which performs as its principal function any activity pertaining to the criminal laws, including police efforts to prevent, control, or reduce crime or to apprehend criminals, and the activities of prosecutors, courts correctional, probation, pardon, or parole authorities, and which consists of (A) information compiled for the purpose of identifying individuals criminal offenders and alleged offenders and consisting only of identifying data and notations of arrests, the nature and disposition of charges, sentencing, confinement, release, and parole and probation status, (B) information compiled for the purpose of a criminal investigation, including reports of informants and investigators, and associated with an identifiable individual, or (C) reports identifiable to an individual compiled at any stage of the process of enforcement of the criminal laws from arrest or indictment through release from supervision" [5 U.S.C. 552a(2)(j)(2)].

I hope that I have been of some assistance. Should any further questions arise, please feel free to contact me.

Very truly yours,

Robert J. Freeman
Deputy Counsel

enc. (3)

RJF:sd

FOIL-AO-245

July 15, 1975

Hon. Charles S. Desmond
Chairman
Board of Public Disclosure
162 Washington Avenue
Albany, New York 12231

Dear Judge Desmond:

You have inquired of the Committee on Public Access to Records whether financial disclosure statements and related material required to be filed with the Board of Public Disclosure ("Board") by Executive Order No. 10 ("Executive Order"), issued May 22, 1975, are records "available for public inspection and copying pursuant to the Freedom of Information Law ("Law") (N.Y. Public Officers Law, Article 6, McKinney Supp. 1974).

The Law defines "agency" as:

> "any state ... board, bureau, commission, council, department ... division, office or other governmental entity performing a governmental or proprietary function for the state of New York ..." [N.Y. Public Officers Law, § 87(1)].

Therefore, the Board is an agency as defined by the Law.

Although the Board is an agency, the public right to inspect and copy its records is limited. Public access must be granted only to categories of records enumerated by the Law [N.Y. Public Officers Law, § 88(1) and (10), and only then if the right is not precluded by another section of the Law, statute or judicial decision.

In reviewing the categories, it is arguable that, due to the advisory nature and function of the Board, most records in its possession are not analogous to any of the categories. Relevant to the provisions of § 88(1), the Board does not adjudicate cases

[§ 88(1)(a)] or create policy [§ 88(1)(b)], nor is the Board a "governing body" of an agency which makes final determinations [§ 88(1)(h)].

It is possible that the Board may possess "statistical or factual tabulations" [§ 88(1)(d)]. However, it is questionable whether a statement of assets and liabilities or income sources is a "tabulation" within the intent of the Law. To date, the courts have not yet defined the term.

As such, there appears to be no specific public right of access to records in possession of the Board under the Freedom of Information Law. Rather, the Board and thereafter the Department of State are directed to permit "public viewing" of certain records after having been scrutinized by the Board.

With regard to protection of personal privacy, the last paragraph of section I of the Executive Order grants the Board discretion upon request of the applicant to delete any item

> "upon a finding that any such item is of a highly personal nature, does not in any way relate to the duties of the position held by the person, andddoes not create an actual or potential conflict of interest."

The discretion placed in the Board by the Executive Order is fully consonant with the right given agencies under N.Y. Public Officers Law, § 88(3):

> "3. To prevent an unwarranted invasion of personal privacy, the committee on public access to records may promulgate guidelines for the deletion of identifying details for specified records which are to be made available. In the absence of such guidelines, an agency or municipality may delete identifying details when it makes records available. An unwarranted invasion of personal privacy includes, but shall not be limited to:
>
> a. Disclosure of such personal matters as may have been reported in confidence to an agency or municipality and which are not relevant or essential to the ordinary work of the agency or municipality;

b. Disclosure of employment, medical or credit histories or personal references of applicants for employment, except such records may be disclosed when the applicant has provided a written release permitting such disclosure;

c. Disclosure of items involving the medical or personal records of a client or patient in a hospital or medical facility;

d. The sale or release of lists of names and addresses in the possession of any agency or municipality if such lists would be used for private, commercial or fund-raising purposes;

e. Disclosure of items of a personal nature when disclosure would result in economic or personal hardship to the subject party and such records are not relevant or essential to the ordinary work of the agency or municipality."

The Committee on Public Access to Records has neither defined "unwarranted invasion of personal privacy" nor "promulgated guidelines" regarding specific records. The examples provided by the Law merely represent five instances of unwarranted invasions among conceivable dozens. Further, federal judicial determinations do not weigh against the standards established in the Executive Order [see e.g. Wine Hobby U.S.A., Inc. v. U. S. Internal Revenue Service, 502 F. 2d 133 (1974); Getman v. NLRB, 450 F. 2d 670 (1971)].

Even if the access provisions of the Freedom of Information Law were applicable to records in possession of the Board, as the Court of Appeals held in Cirale v. 80 Pine Street Corp., 35 N.Y.2d 113, 359 N.Y.S.2d 1 (1974), there is a common law privilege which attaches to official information in the hands of governmental agencies when the public interest "would be harmed if the material were to lose its cloak of confidentiality" (35 N.Y.2d 118, 359 N.Y.S.2d 4).

In commenting upon the privilege, the Court stated that:

"public interest encompasses not only the needs of the government, but also the societal interests in redressing private wrongs and arriving at a just result in private litigation. Thus, the balancing that is required goes to the determination of the harm to the overall public

> interest. Once it is shown that disclosure would be more harmful to the interests of the government than the interests of the party seeking the information, the overall public interest on balance would then be better served by nondisclosure." (35 N.Y.S. 118; 359 N.Y.S.2d 5)
>
> Moreover, in a footnote, the Court added that:
>
> "although the Legislature has recently passed a freedom of information law ..., it does not abolish the common-law privilege for official information" (35 N.Y. 117, 359 N.Y.S.2d 4).

Therefore, notwithstanding rights of access granted by the Freedom of Information Law, records in possession of the Board, or any other unit of government, may be withheld under circumstances in which disclosure would be detrimental to the public interest.

In this regard, the public interest may be better served by refusing to disclose material of a highly personal nature which does not relate to the position proposed for the applicant and which would not create a conflict of interest. Without the availability of this protection, it is unlikely that New York State will be capable of continuing to attract the qualified people it needs to render effective public service to its citizens.

Consequently, it is possible that the governmental privilege may be appropriately invoked in instances in which disclosure would on balance be harmful to the public interest.

Sincerely,

ROBERT J. FREEMAN
Counsel

POINTERS
OF VILLAGE LAW.

#246

July 16, 1975

Mr. James L. Emery
Assistant Minority Leader
The Assembly
State of New York
Albany, New York

Dear Assemblyman Emery:

The right of public access to minutes of a village board is clearly established in the Freedom of Information Law, Village Law and the General Municipal Law.

The Freedom of Information Law provides that "minutes of meetings of the governing body" must be made available for inspection and copying [Section 88(1)(c)].

Village Law states that the clerk must keep a record of proceedings of the Board [Section 4-402(b)] and

> "shall, during office hours as prescribed by the board of trustees, on demand of any person, produce for inspection the books, records and papers of his office, and shall furnish a copy of any portion thereof... [Section 4-402(e)].

Further, Section 51 of the General Municipal Law provides a right to inspect and copy

> "[A]ll books of minutes, entry or account, and the books, bills, vouchers, checks, contracts, or other papers connected with or used or filed in the office of, or with any officer, board or commission acting for or on behalf of any county, town, village or municipal corporation in this state..."

Consequently, it is doubtless that any person has a substantive right to inspect and copy minutes of a village board.

The regulations promulgated by the Committee, to which all units of government must adhere, provide the procedural requirements of implementation of the Freedom of Information Law (see attached). In relevant part, the regulations hold that

> "[W]here a request for records is required, such request may be oral or in writing. However, written request shall not be required for records that have been customarily available in the past [Section 1401.6(a)].

If the minutes have been customarily made available upon oral request, the requirement that a request be made in writing would be inconsistent with Committee regulations. If the minutes have not been customarily made available upon oral request, the clerk may require that the request be made in writing. However, failure to use a prescribed form cannot be a valid basis for denial of access.

The regulations further provide that

> "[A]n agency or municipal official shall respond promptly to a request for records. Except under extraordinary circumstances, his response shall be made no more than five working days after receipt of the request by the agency or municipality, whether the request is oral or in writing [Section 1401.6(f)(1)].

Therefore, records should be provided without unnecessary delay. If they are readily available, in my opinion, any delay would be inconsistent with the spirit of the law.

Moreover, Section 1401.5(a) of the regulations directs that

> "[E]ach agency and municipality shall accept request for public access to records and produce records during all hours they are regularly open for business."

Additionally, case law preceding enactment of the Freedom of Information Law held that "mere inconvenience" cannot be a bar to public access [New York Post v. Moses, 12 A.D. 2d 243, 210 NYS 2d 88, 1961; reversed on other grounds, 10 NY 2d 199, 219 NYS 2d 7, 1961]. It appears that denial of access based upon inconvenience to government is proper only to prevent disruption of the orderly functioning of a government office [Sears Roebuck v. Hoyt, 202 Misc. 43, 107, NYS 2d 756, 1951]. Disruption of the office does not appear to have been at issue with respect to Mr. Cottone's request.

I hope that I have been of some assistance. Should any questions arise, please feel free to call me.

Sincerely,

Robert J. Freeman
Counsel

Attachment

cc: Mr. Samuel J. Cottone
[redacted]

#247

July 18, 1975

Ms. Jean M. Shields
[redacted]

Dear Ms. Shields:

Your letter of June 25, 1975, addressed to the Attorney General has been forwarded to the Committee on Public Access to Records, which has the responsibility of advising with respect to the Freedom of Information Law.

In my opinion, you have a right of access to the proposed "budget figures" sought from the Randolph Central School pursuant to three statutes.

First, under the Freedom of Information Law, any person has a right to inspect and copy "statistical or factual tabulations [Section 88(1)(d)].

Second, Section 2116 of the Education Law provides that

> "[T]he records, books and papers belonging or appertaining to the office of any officer of a school district are hereby declared to the property of such district and shall be open for public inspection by any qualified voter of the district at all reasonable hours, and any such voter may make copies thereof."

Third, Section 1718 of the Education Law states that

> "[I]t shall be the duty of the board of education of each district to present at the annual meetings a detailed statement in writing of the amount of money which will be required for the ensuing year for school purposes exclusive of the public monies, specifying the several purposes and the amount for each..."

I am enclosing copies of the Freedom of Information Law and regulations promulgated by the Committee, which have the force and effect of law throughout the state. The regulations will be helpful in explaining the procedural aspects of the Law, such as the time limit during which the school District must respond to a request and the means by which a denial of access can be appealed.

I hope that I have been of some assistance. Should any further questions arise, please feel free to contact me.

Sincerely,

Robert J. Freeman
Counsel

Enclosures

cc: Hon. Ruth Toch, Solicitor General
Mr. Raymond Leahy, District Principal

RJF:lbb

#248

July 21, 1975

Ms. Lynne Norris
Vice President
Client Service
Innovative Systems, Inc.
341 Fourth Avenue
Pittsburgh, Pennsylvania 15222

Dear Ms. Norris:

Your letter of June 26, 1975, addressed to Secretary of State Cuomo has been forwarded to this Committee, which has the responsibility of advising with respect to the Freedom of Information Law.

However, since the Committee is not a depository of records, I have transmitted your request to the Department of Audit and Control, which is in possession of all state contracts. I am sure that the Department will respond to your request accordingly.

Sincerely,

Robert J. Freeman
Counsel

RJF:lbb

#249

July 21, 1975

Mr. & Mrs. Anthony Bamond, Jr.
[redacted]

Dear Mr. & Mrs. Bamond:

I have received the newspaper article relating to your suit and your plea for help, but I cannot assist you at this time. The Committee on Public Access to Records is not a repository of information held by agencies.

I suggest that you direct your requests for records to the agencies which have possession of the records sought. I am enclosing copies of the Freedom of Information Law and regulations promulgated thereunder, both of which will assist you in ascertaining your rights and agencies' responsibilities under the Law.

Sincerely,

Robert J. Freeman
Counsel

Enclosures

RJF:lbb

ADOPTED REGS/
RECOMMENDATIONS
#250

July 21, 1975

Ms. Claire Leschot
District Clerk
Hyde Park Central School District
South Albany Post Road
Hyde Park, New York 12538

Dear Ms. Leschot:

Thank you for your interest in complying with the Freedom of Information Law and regulations promulgated thereunder.

Having reviewed the regulations adopted by the Hyde Park Central School District, they are, in my opinion, consistent with those promulgated by the Committee.

I thank you once again for your efforts.

Sincerely,

Robert J. Freeman
Counsel

RXRXKXM

RJF:lbb

FF 251

July 21, 1975

Mr. Louis L. Levine
Industrial Commissioner
State of New York
Department of Labor
Two World Trade Center
New York, New York 10047

Dear Mr. Levine:

I am in accord with your decision regarding the request for information sought by Mr. Abraham Reich, Esq.

The Freedom of Information Law provides that, notwithstanding rights of access granted thereunder [Section 88(1)], the Law does not apply to information that is "specifically exempted by statute" [Section 88(7)(a)].

In this regard, Section 537 of the Labor Law is controlling:

> "[I]nformation acquired from employers or employees pursuant to this article shall be for the exclusive use and information of the Commissioner in the discharge of his duties hereunder and shall not be open to the public nor be used in any court, in any action or proceeding pending therein unless the commissioner is a party to such action or proceeding, notwithstanding any other provision of law. Such information insofar as it is material to the making and determination of a claim for benefits shall be made available to the parties affected and, in the commissioner's discretion, may be made available to the parties affected in connection with affecting placement."

With respect to disclosure of names and addresses of claimants and staff members, while information pertaining to claimants is clearly exempt, Section 88(1)(g) of the Freedom of Information Law provides that the fiscal officer charged with the duty of preparing payrolls must compile and provide for inspection and copying a list of agency officers' and employees' names, addresses, titles and salaries. Because the provision does not specify which address shall be made available, an agency official has discretion to disclose either the home or the business address. Therefore, if in your judgment disclosure of employees' home addresses would constitute an "unwarranted invasion of personal privacy" [see Freedom of Information Law, Sections 88(3) and 88(7)(c)], home addresses need not be provided.

I hope that I have been of some assistance.

Sincerely,

Robert J. Freeman
Counsel

cc: W. D. Cabin

RJF:lbb

YEARLY REPORT
#252

July 21, 1975

Mr. Vincent McCarthy
C-670 Unit M
Box 307
Beacon, New York 12503

Dear Mr. McCarthy:

I apologize for the delay in responding to your letter.

The Committee on Public Access to Records does not have possession of agency records; rather, it is responsible for advising with respect to the Freedom of Information Law.

Therefore, I am forwarding your request to the Office of Public Relations in the Department of Correctional Services. I trust that your request will be answered appropriately.

If I can be of further assistance, please feel free to contact me.

Sincerely,

Robert J. Freeman
Counsel

cc: Department of Correctional Services
Office of Public Relations
State Office Building Campus
Building #2
Albany, New York 12226
Attention: Mr. Castro

RJF:lbb

PRIVACY
#253

July 22, 1975

Mr. Ambrose P. Donovan, Jr.
Chief Associate Counsel
State of New York
Department of Health
Tower Building
Empire State Plaza
Albany, New York 12237

Dear Mr. Donovan:

Thank you for your interest in complying with the Freedom of Information Law.

Although the purpose of a license is to apprise the public that an individual is qualified to perform a particular kind of work, in my opinion, refusal to provide the home addresses of licensees is permissible under the Law.

Section 88(3) of the Law gives agency officials discretion to "delete identifying details" when in their judgment disclosure would constitute an unwarranted invasion of personal privacy. The provision further states that

> "[A]n unwarranted invasion of personal privacy includes...
>
> e. [D]isclosure of items of a personal nature when disclosure would result in economic or personal hardship to the subject party and such records are not relevant or essential to the ordinary work of the agency."

Therefore, if in your judgment disclosure of a licensee's home address would result in such an invasion, it need not be disclosed.

R.J.

Moreover, according to Mr. Krill, with whom I discussed the issue, information relevant to the work of the Department, such as the names of licensees and information pertaining to the issuance of a license, is disclosed as a matter of course. In my view, the home address of the individual concerned is merely an incident of licensing and is neither relevant nor essential to the ordinary work of the Department.

As such, I feel that denial of access to home addresses of licensees is consonant with the Law.

I hope that I have been of some assistance. Should any further questions arise, please feel free to call me.

Sincerely,

Robert J. Freeman
Counsel

cc: Mr. Steven Krill
Director
Office of Management Analysis

RJF:lbb

VOTES

#254

July 22, 1975

Reverend James C. Enright
St. Mary's Church
15 Clark Street
Auburn, New York 13021

Dear Reverend Enright:

The public clearly has a right of access to a record of the votes of county legislators.

First, a county legislative body must hold its meetings in public [County Law, Section 152]. Second, the clerk appointed by such a body

> "shall keep a record of all acts and proceedings of the board and be the custodian of the records, vouchers and other papers required or authorized by law to be deposited in his office" [County Law, Section 475].

Third, Section 88(5) of the Freedom of Information Law (see enclosed) provides that

> "...each agency or municipality controlled by a board, commission or other group having more than one member shall maintain and make available for public inspection a record of the final votes of each member in every agency proceeding in which he votes."

Additionally, the Freedom of Information Law directs that minutes of meetings of the governing body of an agency be made available for public inspection and copying [Section 88(1)(c)].

Pursuant to regulations promulgated by the Committee (see enclosed), a municipal official must respond to a request "promptly" and within five days, unless "extraordinary circumstances" arise [Regulations, Section 1401.6]. If more than five days have elapsed without a response, the failure to respond may be deemed a denial of access

[Regulations, Section 1401.7(c)]. In such case, you may appeal to the County Legislature or the person or persons designated by the body to hear appeals. The person or body who hears appeals must inform you of its decision within seven business days of receipt of the appeal [Freedom of Information Law, Section 88(8); Regulations, Section 1401.7(e)]. If access is denied on appeal, you may challenge the denial in the courts via an Article 78 proceeding.

I hope that I have been of some assistance. Should any further questions arise, please feel free to contact me.

Sincerely,

Robert J. Freeman
Counsel

Enclosures

cc: Hon. Ruth Toch
Solicitor General

Ms. Flossie Langley
Clerk, Cayuga County Legislature

RJF:lbb

AGENCY #255

STATE OF NEW YORK
COMMITTEE ON PUBLIC ACCESS TO RECORDS

EMPIRE STATE PLAZA TOWER - ALBANY, NEW YORK 12223

July 22, 1975

Mr. Louis A. Fallon
[redacted]

Dear Mr. Fallon:

Your letter of July 14, 1975, addressed to the Attorney General has been transferred to the Committee on Public Access to Records, which has the responsibility of advising with respect to the Freedom of Information Law.

The issue as stated is whether the American Kennel Club is within the scope and coverage of the Freedom of Information Law. The Law defines "agency" as

> "any state or municipal board, bureau, commission, council, department, public authority, public corporation, division, office or other governmental entity performing a governmental or proprietary function for the state of New York or one or more municipalities therein" [Section 87(1)].

It appears that the definition quoted would not include the Club.

In creating the American Kennel Club as a corporation, the Legislature specifically directed that the Club be subject to the Membership Corporations Law [Laws of 1908, Ch. 280]. Further, according to my research, the courts have never held that the Club is a govenrmental entity [see Henry v. American Kennel Club, 269 App. Div. 1, 53 NYS 2d 878 (1945)].

With regard to the American Society for the Prevention of Cruelty to Animals [A.S.P.C.A.], the courts have held by implication that it is not a governmental entity, even though it may receive some public funding [A.S.P.C.A. v. New York City, 205 App. Div. 335, 199 NYS 728 (1923), and that

it is a charitable corporation [In re Title Guarantee & Trust Co., 165 NYS 71 (1917)]. I am unaware of any decisions holding that the A.S.P.C.A. is subject to the Freedom of Information Law.

For the reasons stated above, in my opinion, the American Kennel Club is not included within the scope of the Freedom of Information Law.

I hope that I have been of some assistance. Should any further questions arise, please feel free to contact me.

Sincerely,

Robert J. Freeman

Robert J. Freeman
Counsel

cc: Hon. Ruth Toch
Solicitor General

ADOPTED REGY
RECOMMENDATIONS
#256

August 4, 1975

Mr. F. Joseph Pinizzotto
Executive Director
Ossining Urban Renewal Agency
16 Croton Avenue
Ossining, New York 10562

Re: Correspondence #227

Dear Mr. Pinizzotto:

As suggested in your letter of July 21 addressed to Secretary of State Cuomo, I discussed the adoption of regulations pursuant to the Freedom of Information Law with your assistant, Ms. Susan Brewster.

According to Ms. Brewster, the regulations adopted by the Village of Ossining were not intended to include your agency. As such, the Ossining Urban Renewal Agency should adopt its own regulations to be in compliance with the Freedom of Information Law [see Section 88(2)].

I am enclosing copies of the official regulations promulgated by the Committee, and model regulations which will assist you in complying with the Law, as well as resolutions adopted by the Committee, one of which specifically involves records in possession of urban renewal agencies.

I hope that I have been of some assistance. Should any further questions arise, please feel free to contact me.

Very truly yours,

Robert J. Freeman
Counsel

RJF/sd

enc.

cc: Mr. William D. Cahir

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PRIVACY
#257

August 4, 1975

Ms. Nancy Kramer
Senior Staff Attorney
New York Public Interest
Research Group
5 Beekman Street
New York, New York 10038

Dear Ms. Kramer,

To date, the Committee has not promulgated guidelines with regard to protection of privacy.

I am sure, however, the the subject will be considered in the coming year, and I will apprise you of any developments on the matter.

Thank you.

Sincerely,

Robert J. Freeman
Counsel

RFJ:lbb

misc
#258

August 4, 1975

Ms. Helen M. Komoroski
City Clerk
City of Mechanicville
36 North Main Street
Mechanicville, New York 12118

Dear Ms. Komoroski:

As requested, please find enclosed resolutions adopted by the Committee pursuant to its advisory authority. Of particular interest in this instance is Resolution 1, "Urban Renewal Acquisitions." The Resolution is based in great measure upon the holding of the Appellate Division in Sorley v. Village of Rockville Centre, 30 A.D. 2d 822 (1968).

I hope that I have been of some assistance. Should any further questions arise, please feel free to contact me.

Very truly yours,

Robert J. Freeman
Counsel

RJF/sd

enc.

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general request

#259

August 5, 1975

Mr. Wallace Nolen
Assistant Director
12 Chase Street
White Plains, New York 10606

Dear Mr. Nolen:

I apologize for the delay in responding to your letter.

In my opinion, much of the information that you are seeking is accessible pursuant to either the Freedom of Information Law or other statutes.

The Freedom of Information Law provides a right to inspect and copy nine categories of records. Perhaps most important among the categories is Section 88(1)(i), which provides access to

> "any other files, records, papers or documents required by any other provision of law to be made available for public inspection and copying."

One such provision of law is Section 51 of the General Municipal Law, which grants access to

> "[A]ll books of minutes, entry or account, and the books, bills, vouchers, checks, contracts or other papers connected with or used or filed in the office of or on behalf of any county, town, village or municipal corporation in this state..."

Therefore, virtually all "papers connected with or used or filed" in the office of a municipality are available for public inspection and copying.

There are, however, some limitations on rights of access. As you aptly intimated, information which if disclosed would result in an "unwarranted invasion of personal privacy" [see Section 88(3) and (7)(c)] may be withheld.

Additionally, since it has been held that a building inspector has law enforcement authority [see Willets v. Quinto, 225 NYS 2d 301 (1962)], it would appear that "investigatory records compiled for law enforcement purposes" [see Section 88(7)(d)] by a building inspector need not be disclosed.

Further, the Court of Appeals recently held that government may deny access to information if on balance disclosure would be detrimental to the public interest [Cirale v. 80 Pine St. Corp., 35 NY 2d 113, 359 NYS 2d 1 (1974). In such circumstances, however, the unit of government claiming that the information is privileged has the burden of proving the potential detriment.

With regard to papers involved in a judicial proceeding, Section 255 of the Judiciary Law provides that

> "[A] clerk of a court must, upon request, and upon payment of or offer to pay, the fees allowed by law, or, if no fees are expressly allowed by law, fees at the rate allowed to a county clerk for a similar service, diligently search the files, papers, records and dockets in office; and either make one or more transcripts or certificates of change therefrom, and certify to the correctness thereof, and to the search, or certify that a document or paper, of which the custody legally belongs to him, can not be found."

Consequently, the papers in possession of a clerk of a court are available, including an accusatory instrument, unless it is sealed by a court.

I am enclosing copies of the Freedom of Information Law and regulations promulgated by the Committee which deal with the procedural aspects of the Law and which have the force and effect of law.

I hope that I have been of some assistance. Should any further questions arise, please feel free to contact me.

Very truly yours,

Robert J. Freeman
Counsel

Enclosures

Misc.
#260

August 6, 1975

Mr. Leonard B. Wachsman
Research Director
Civil Service Merit Council
3535 DeKalb Avenue
Bronx, New York 10467

Dear Mr. Wachsman:

Mr. Louis Tomson, who is no longer Executive Director of the Committee, transmitted your letter of July 30 to me.

As I have written in previous communications, the Committee has no authority to enforce the provisions of either the Freedom of Information Law or the regulations promulgated thereunder.

Section 88(9)(a) of the Law provides that the Committee shall:

> "i. advise agencies and municipalities regarding this article by means of guidelines, advisory opinions, regulations or other means deemed advisable;
>
> ii. promulgate and issue rules and regulations in conformity with this article in relation to subdivisions two and four of this section; and
>
> iii. recommend changes in the freedom of information law in order to further the purposes of this article."

The burden of enforcing compliance with the Law, therefore, must be met by the public. As stated in Section 88(8) of the Law, the public has the opportunity to ensure compliance

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with the Law via initiation of Article 78 proceedings in the courts.

I regret that I cannot be of greater assistance.

Very truly yours,

Robert J. Freeman
Counsel

RJF/sd

bcc: Louis R. Tomson

Police blotter

#261

August 6, 1975

Mr. Lewis P. Fons
Publisher
The PATRIOT
The Wellsville Publishing Company
51 East State Street
Wellsville, New York 14895

Dear Mr. Fons:

Thank you once again for your interest in the Freedom of Information Law. I have reviewed the letter sent to you on February 10, 1975, and I regret that I can add little to the opinion written then.

Essentially, the problem involves defining the term "police blotter" and delineating the scope of information compiled pursuant to an investigation for law enforcement purposes. The use of police blotters has evolved through custom. There is no definition of the term either in statutes or in case law, and the State Police have not issued any directives or guidelines describing what should be contained in a blotter. In fact, there is no requirement in law that a blotter must be kept. Further, having conferred with several police chiefs throughout the state, it is evident that the form and content of police blotters vary from one department to another.

As stated in the earlier letter, in my opinion, it is arguable that the complaint forms are accessible. To reiterate, Section 51 of the General Municipal Law has long provided access to virtually all records in possession of a municipality and its officials. A police department may, however, have two potential grounds for denial of access to the forms.

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First, if the forms are indeed investigatory in nature and compiled for law enforcement purposes, there is no right of access [See Section 88(7)(d)]. Whether or not a complaint memorialized in writing and used as the basis of an investigation falls within the scope of "investigatory files" must be determined by the courts.

Second, the Court of Appeals has held that information in possession of government may be privileged if disclosure would on balance be detrimental to the public interest [Cirale v. 80 Pine Street Corp., 35 NY 2d 113, 359 NYS 2d 1 (1974)]. In such case, the unit of government asserting the privilege has the burden of proving the potential detriment.

Since the Freedom of Information Law enables agency officials to "delete identifying details" to prevent an "unwarranted invasion of personal privacy" [Section 88(3)], it would appear that such deletions from the complaint forms would leave form merely as the report of an event. As such, in my view, it would be difficult to prove that the public interest would be harmed by disclosure.

I regret that I cannot be of greater assistance. As stated previously, guidance in this area must come from the courts.

Should any further questions arise, please feel free to contact me.

Sincerely,

Robert J. Freeman
Counsel

RJF:lbb

RECOMMENDATIONS

#262

August 7, 1975

Mr. John E. Cosgrove
Director of Planning
Department of Civil Service
State Office Building Campus
Albany, New York 12239

Dear John:

Thank you for sending the Department's Guidelines and Regulations. Having reviewed the Regulations, I would like to offer a few minor comments.

Section 80.2

The term "record" is defined neither in the Freedom of Information Law nor in the regulations promulgated thereunder by the Committee. I have two concerns with regard to the definition composed by the Department. First, the reference to minutes pertains only to minutes of public hearings [80.2(a)(iii)]. If minutes of meetings of the Civil Service Commission are compiled, they too should be made available. Second, there is no reference to Section 88(1)(h) of the Law, dealing with final determinations of a govering body. Again, if the Commission makes determinations other than opinions in the adjudication of cases, such determinations should be made available.

The same subdivision defines "statistical tabulation" and "factual tabulation". The definition reflects the form in which statistical or factual information is compiled and is consistent with a dictionary definition of "tabulation". However, in my opinion, the intent of the Law is to grant access to statistical or factual material, regardless of the form in which the information appears on a printed page [see Marino, The New York Freedom of Information Law, 43 Ford. L. Rev. 83, 86 (1974)].

Section 80.4(b)

Although a written request may be required for records not customarily made available [see Committee regulations, Section 1401.6(a)], failure to complete a form prescribed by

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the Department cannot be a valid basis for denial of access. Any writing consisting of a request for identifiable records should suffice.

Section 80.6

Committee regulations provide that agencies

> "shall accept requests for public access to records and produce records during all hours they are regularly open for business" [Section 1401.5].

If the hours proposed are indeed the regular business hours of the branch offices, the Department regulations are consistent with those of the Committee.

As stated earlier, my comments are reflective of minor deficiencies or merely differences of opinion.

I hope that I have been of some assistance. Should any questions arise, please feel free to call me.

I too look forward to my continued association and friendship with you and the Department.

Very truly yours,

Robert J. Freeman
Counsel

RJF/sd

#263

August 8, 1975

Mr. Myron H. Blumenfeld
[redacted]

Dear Mr. Blumenfeld:

I telephoned Mr. Hallman, General Counsel to the Department of Environmental Conservation, on your behalf.

Mr. Hallman informed me that the report that you are seeking will be made available.

In response to your question, after having received a decision on appeal made by the head of an agency [see Freedom of Information Law, Section 88(8); Regulations, Section 1401.7], there is no additional administrative appeal available. In such case, if denial of access is affirmed by the agency, your only recourse is initiation of an Article 78 proceeding in the courts.

I am enclosing a copy of regulations promulgated by the Committee, which govern the procedural aspects of the Law, and which have the force and effect of law.

I hope that I have been of some assistance. Should any further questions arise, please feel free to contact me.

Sincerely,

Robert J. Freeman
Counsel

Enclosure

RJF:lbb

School Elsm
#264

August 8, 1975

Mr. Donald M. Kelly
[redacted]

Dear Mr. Kelly:

Thank you for your continued interest in the Freedom of Information Law.

I regret to inform you that the legislation recommended by the Committee was not enacted during this year's session. I trust, however, that it will be reconsidered next year.

With regard to requests for records, the regulations promulgated by the Committee, which have the force and effect of law, provide that

> "[W]here a request for records is required, such request may be oral or in writing. However, written requests shall not be required for records that have been customarily available without request [see enclosed, Regulations, Section 1401.6(a)].

Therefore, the school district may require that requests be made in writing with respect to records that have not been customarily made available upon oral request. However, failure to complete a form prescribed by the District cannot be a valid basis for denial of access. Any writing containing a request for identifiable records should suffice.

As you know, you may challenge an initial denial by appealing to the governing body of an agency [see Section 88(8), Freedom of Information Law; Section 1401.7 Regulations]. If the denial is affirmed by

the appeals body, your only recourse is initiation of an Article 78 proceeding in the courts. Modification of this procedure can be performed only by the legislature. Hopefully, the Freedom of Information Law will be amended to ease the current burden now shouldered by the public.

I hope that I have been of some assistance. Should any further questions arise, please feel free to contact me again.

Very truly yours,

Robert J. Freeman
Counsel

RJF/sd

enc.

School dist
#264

August 8, 1975

Mr. Donald M. Kelly
[redacted]

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I regret to inform you that the legislation recommended by the Committee was not enacted during this year's session. I trust, however, that it will be reconsidered next year.

With regard to requests for records, the regulations promulgated by the Committee, which have the force and effect of law, provide that

> "[W]here a request for records is required, such request may be oral or in writing. However, written requests shall not be required for records that have been customarily available without request [see enclosed, Regulations, Section 1401.6(a)].

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the appeals body, your only recourse is initiation of an Article 78 proceeding in the courts. Modification of this procedure can be performed only by the legislature. Hopefully, the Freedom of Information Law will be amended to ease the current burden now shouldered by the public.

I hope that I have been of some assistance. Should any further questions arise, please feel free to contact me again.

Very truly yours,

Robert J. Freeman
Counsel

RJF/sd

enc.

PAYROLL

#265

August 8, 1975

Mr. George Mayes
[redacted]

Dear Mr. Mayes:

Thank you for your continued interest in the Freedom of Information Law.

In response to your questions, first, according to the regulations promulgated by the Committee, which have the force and effect of law, a search fee is prohibited unless such fee had been established by law, rule or regulation prior to September 1, 1974 [see enclosed Committee Regulations, Section 1401.8(a)].

Second, there is no requirement that the fiscal officer sign a statement signifying that he is the officer responsible for preparing the payroll.

Third, both the Law and regulations provide that the fiscal officer shall on request compile a payroll record consisting of the name, address, title and salary of all officers and employees, except in the case of law enforcement officers and employees. In such case, the fiscal officer need only provide title and salary [see Freedom of Information Law, Section 88(1)(g); Regulations, Section 1401.3].

It is noted, however, that the Law does not specify whether the home address or business address should be provided. Therefore, in my opinion, an agency official has discretion to furnish either address. For example, if in the judgement of such official, disclosure of employees' home addresses would result in an "unwarranted invasion of personal privacy" [see Freedom of Information Law, Section 88(3)], business addresses may be provided.

With regard to public notice, Section 1401.9 of the regulations provides:

> "Each agency and municipality shall publicize by posting in a conspicious location wherever records are kept and/or by publication in a local newspaper of general circulation:
>
> (a) The location where public records shall be made available for inspection and copying.
>
> (b) The name, title, business address and business telephone number of the designated records access officer and fiscal officer.
>
> (c) The right to appeal by any requester denied access to a record for whatever reason and the name and business address of the person or persons to whom an appeal is to be directed."

As stated in your letter, a "news item" related to the Law published in September of 1974 does not meet the requirements contained in Committee regulations, which became effective on November 20, 1974. However, there is no requirement that the Town place a notice in the local newspaper. Posting a notice in a manner consistent with the quoted provisions is sufficient.

I hope that I have been of some assistance. Should any further questions arise, please feel free to contact me.

Sincerely,

Robert J. Freeman
Counsel

cc: Mr. Charles E. Hastings, Supervisor
Town of Warrensburg
Warrensburg, New York 12885

ADOPTED REG'L RECOMMENDATION #266

August 8, 1975

Ms. Kay Meyer
The Long-Islander
Huntington, New York

Dear Ms. Meyer:

As requested, I have reviewed the regulations adopted by the Huntington Town Board. Although the regulations are generally excellent and in compliance with those promulgated by the Committee, I would like to offer the following comments:

Section 3(b)

Town regulations appropriately grant access to payroll information to any person, including members of the news media. However, it is noted that Form AC 375 prescribed by the State Comptroller requires certification by the applicant that he or she is a bona fide member of the news media. Consequently, Form AC 375 cannot be used by members of the general public. In any event, the right of public access to payroll information was established prior to enactment of the Freedom of Information Law [Winston v. Mangan, 338 NYS 2d 656 (1973)].

Section 5(b)

As you stated, this provision is unclear with regard to the utilization of the term "vital statistics". Regardless of whether the term is being used in relation to applications for employment or to marriage, birth and death records, agency officials have discretion to disclose or withhold such records.

First, Section 88(3) of the Freedom of Information Law enables units of government to "delete identifying details" to prevent "an unwarranted invasion of personal privacy". It is noted that the Law does not compel agencies to protect privacy; rather, it provides discretion to agency officials to withhold information when in their judgment disclosure would result in such an invasion of personal privacy. In my view, paragraphs (a) through (e) of the privacy provision are merely five examples among conceivable dozens of such invasions. Therefore, if the Town regulations pertain to vital statistics contained in applications for employment, officials of the Town have discretionary authority under the Law to withhold such information.

Access to marriage, birth and death records is specifically treated by other statutes. Section 4174 of the Public Health Law provides that the Commissioner of the State Department of Health or any person authorized by him shall

> "(c) upon request, issue certification of birth or death unless in his judgement it does not appear to be necessary or required for a proper purpose."

Similarly, Section 20-b of the Domestic Relations Law provides that the Commissioner shall issue a certification of marriage to any applicant

> "unless he is satisfied that the same does not appear to be necessary or required for judicial or other proper purposes."

Although the meaning of "proper purpose" is unclear and undefined by the statutes quoted, case law provides that an individual seeking to inspect such records must show some "legitimate and specific purpose and not merely the gratification of idle curiosity" [Rome Sentinel Company v. Boustedt, 252 NYS 2d 10, 14 (1964)]. However, the Court provided a somewhat different direction with respect to the news media seeking death records:

> "[I]n balancing the community's right to be informed by the news media with the discretionary power of public officials to refuse to release public records, certain criteria may be formulated. It appears to this Court that the public's right to know should be subject to only those matters which have a news value or are of public interest of a legitimate kind. The news media must provide news but avoid poking or prying into matters which an individual might reasonably insist on keeping to himself. The public's right to know and be informed on the activities of public figures is practically absolute unless commercialization may be shown. Whether the event be a calamity or an honor, it may be one in which his neighbors have a legitimate interest.

> During this brief period and for a reasonable length of time thereafter, pictures, stories and comments may be made with out his consent" [id at 12].

Therefore, in my opinion, it appears that a member of the news media seeking vital statistics consistent with the criteria quoted above should meet the "proper purpose" standard envisioned by the statutes. It is emphasized, however, that the language at issue has been judicially reviewed on few occasions and that more specific guidance from the courts is needed.

I hope that I have been of some assistance. Should any further questions arise, please feel free to contact me.

Very truly yours,

Robert J. Freeman
Counsel

RJF/sd

cc: Town Board
Town of Huntington
227 Main Street
Huntington, New York

#267

August 12, 1975

Mr. Larry J. Wagner
[redacted]

Dear Mr. Wagner:

As I understand the facts, you are attempting to gain access to your personnel records in possession of both the Monroe County Department of Social Services and the Central Trust Company.

First, there is no right of access under the Freedom of Information Law to records of the Central Truse Company, since the Law pertains only to the records of government.

With regard to the County Department of Social Services, although there is no specific right of access to personnel files under the Freedom of Information Law, rights of access to records made available by other provisions of law are preserved [see enclosed Freedom of Information Law, Sections 88(1)(i) and (10)].

One such provision is Section 51 of the General Municipal Law, which states that

> "[A]ll books of minutes, entry or account, and the books, bills, vouchers, checks, contracts or other papers connected with or used or filed in the office of, or with any officer, board or commission acting for or on behalf of any county, town, village or municipal corporation in this state...are hereby declared to be public records, and shall be open...to the inspection of any taxpayer or registered voter, who may copy, photograph or make photocopies thereof, on the premises where such records are regularly kept."

The Freedom of Information Law affects the provision quoted above in several ways. First, the Committee on Public Access to Records, which has the responsibility of advising with respect to the Law, has resolved that information available under the Law "shall be made equally accessible to any person without regard to status or interest" [see enclosed resolution]. Therefore, a person need not be a "taxpayer or registered voter" to inspect and copy records.

Second, there are four categories of information to which the access provisions of the Law do not apply [see Section 88(7)]. These categories include information that is exempt from disclosure by stature, confidential information relating to commercial enterprise and licensing, information which if disclosed would constitute an unwarranted invasion of personal privacy and investigatory files compiled for law enforcement purposes. In my opinion, to the extent that your personnel records in possession of the Department do not contain information included within the four categories, they should be made available to you.

I am enclosing copies of the Freedom of Information Law and regulations promulgated by the Committee, which have the force and effect of law. The regulations contain directions regarding who to contact, where records are kept, hours for public inspection, appeals and fees.

I hope that I have been of some assistance. Should any further questions arise, please feel free to contact me.

Sincerely,

Robert J. Freeman
Counsel

Enclosures

RJF:lbb

#268

August 13, 1975

Ms. Marcia Tompkins
Natural Resources Defense Council, Inc.
15 West 44th Street
New York, New York 10036

Dear Ms. Tompkins:

Thank you for your continued interest in the Freedom of Information Law.

As requested, I am enclosing three copies of the Law and regulations, as well as a package of resolutions adopted by the Committee.

With regard to your questions, first, the authority of the Committee is advisory only [see Freedom of Information Law, Section 88(9)(a)(i)]. Generally, when a unit of government or a member of the public forwards questions concerning the Law or informs this office of a dispute, an advisory opinion is given either orally or in writing. The only sense in which the Committee "administers" the Law is via promulgation of regulations, which have the force and effect of law. Again, however, if regulations adopted by an agency are not in compliance with those promulgated by the Committee, this office can only advise.

Enforcement of both the Law and regulations rests on the shoulders of the public. As you know, an administrative appeal procedure is provided [the Law, Section 88(8); regulations, Section 1401.7], and if a denial of access is affirmed on appeal or an agency is otherwise allegedly in violation of the Law, an aggrieved person (or group) can challenge such action in the courts via an Article 78 proceeding.

Since there is no requirement that agencies report to the Committee, it is impossible to be aware of violations of law. However, as stated previously, when an agency or the public has questions concerning the Law or regulations, and advisory opinion is written. In many instances, units of government that have forwarded their regulations for comment have amended them pursuant to an

advisory opinion. Similarly, disputes have often been settled by means of advice given by this office.

During the recent session of the Legislature, bills were introduced which would have given the Committee greater authority. Although they failed to pass, I am hopeful that meaningful amendments to the Law will be enacted next year.

I hope that I have been of some assistance. Should any further questions arise, please feel free to contact me.

Very truly yours,

Robert J. Freeman
Counsel

RJF/sd

enc.

venue
#269

August 13, 1975

Mr. Louis J. Fascia
[redacted]

Dear Mr. Fascia:

As I understand the facts stated in your letter, you have unsuccessfully attempted to obtain appraisal information from the Mechanicville Urban Renewal Agency pursuant to the Freedom of Information Law.

Although the Freedom of Information Law does not specifically refer to the records in question, there is case law pertinent to the issue. In Sorley v. Clerk, the Mayor and the Board of Trustees of the Incorporated Village of Rockville Centre, the Appellate Division held:

> "[I]n our view, urban renewal correspondence, data and valuations are not to be deemed public records within the statutory definitions (General Municipal Law, § 51; Village Law, § 82; Public Officers Law, § 66), at least so long as the transactions to which they relate remain inchoate and uncompleted. In the initial stage, these papers should be treated as confidential communications and items of evidence which, in the public interest, ought not to be disclosed before the transactions in which they are involved are consummated. 'It may not be denied that there are papers concerning governmental matters which are properly treated as secret and confidential' (Matter of Egan, 205 NY 147, 157). In the case at bar, we would hold that the urban renewal papers sought might be open to public inspection, if it appeared that they related to matters which have been consummated and finalized" [30 A.D. 2d 822, 823 (1968)].

Further, with regard to "confidential communications", the state's highest court recently held that the common law governmental privilege for official information continues to exist, notwithstanding the enactment of the Freedom of Information Law [Cirale v. 80 Pine St. Corp., 35 NY 2d 113; see footnote at 117 (1974)].

According to both Mr. Lenahan, Director of the Mechanicville Urban Renewal Agency, and Mr. Brennan, an official of the United States Department of Housing and Urban Development (HUD), the records sought do in fact relate to transactions which have not yet been "consummated and finalized".

As such, in my opinion, the records at issue may be appropriately denied.

I hope that I have been of some assistance. Should any further questions arise, please feel free to contact me.

Very truly yours,

Robert J. Freeman
Counsel

RJF/sd

cc: Mayor John R. Fascia

Mr. John Lenahan

#270

August 13, 1975

Mr. R. J. McLoughlin
[redacted]

Dear Mr. McLoughlin:

Your letter of August 6 addressed to the Attorney General has been forwarded to this Committee, which has the responsibility of advising with respect to the Freedom of Information Law.

Although the Freedom of Information Law does not specifically pertain to cancelled checks, the Law preserves rights of access to records made available by other provisions of law [see enclosed, Freedom of Information Law, Section 88(1)(i)].

One such provision of law is Section 1113 of the New York City Charter which provides that

> "[T]he heads of all administrations and departments, except the police and law departments, and the chiefs of each and every division or bureau thereof and all borough presidents, shall with reasonable promptness, furnish to any taxpayer desiring the same, a true and certified copy of any book, account or paper kept by such administration, department, bureau or officer, or such part thereof as may be demanded, upon payment in advance of ten cents for every hundred words thereof by the person demanding the same. The provisions of this section shall not apply to any papers prepared by or for the comptroller for use in any proceeding to adjust or pay a claim against the city or any agency or by or for counsel for use in actions or proceedings to which the city, or any agency is a

> party or for use in any investigation authorized by this charter."

Similarly, Section 51 of the General Municipal Law provides a right of access to

> "[A]ll books of minutes, entry or account, and the books, bills, vouchers, checks, contracts or other papers connected with or used or filed in the office of, or with any officer, board or commission acting for or on behalf of any county, town, village or municipal corporation in this state..."

Rights of access under the Freedom of Information Law are not applicable to certain categories of information, such as information exempt from disclosure by statute, information related to regulation of commerce and licensing , information which if disclosed would result in an unwarranted invasion of personal privacy, and investigatory files compiled for law enforcement purposes [see Section 88(7)].

As you have stated the facts, it appears that the records in question do not fall within any of the aforementioned categories to which rights of access do not apply. Therefore, in my opinion, the records should be made available to you.

I hope that I have been of some assistance. Should any further questions arise, please feel free to contact me.

Very truly yours,

Robert J. Freeman
Counsel

RJF/sd

enc.

cc: Office of the Solicitor General

AGENCY

#571

August 14, 1975

Mr. V. Amos
Designated Records Access Officer
Department of Civil Defense
P.O. Box 127
Yaphank Avenue
Yaphank, New York 11980

Dear Mr. Amos:

Thank you for your interest in the Freedom of Information Law.

A county civil defense department is, in my opinion, an agency as defined by the Freedom of Information Law [see Section 87(1)]. Therefore, the records in possession of the Department of Civil Defense are subject to the Law.

Of particular importance to municipalities is Section 88(1)(i), which provides access to

> "any other files, records, papers or documents required by any other provision of law to be made available for public inspection and copying."

One such provision is Section 51 of the General Municipal Law which has long granted public access to

> "[A]ll books of minutes, entry or account, and the books, bills, vouchers, checks, contracts or other papers connected with or used or filed in the office of, or with any officer, board or commission acting for or on behalf of any county, town, village or municipal corporation in this state..."

It is noted, however, that the Law provides no right of access to certain categories of records, such as information exempted from disclosure by statute, confidential information pertaining to the regulation of commercial enterprise and trade secrets, information which if disclosed would result in

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files compiled for law enforcement purposes [see Section 89(7)]. In my opinion, information falling within any of the four aforementioned categories may be withheld.

Perhaps of greater relevance to your department is the "governmental privilege". The Court of Appeals recently held that, notwithstanding the enactment of the Freedom of Information Law, the common law privilege of confidentiality for official information continues to exist [Cirale v. 80 Pine St. Corp., 35 NY 2d 113, 117 (1974)]. The Court stated that

> "[T]he hallmark of this privilege is that it is applicable when the public interest would be harmed if the material were to lose its cloak of confidentiality" (id).

The Court also stated that there must be specific support for the claim of privilege and that only a court has the authority to evaluate the propriety of assertion of such a claim [id at 118-119].

With regard to federal reimbursement, it would appear that administrative expenses including fees for copies are within the scope of P.L. 85-606 [see Section 205]. Nevertheless, since I am unfamiliar with federal regulations or other requirements, I suggest that you attempt to obtain an official response from the appropriate federal agency.

I hope that I have been of some assistance. Should any further questions arise, please feel free to contact me.

Very truly yours,

Robert J. Freeman
Counsel

RJF/sd

REGULATIONS/
RECOMMENDATIONS
#272

August 18, 1975

Mr. Ramsey G. Ludington
Counsel
Fulton Housing Authority
Fulton, New York 13069

Dear Mr. Ludington:

Thank you for your continued interest in complying with the Freedom of Information Law and the regulations promulgated thereunder by the Committee.

Having reviewed the rules and regulations adopted by the Fulton Housing Authority, they are, in my opinion, fully in compliance with those adopted by the Committee.

Should any questions arise regarding the Law or regulations, please feel free to contact me.

Very truly yours,

Robert J. Freeman
Counsel

RJF/sd

AGENCY #273

August 19, 1975

Mr. Louis A. Fallon
[redacted]

Dear Mr. Fallon:

I regret that I am unable to assist you to the extent that you have requested.

I cannot provide copies of either the Membership Corporations Law or the cases decided thereunder (the Committee does not yet have a set of law books). However, I suggest that you contact:

The Lawyers Co-operative
Publishing Company
50 Broad Street
Rochester, New York 14603

I am sure that the Lawyers Co-operative will accept an order for the volume sought, which includes citations and summaries of significant cases dealing with the Membership Corporations Law.

With regard to the Freedom of Information Law, I take issue with your interpretation of "proprietary function." First, the definition of "agency" [Section 87(1)] includes governmental entities performing such a function for the state. Second, generally the term refers to a municipality or municipal department which performs a duty other than governmental [see Black's Law Dictionary]. In my opinion, the functions of the American Kennel Club do not meet this standard.

I hope that I have been of some assistance. Should any further questions arise, please do not hesitate to call me.

Sincerely,

Robert J. Freeman
Counsel

RJF:lbb

STAT. & FAC. TABS.
#274

September 3, 1975

Senator Norman J. Levy
[redacted]

Dear Senator Levy:

Thank you for your continued interest in the Freedom of Information Law.

The questions raised pertain to the availability of statistical information and correspondence in possession of the Nassau County Department of Social Services pursuant to the Freedom of Information Law.

The Law specifically provides access to "statistical or factual tabulations made by or for the agency" [Section 88(1)(d)]. Perhaps most important with respect to municipal government, however, Section 88(1)(i) also provides access to

> "any other files, records, papers or documents required by any other provision of law to be made available for public inspection and copying."

One such provision of law is Section 51 of the General Municipal Law, which directs that

> "[A]ll books of minutes, entry or account, and the books, bills, vouchers, checks, contracts or other papers connected with or used or filed in the office of, or with any officer, board or commission acting for or on behalf of any county, town, village or municipal corporation in this state...are hereby declared to be public records, and shall be open during all regular business hours...to the inspection of any taxpayer or registered voter, who may copy, photograph or make photocopies thereof on the premises where such records are regularly kept."

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Therefore, virtually all "papers connected with or used or filed" by the County Department of Social Services should be made available unless otherwise exempt [see Section 88(7)(a)].

It is noted that names and addresses of applicants for or recipients of public assistance are statutorily exempt from disclosure. Similarly, any communications or information related to a person receiving public assistance or care obtained by a social services official or employee is deemed confidential and may be disclosed only to specified public officials [see Social Services Law, Section 136].

Further, your request involves a "statistical breakdown, by Village, of the placement of welfare recipients throughout Nassau County." If the information has been recorded and broken down by village, it should be made available. However, if no record exists containing the specific information sought, the Department need not create a record to meet the request. The Law provides access to existing records; there is no duty to compile a record, except under specified circumstances [e.g., Section 88(1)(g), the payroll record; Section 88(5), a record of votes].

The correspondence between the Department of Social Services and real estate brokers also falls within the scope of Section 88(1)(i) by means of Section 51 of the General Municipal Law. Nevertheless, rights of access may be limited by an appropriate invocation of the governmental privilege. In a recent decision, the Court of Appeals held that the common law privilege for official communications to and from public officials continues to exist, notwithstanding the access provisions of the Freedom of Information Law [Cirale v. 80 Pine St. Corp., 35 NY 2d 113, 117 (1974)]. Specifically, the Court held that the privilege attaches to

> "confidential communications between public officers and to public officers, in the performance of their duties, where the public interest requires that such confidential communications or the sources should not be divulged...The hallmark of this privilege is that it is applicable when the public interest would be harmed if the material were to lose its cloak of confidentiality" [id].

However, the Court further stated that

> "[T]here must be specific support for the claim of privilege. Public interest is a flexible term and what constitutes sufficient potential harm to the public interest so as to render the privilege operable must of necessity be determined on the facts of each case. Such a determination is a judicial one and requires that the governmental agency come forward and show that the public interest would indeed be jeopardized by a disclosure of the information. Otherwise, the privilege could be easily abused, serving as a cloak for official misconduct" [id 118-119].

Therefore, if the information is denied based upon the governmental privilege of confidentiality, the propriety of such an assertion can be determined only by the courts.

I am enclosing a copy of the regulations promulgated by the Committee, which govern the procedural aspects of the Freedom of Information Law and which have the force and effect of Law.

I hope that I have been of some assistance. Should any further questions arise, please feel free to contact me.

Very truly yours,

Robert J. Freeman
Counsel

enc.

RJF/sd

#275

September 4, 1975

Mr. Richard Stern
[redacted]

Dear Rich:

As requested, I am enclosing copies of the state compliance survey and a list of municipalities included in the local government compliance survey.

With regard to Section 88(4), in my opinion, the provision contains several valuable aspects. First, it permits the public to know what kinds of records an agency has in its possession; second, it enables the public to specify the category of records sought, thereby meeting the standard that a request for "identifiable records" be made [see Section 88(6) of the Law and Section 1401.6(c) through (e) of the regulations]; and third, it may be a useful tool for agencies in responding to requests and in compiling an efficient filing system.

I hope that I have been of some assistance, and I look forward to continuing our conversation.

Sincerely,

Robert J. Freeman
Counsel

Enclosures

RJF:lbb

~~PRIOR~~

#276

September 5, 1975

Mrs. Margaret E. Cali
[redacted]

Dear Mrs. Cali:

The right of access to records in possession of units of government in New York State is prescribed by the Freedom of Information Law, a copy of which is enclosed. The statute sent to you by your congressman pertains only to federal agency records.

Although the Freedom of Information Law grants public access to certain categories of records, the information that you are seeking is specifically exempted from disclosure by statute. Section 537 of the Labor Law provides:

> "[I]nformation acquired from employers or employees pursuant to this article shall be for the exclusive use and information of the commissioner in the discharge of his duties hereunder and shall not be open to the public nor be used in any court in any action or proceeding pending therein unless the commissioner is a party to such action or proceeding, notwithstanding any other provisions of law."

Although there is no right of access to the information in question, I have contacted officials of the Division of Labor Standards in Binghamton on your behalf, and they have assured me that their records do not include any damaging or derogatory remarks with respect to your daughter.

I hope that I have been of some assistance. Should any further questions arise, please feel free to contact me.

Very truly yours,

Robert J. Freeman
Counsel

enc.

RJF/sd

bcc: Mr. Harry Aloisi

#277

September 5, 1975

Mr. Ted Szymanski
Assistant County Attorney
25 Delaware Avenue
Buffalo, New York

Dear Ted:

Thanks for forwarding the local law enacted by the County Legislature pertaining to public access to records.

As we have discussed in the past, my only point of contention regarding the County Legislature's pronouncement concerns the two step appeal procedure [Section 9]. In my opinion, Section 9 of the local law is inconsistent with Section 88(8) of the Freedom of Information Law. In effect, the procedure prescribed by the County Legislature constructively denies the public its right of judicial review as directed by Section 88(8).

In all other respects, the local law is in accord with the regulations promulgated by the Committee.

I look forward to future conversations and continuing our friendship.

Sincerely yours,

Robert J. Freeman
Counsel

RJF/sd

S

#278

September 5, 1975

Mr. M. Shimberg
[redacted]

Subject: Correspondence #405

Dear Mr. Shimberg:

Your letter of August 22 addressed to the Secretary of State has been forwarded to this Committee, which has the responsibility of advising with respect to the Freedom of Information Law, a copy of which is enclosed.

The question you have raised involves public access to traffic summonses issued by a municipality, their disposition, and the names of the patrolmen who issued them.

The Freedom of Information Law provides the right to inspect and copy specific categories of records [see Section 88(1)], as well as

> "any other files, records, papers or documents required by any other provision of law to be made available for public inspection and copying" [Section 88(1)(i)].

Therefore, rights of access granted pursuant to other provisions of law are preserved by the Freedom of Information Law.

Summonses kept by a local traffic court should be made available pursuant to Section 255 of the Judiciary Law, which provides

> "[A] clerk of a court must, upon request, and upon payment of or offer to pay, the fees allowed by law, or, if no fees are expressly allowed by law, fees allowed to a county clerk for a similar service, diligently search the files, papers, records and dockets of his office; and either make one or more transcripts or

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> certificates of change therefrom, and certify to the correctness thereof, and to the search, or certify that a document or paper, of which the custody legally belongs to him, can not be found."

Thus, if the records that you are seeking are in possession of a court clerk, they must be made available to you.

Additionally, a court having jurisdiction of traffic cases may be authorized by the legislative body of a city, town or village to establish a traffic violations bureau [see Section 370, General Municipal Law]. If such a bureau has been created in your community, it has in its possession

> "a record of all violations of which each person has been guilty, whether such guilt was established in court or in the bureau, and also a record of all fines collected and the disposition thereof" [Section 373, General Municipal Law].

If the records in question are kept by a traffic violations bureau, they are accessible pursuant to Section 51 of the General Municipal Law, which provides a right of access to

> "[A]ll books of minutes, entry or account, and the books, bills, vouchers, checks, contracts or other papers connected with or used or filed in the office of, or with any officer, board or commission acting for or on behalf of any county, town, village or municipal corporation in this state..."

I hope that I have been of some assistance. Should any further questions arise, please feel free to contact me.

Very truly yours,

Robert J. Freeman
Counsel

enc.
cc: Mr. William D. Cabin

RJF/cj

STAT. & FACT. TABS. #279

September 9, 1975

Mr. Don J. Waters
[redacted]

Dear Mr. Waters:

Your letter of September 4, 1975, states correctly that statistical or factual information in possession of a governmental entity should be made available [see Section 88(1)(b) and (d), Freedom of Information Law]. Nevertheless, your request was appropriately denied.

The Freedom of Information Law grants access to existing records; an agency has no duty to compile a new record to comply with a request. If the information sought had been compiled in the form of a record, it would be available under the Law. Apparently, the graduate school to which your request was directed has not compiled a document or tabulation containing the information sought. Although school officials may have the information among their records, they have no obligation under the Law to review each application and compile a statistical record pursuant to your request.

I am enclosing copies of the Freedom of Information Law and regulations promulgated thereunder by the Committee which govern the procedural aspects of the Law and which have the force and effect of law throughout the state.

I regret that I cannot be of greater assistance. Should any further questions arise, please feel free to contact me.

Sincerely,

Robert J. Freeman
Counsel

Enclosures

RJF:lbb

PRIVACY
#280 H

September 10, 1975

Mr. Carl Hall
G.M. #32070
Legal Coordinator
N.A.A.C.P.
Correctional Facility
Post Office Box 51
Comstock, New York 12821

Dear Mr. Hall:

Thank you for your interest in the Freedom of Information Law.

In my opinion, the Law does not provide a right of access to records and information pertaining to inmates of correctional facilities.

Section 88(3) of the Law permits agency officials discretion to withhold information if in their judgment disclosure would constitute "an unwarranted invasion of personal privacy." Further, Correction Law, Section 29(2) provides that

> "[T]he commissioner of correctional services shall make rules as to the privacy of records, statistics and other information collected, obtained and maintained by the department, its institutions or the board of parole and information obtained in an official capacity by officers, employees or members thereof."

It is suggested that you attempt to obtain a copy of the rules adopted by the Commissioner mentioned in the section quoted above.

I am enclosing copies of the Freedom of Information Law and regulations promulgated by the Committee, which govern the procedural aspects of the Law.

I hope that I have been of some assistance. Should any further questions arise, please feel free to contact me.

Sincerely,

Enclosures

PRIVACY
#280

September 10, 1975

Mr. Carl Hall
G.M. #32070
Legal Coordinator
N.A.A.C.P.
Correctional Facility
Post Office Box 51
Comstock, New York 12821

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It is suggested that you attempt to obtain a copy of the rules adopted by the Commissioner mentioned in the section quoted above.

I am enclosing copies of the Freedom of Information Law and regulations promulgated by the Committee, which govern the procedural aspects of the Law.

I hope that I have been of some assistance. Should any further questions arise, please feel free to contact me.

Sincerely,

Enclosures

FIRE DISTRICTS

#281

September 10, 1975

Mr. Donald M. Kelly
[redacted]

Dear Mr. Kelly:

Thank you for your continued interest in the Freedom of Information Law.

In response to your questions, the Uniondale Fire District sent the Committee its rules governing public access to records on November 26, 1974. The rules include the following list of records to be made available:

> "(a) Minutes of the Regular Meetings of the Board after approval and adoption of such minutes;
>
> (b) Reports of the Board Auditor and Department of Audit and Control;
>
> (c) Payroll records or parts thereof, authorized by the law to the news media provided written notice is given to the Board by a bona fide member of the news media;
>
> (d) Statements of policy, if any, adopted by the Board and the reasoning used in the adoption of such policy."

It is noted that the rules were adopted by the Board prior to the effective date of the regulations promulgated by the Committee (November 29, 1974), which have the force and effect of law. Also, the Board's rules were never reviewed by Committee staff.

In my opinion, the list contained in the Board rules is incomplete. Section 88(1)(i) of the Freedom of Information Law provides a right of public inspection and copying with respect to

> "any other files, records, papers or documents required by any other provision of law to be made available for public inspection and copy."

One such provision of law is Section 51 of the General Municipal Law, which provides that

> "[A]ll books of minutes, entry or account, and the books, bills, vouchers, checks, contracts or other papers connected with or used or filed in the office of, or with any officer, board or commission acting for or on behalf of any county, town, village or municipal corporation in this state...are hereby declared to be public records and shall be open...to the inspection of any taxpayer or registered voter, who may copy, photograph or make photocopies thereof on the premises where such records are regularly kept."

Therefore, virtually all "papers connected with or used or filed" in the office of the Board should be made available, so long as the information does not fall within the scope of Section 88(7) of the Freedom of Information Law (i.e., information exempted from disclosure by statute, investigatory files compiled for law enforcement purposes).

Further, the Freedom of Information Law preserves rights of access granted by statutory and case law [see Section 88 (1)(i) and (10)]. In this regard, the right of access to payroll information was established prior to the enactment of the Freedom of Information Law. Winston v. Mangan [338 NYS 2d 654, 662 (1974)] held:

> "The names and pay scales of the park district employees, both temporary and permanent, are matters of public record and represent important fiscal as well

> as operational information. The identity of the employees and their salaries are vital statistics kept in the proper recordation of departmental functioning and are the primary sources against employment favortism. They are subject therefore to inspection."

Consequently, payroll information should be made available to any person, and not only to members of the news media [see attached resolution and Committee regulations, Section 1401.3].

I hope that I have been of some assistance. Should any further questions arise, please feel free to contact me.

Very truly yours,

Robert J. Freeman
Counsel

enc.

cc: Howard Blanshan, Secretary
Board of Fire Commissioners
Uniondale Fire District

RJF/sd

Regulations / Recommendations
R, F
#282

September 10, 1975

Mr. Thomas G. Pillsworth
Municipal Service Division
Department of Civil Service
State Office Building Campus
Building #1
Albany, New York 12239

Dear Mr. Pillsworth:

The City of Yonkers Civil Service Commission may be included within the coverage of the City's general regulations governing public access to records, but it need not.

The last paragraph of Section 88(2) of the Freedom of Information Law provides:

> "The governing body of a municipality may make and publish uniform rules for any group of or all agencies in that municipality."

Therefore, the governing body of the City of Yonkers has the authority to determine which of its agencies shall be included within the coverage of its regulations. Since the Civil Service Commission is not included in the list of departments subject to the City's regulations, the Commission should adopt a separate body of regulations.

I hope that I have been of some assistance. Should any further questions arise, please feel free to call me.

Sincerely,

Robert J. Freeman
Counsel

cc: Mr. John Boland
Municipal Personnel Technician
City of Yonkers
Yonkers, New York 10701

QSN10L
#283

September 17, 1975

Mr. Don J. Waters
[redacted]

Dear Mr. Waters:

Although the State University has in its possession the information that you are seeking, applications for graduate study or other information identifiable to individual students may legally be denied.

Congress recently enacted the "Family Educational Rights and Privacy Act of 1974 [Pub. L. 93-380 (enacted August 21, 1974), and amended by Senate Joint Resolution 40 (1974)], which restricts educational institutions from releasing personally identifiable information without the consent of a student's parents if the student is under eighteen years of age or, if eighteen years of age or more, the student himself. The penalty faced by such institutions acting in contravention of the statute is forfeiture of federal funds.

As such, there is no right of access to the information in question under the Freedom of Information Law. Section 88(7) of the Law states that, notwithstanding rights of access granted by Section 88(1), the Law does not apply to information that is "specifically exempted by statute" [Section 88(7)(a)].

Moreover, Section 88(3) of the Freedom of Information Law gives agency officials discretion to withhold information if in their judgment disclosure would result in "an unwarranted invasion of personal privacy."

R

As stated in my letter of September 9, if the University has compiled a statistical record containing the information sought that is not identifiable to individual students, it should be made available. However, if no such record has been created, the University has no obligation to do so in response to your request.

Nevertheless, whether or not there is a right of access to the information in question, you should have been apprised of your right to appeal to the head of the agency or whomever has been designated to hear appeals [see Freedom of Information Law, Section 88(8); Regulations, Section 1401.7(b)].

I suggest that you first attempt to obtain the reasons for the denial and then appeal if you remain dissatisfied with the reasons given. If an appeal is taken, the agency must fully explain its reasons for denial in writing within seven business days of receipt of the appeal.

I regret that I cannot be of greater assistance. Should any further questions arise, please feel free to contact me once again.

Sincerely,

Robert J. Freeman
Counsel

RJF:lbb

#284 c

September 25, 1975

Mr. Harry H. Chambers
Town Attorney
Town of Somers
60 East 42nd Street
New York, New York 10017

Dear Mr. Chambers:

Thank you for your interest in complying with the Freedom of Information Law.

With regard to fees, Section 1401.8 of the regulations promulgated by the Committee states that the fees permitted to be charged under the regulations shall govern

> "[E]xcept where fees or exemptions from fees have been established by law, rule or regulation prior to September 1, 1974..."

Therefore, the fee provisions of the regulations are applicable to units of government which had not officially established fees by law, rule or regulation before the effective date of the Freedom of Information Law.

Town Law provides that the clerk "shall have the custody of the records, books and papers of the town" [Section 30(1)], and that he shall have whatever additional powers and duties conferred or imposed upon him by law [Section 30(11)]. Although the clerk is obliged to make copies of records under both Section 51 of the General Municipal Law and the Freedom of Information Law, the Town Law does not require that a specific fee be charged for copies.

Prior to September 1, 1974, Section 66 of the Public Officers Law, which was repealed by enactment of the Freedom of Information Law [Public Officers Law, Section 85-89], enabled public officers to charge "at the rate allowed to a county clerk for similar services" if no fees were expressly allowed by law. However, in my view, since Section 66 has been repealed, if a public officer had not charged pursuant to law, rule or regulation, he may no longer charge at the rate allowed by a county clerk; he must now charge at a rate consistent with the Committee's regulations.

Also, if the Town of Somers adopted a fee by enactment of a local law before September 1, 1974, the local law is controlling, even if it authorizes a higher fee than that prescribed by the Committee.

As requested, I am enclosing a copy of the model regulations.

I hope that I have been of some assistance. Should any further questions arise, please feel free to contact me.

Sincerely,

Robert J. Freeman
Counsel

Enclosure

RJF:lbb

#285

September 26, 1975

Mrs. Gail S. Wolanin
Town Clerk
Town of New Hartford
New Hartford, New York 13413

Dear Mrs. Wolanin:

Thank you for your interest in complying with the Freedom of Information Law.

With regard to fees, Section 1401.8 of the regulations promulgated by the Committee states that the fees permitted to be charged under the regulations shall govern

> "[E]xcept where fees or exemptions from fees have been established by law, rule or regulation prior to September 1, 1974..."

Therefore, the fee provisions of the regulations are applicable to units of government which had not officially established fees by law, rule or regulation before the effective date of the Freedom of Information Law.

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Therefore, if the fee of one dollar per page is merely reflective of custom, rather than an officially adopted resolution or local law, the fees prescribed by the Committee are controlling.

I hope that I have been of some assistance. Should any further questions arise, please feel free to contact me.

Sincerely,

Robert J. Freeman
Counsel

RJF:lbb

#286

September 29, 1975

Mr. Rudolph N. Silas
Staff Assistant
Broome Legal Assistance Corporation
30 Fayette Street
Binghamton, New York 13901

Dear Mr. Silas:

As I understand the facts stated in your letter, a local housing authority in Broome County has recently adopted a policy resulting in denial of access to reports compiled by housing code enforcement inspectors, based upon Section 88(7)(d) of the Freedom of Information Law.

Section 88(7) provides that, notwithstanding rights of access granted by Section 88(1), the access provisions of the Law

> "shall not apply to information that is...
>
> (d) part of investigatory files compiled for law enforcement purposes."

The scope of the quoted passage, "investigatory files compiled for law enforcement purposes," has not yet been determined by the courts. As such, whether or not the reports in question fall within the scope of the exemption remains to be determined judicially.

Second, and perhaps most important, Section 88(10) of the Law states:

> "[N]othing in this article shall be construed to limit or abridge any existing right of access at law or in equity of any party to records kept by an agency or municipality."

Stated in another way, rights of access previously granted by statute or by the courts are preserved by the Freedom of Information Law and may not be diminished by application of any provision contained in the Freedom of Information Law.

In this regard, the Multiple Residence Law, Section 307, has long provided that

> "[A]ll records of the department shall be public. Upon request the department shall be required to make a search and issue a certificate of any of its records, including violations, and shall have the power to charge and collect reasonable fees for searches or certificates."

"Department" is defined as the "department, bureau, division, agency or person charged with the enforcement" of the Multiple Residence Law [Section 4(10)], which is applicable to "all cities of less than four hundred thousand population and to all towns and villages."

Therefore, in my opinion, the existing right of access to records in possession of the housing authority granted pursuant to the Multiple Residence Law, which is preserved by the Freedom of Information Law, cannot be abridged or denied by application of Section 83(7)(d).

Third, as stated in your letter, the policy adopted by the agency permits landlords, but not tenants, to obtain copies of the information in question. In my view, this practice is inconsistent with the intent of the Law. As the Committee on Public Access to Records has resolved,

> "information accessible under the Freedom of Information Law shall be made equally accessible to any person, without regard to status or interest" [see attached resolution].

I hope that I have been of some assistance. Should any further questions arise, please feel free to contact me.

Sincerely,

Robert J. Freeman
Counsel

Attachment

RJF:lbb

#287 G

September 29, 1975

Mr. Charles Goll 64695
NYSIIS #3203011N
State of New York
Department of Correctional Services
Auburn Correctional Facility
Auburn, New York 13021

Dear Mr. Goll:

I regret to inform you that the responses to the requests for information forwarded to you by Mr. Douglas, Executive Deputy Commissioner of the Department of Correctional Services, and Mr. Clarke, Executive Aide to Commissioner Ward, are consistent with case law governing access to Department records.

In a recent decision, Zuckerman v. New York State Board of Parole (Supreme Court, Sullivan County, March 14, 1975), the court held that unless records in possession of the Department of Correctional Services are specifically made available by law, they are deemed to be confidential. The court stated:

> "Section 221 of the Correction Law provides in part that the Commissioner of Correctional Services shall make rules as to the privacy of records of persons released on parole and information obtained in an official capacity by officers, employees, or members of the department or Board of Parole. Section 29 of the Correction Law, entitled 'Department statistics', provides, inter alia, that the Commissioner shall make rules as to the privacy of records, statistics, and other information collected, obtained and maintained by the Board of Parole and information obtained in an official capacity by officers, employees or members thereof.

> Pursuant to this statutory authority, the Commissioner adopted regulations governing department records on February 14, 1975 (7 NYCRR 5.1 et seq.). Under 7 NYCRR 5.10, any department record not otherwise available by rule or regulation of the department shall be confidential for the sole use of the Department, the Board of Parole and the officers, employees and members thereof."

Since the records that you have requested are not specifically made available, they are deemed to be confidential.

If any new developments arise regarding rights of access to Department records, I will inform you.

I hope that I have been of some assistance. Should any further questions arise, please feel free to contact me.

Sincerely,

Robert J. Freeman
Counsel

bcc: Marshall Maydan, Esq.

RJF:lbb

#288

September 29, 1975

Mr. John W. Orcutt
City Clerk
City of Olean
Municipal Building
Olean, New York 14760

Dear Mr. Orcutt:

Thank you for your interest in complying with the Freedom of Information Law.

Generally, information relating to appraisals and assessments of real property should be made available [Sears Roebuck & Company v. Hoyt, 107 NYS 2d 756 (1951); Sanchez v. Papontas, 303 NYS 2d 711 (1969)].

Nevertheless, records concerning an uncompleted urban renewal project have been found to be confidential. In Sorley v. Clerk, the Mayor and the Board of Trustees of the Incorporated Village of Rockville Centre [30 2d 822-823 (1968)], the Appellate Division held that

> "urban renewal correspondence, data and valuations are not to be deemed public records..., at least so long as the transactions to which they relate remain inchoate and incompleted. In the initial stage, the papers should be treated as confidential communications and items of evidence which, in the public interest, ought not to be disclosed before the transactions in which they are involved are consummated."

The court further stated that the papers in question should be made available when the transactions to which they relate have been finalized:

> "[I]n instances where matters have been completed, the public officers whose acts are reflected in filed papers 'should welcome an opportunity to justify their action'"(id at 823).

Therefore, if the requested records relate to an "inchoate transaction", analogous to the facts described in the Sorley case, in my opinion, access may appropriately be denied.

I hope that I have been of some assistance. Should any further questions arise, please feel free to contact me.

Sincerely,

Robert J. Freeman
Counsel

Committee on Public Access to Records
162 Washington Avenue - 2nd Floor
Albany, New York 12231
Telephone - (518) 474-2791 or 474-2518

RJF:lbb

#289 S

September 29, 1975

Mr. John J. Sheehan
[redacted]

Dear Mr. Sheehan:

Your telegram addressed to Attorney General Lefkowitz has been forwardod to this Committee, which has the responsibility of advising with respect to the Freedom of Information Law.

Although the Committee has no investigative authority, I could write an advisory legal opinion or perhaps contact the appropriate officials of the City of Binghamton if you describe tho nature of your problem and the records which havo not been made available to you.

If I can be of assistance in this regard, please feel free to contact me.

Sincerely,

Robert J. Freeman
Counsel

cc: Hon. Louis Lefkowitz
Attorney General

RJF:lbb

#290 K

September 30, 1975

Mr. Donald M. Kelly
[redacted]

Dear Mr. Kelly:

I regret that I missed your visit on September 15. I am sure that we would have had an interesting discussion.

Many of the issues raised in your letter and the attached materials have been answered in previous correspondence. Nevertheless, I will attempt to answer all of your questions.

First, both the regulations adopted by the Committee [Section 1401.3] and judicial decisions preceding enactment of the Freedom of Information Law provide that payroll information concerning government employees must be made available to the public. Winston v. Mangan, decided in 1973, held that:

> "[T]he names and pay scales of... employees, both temporary and permanent, are matters of public record and represent important fiscal as well as operational information. The identity of the employees and their salaries are vital statistics kept in the proper recordation of departmental functioning and are the primary sources against employment favoritism. They are subject therefore to inspection" [338 NYS 2d 654, 662].

Since the Law preserves existing rights of access granted by statute or by the courts, payroll information must be made available. With respect to this information, the Freedom of Information Law, Section 89(1)(g), also directs that addresses of employees be provided, However, the Law does not specify whether the home or business

address should be disclosed. Therefore, in my opinion, if the fiscal officer of an agency determines that disclosure of employees' home addresses would result in "an unwarranted invasion of personal privacy" [see Section 88(3)], the business address may be provided.

Second, vouchers representing expenditures made concerning a court case should be made available. Section 88(1)(i) of the Law provides access to

> "any other files, records, papers or documents required by any other provision of law to be made available for public inspection and copying."

One such provision of law is Section 51 of the General Municipal Law, which has long provided a right of access to

> "[A]ll books of minutes, entry or account, and the books, bills vouchers, checks, contracts or other papers connected with or used or filed in the office of, or with any officer, board or commission acting for or on behalf of any county, town, village or municipal corporation" [emphasis added].

Therefore, the vouchers that you are seeking are accessible.

Third, you mentioned that you were required to complete a form in order to inspect or copy certain records. In this regard, the regulations promulgated by the Committee provide that a request for records may be oral or in writing. Therefore, an agency may require a written request, except for records that have in the past been made customarily available [see Regulations, Section 1401.6(b)]. There is no requirement, however, that a form prescribed by an agency be completed as a prerequisite to access. If a request in writing is required, any writing should suffice, so long as it reflects identifiable records.

Finally, you need not give a reason for requesting to inspect or copy records. Section 88(6) of the Law provides that

> "[E]ach agency...shall make the records promptly available to any person" [emphasis added].

Moreover, the Committee has resolved that

> "information accessible under the Freedom of Information Law shall be made equally accessible to any person, without regard to status or interest."

As such, it should be the nature and content of the records which determine whether or not they are accessible; the reason for asking for records is irrelevant.

I hope that I have been of some assistance. Should any further questions arise, please feel free to write again.

Sincerely,

Robert J. Freeman
Counsel

Committee on Public Access
to Records
162 Washington Avenue
Albany, New York 12231

cc: Mr. Howard Blanshan
Board of Fire Commissioners
Uniondale Fire District
501 Uniondale Avenue
Uniondale, New York 11553

RJF:lbb

#291

September 30, 1975

Brother David Carroll
[redacted]

Dear Brother Carroll:

Much of the information that you are seeking must be made available under the Freedom of Information Law.

First, the definition of "agency" provided by the Law includes public authorities, such as the Metropolitan Transportation Authority (MTA) and the Triborough Bridge and Tunnel Authority (TBTA) [see enclosed Freedom of Information Law, Section 87(1)].

Second, the Law lists several categories of records which must be made available for inspection and copying. Relevant to your inquiry, the Law grants a right of access to "internal or external audits and statistical or factual tabulations" [Section 88(1)(d)] as well as "materials constituting statistical or factual tabulations" which led to the formulation of policy [Section 88(1)(b)].

Therefore, audits and statistical information must be provided to you on request.

However, I would like to point out that the Freedom of Information Law pertains only to existing records. An agency need not compile a new record in response to a request. Therefore, if, for example, the TBTA has not compiled a record reflecting the specific percentage of your toll used for maintenance of the Triborough Bridge, it has no obligation to do so under the Law.

Requests for information should be directed to the agency in possession of the information sought. I am enclosing a copy of regulations promulgated by the Committee on Public Access to Records which govern the procedural aspects of the Law. The regulations deal with the responsibilities of an agency when a

request has been made, hours for public inspection, the right to appeal if denied access, and fees.

I hope that I have been of some assistance. Should any further questions arise, please feel free to contact me.

Sincerely,

Robert J. Freeman
Counsel

Committee on Public Access to Records
162 Washington Avenue - 2nd Floor
Albany, New York 12231
Telephone: (518) 474-2791 or 474-2518

Enclosures

bcc: Joseph Bogatz, Esq.
Office of Counsel
Triborough Bridge and Tunnel Authority
Triborough Station
Box 35
New York, New York 10035

RJF:lbb

M
#292

October 1, 1975

Mr. A. Molnar
[redacted]

Dear Mr. Molnar:

Your letter of September 24, 1975, addressed to Governor Carey has been forwarded to the Committee on Public Access to Records, which has the responsibility of advising with respect to the Freedom of Information Law.

The Freedom of Information Law grants a right of public access to specific categories of records as well as

> "any other files, records, papers or documents required by any other provision of law to be made available for inspection and copying" [Section 88(1)(i)].

With regard to school districts, one such provision of law is Section 2116 of the Education Law which states that

> "[T]he records, books and papers belonging or appertaining to the office of any officer of a school district are hereby declared to be the property of such district and shall be open for inspection by any qualified voter of the district at all reasonable hours, and any such voter may make copies thereof."

Therefore, financial records in possession of a school district must be made available. Additionally, Section 30 of the General Municipal Law requires all school districts to submit an annual financial report to the State Comptroller. The report consists of a breakdown of monies received and expended, including amounts received from both the state and federal governments.

Although there is no regulatory board which oversees the financial affairs of school districts, the annual financial reports submitted by school districts are reviewed by the Comptroller. Moreover, his office, the Department of Audit and Control, performs periodic audits of school districts.

I hope that I have been of some assistance. Should any further questions arise, please feel free to contact me.

Sincerely,

Robert J. Freeman
Counsel

Committee on Public Access to Records
162 Washington Avenue - 2nd Floor
Albany, New York 12231
Telephone - (518) 474-2791 or 474-2518

bcc: Hon. David W. Burke
Secretary to the Governor

Hon. Mario M. Cuomo
Secretary of State

RJF:lbb

#293 W

October 2, 1975

Mr. Don J. Waters
[redacted]

Dear Mr. Waters:

As requested, I have enclosed copies of the relevant sections of Article 78 of the Civil Practice Law and Rules (CPLR).

In essence, Section 7801 pertains to the nature of the proceeding, which is now far less complex than the previous system involving particular writs. It is important to point out that an Article 78 proceeding can be properly initiated only if administrative remedies have been exhausted [see Section 7801(1)]. With reference to the Freedom of Information Law, both Section 88(8) and Section 1401.7 of the regulations [see enclosed] provide a means of exhaustion of administrative remedies. Stated in another way, if a request has been made followed by a denial of access, you must appeal to "the head or heads, or an authorized representative, of the agency" to exhaust your administrative remedies [Section 88(8), Freedom of Information Law].

Section 7803 describes and limits the questions that may be raised in an Article 78 proceeding. In the case of denial of access, the question is "whether the body or officer failed to perform a duty enjoined upon it by law." This type of proceeding once had to be initiated by a writ of mandamus. Essentially, a proceeding in the nature of mandamus is a statutory remedy, the function of which is to compel the doing of an act by a public body or officer when an act is required to be performed by law, and the relief is limited to enforcement of a legal right based on the duty which the officer or body refuses to perform [Hall v. Suffolk County, 231 NYS 2d 235 (1962)].

Further, in such a proceeding, the petitioner (here, the individual denied access on appeal), must prove that the action taken by the person or body was arbitrary, capricious or unreasonable [Application of Gambino, 4 NY 2d 997 (1956)]. The authority of the courts in an Article 78 proceeding is narrow; if the determination made by the person or body has any rational basis, it cannot be held by the courts to be arbitrary and unreasonable [Campo Corp. v. Feinberg, 303 NY 995 (1952)].

Section 7804 describes the procedural aspects of the proceeding.

Also, on your behalf, I contacted the records access officer for the Department of Education. He informed me that the appeals officer is Commissioner Nyquist.

I hope that I have been of some assistance. Should any further questions arise, please feel free to write again.

Sincerely,

Robert J. Freeman
Counsel

Committee on Public Access to Records
162 Washington Avenue - 2nd Floor
Albany, New York 12231

Enclosures

RJF:lbb

#294

October 6, 1975

Mrs. Irma A. Snyder
[redacted]

Dear Mrs. Snyder:

Thank you for your continued interest in the Freedom of Information Law. I regret that I could not respond by the date desired, since I received your letter on October 6.

The Town of Evans appears to have acted contrary to the regulations promulgated by the Committee. As noted in your letter, the Town has a photocopy machine. Therefore, the fee for reproducing the tentative budget should have been based upon a fee specifically prescribed by law. As the regulations state:

> "[T]he fee for copying records shall not exceed 25 cents per page for photocopies not exceeding 8 1/2 by 14 inches" [Regulations, Section 1401.8 (c)(1)].

A fee based upon actual cost would be appropriate only if the town had no photocopying equipment [Regulations, Section 1401.8(c)(2)] or if the records to be copied were not of a standard size or nature [Regulations, Section 1401.8(c)(3)].

Therefore, in response to your first question, it would appear that the fee of $8.96 charged for a 27 page document reflects noncompliance with the regulations adopted by the Committee.

Next, "implementing the law" means carrying out its provisions. In the case of the Freedom of Information Law, the Legislature directed that the Law become effective September 1, 1974.

Since the regulations adopted by the Committee did not become effective until November 29, 1974, there were no regulations in existence with which an agency could comply prior to November 29, 1974. The memorandum concerning "interim general guidelines" was intended as a temporary and advisory guide to be used in a manner consistent with the spirit of the Law until official regulations could be adopted.

You mentioned in your letter that Town officials have promised to provide a free copy of this year's preliminary budget, even though Town regulations state that a fee of 25 cents per copy should be charged. As stated in the Committee regulations, and the letter to you dated December 26, although an agency cannot charge more than 25 cents per copy, it may provide copies free of charge [Regulations, Section 1401.8(b)].

As requested, I am enclosing a copy of the results of the municipal compliance survey. With reference to municipalities in Erie County, the Towns of Tonawanda, Amherst and Akron have set a 25 cent fee for copying, as have the Villages of Kenmore and Williamsville. The Town of Clarence charges one dollar per copy.

I hope that I have been of some assistance. Should any further questions arise, please feel free to contact me.

Sincerely,

Robert J. Freeman
Counsel

Committee on Public Access to Records
162 Washington Avenue - 2nd Floor
Albany, New York 12231
Telephone: (518) 474-2791 or 474-2518

Enclosure

bcc: Louis R. Tomson
(Refer to L-107)

RJF:lbb

#295

October 7, 1975

Mr. Mark F. Goodfriend
Counsel
Spring Valley Urban Renewal Agency
23 Church Street
Spring Valley, New York 10977

Dear Mr. Goodfriend:

Thank you for your interest in complying with the Freedom of Information Law.

As I understand the facts, a request has been made pursuant to the Freedom of Information Law for records relating to an ongoing urban renewal transaction.

The Law provides access to specific categories of records, as well as

> "any other files, records, papers or documents required by any other provision of law to be made available for inspection and copying" [Section 88(1)(i)].

In this regard, one such provision of law is Section 51 of the General Municipal Law, which has long provided public access to

> "[A]ll books of minutes, entry or account and the books, bills, vouchers, checks, contracts or other papers connected with or used or filed in the office of, or with any officer, board or commission acting for or on behalf of any county, town, village or municipal corporation in this state..."

Therefore, virtually all "papers connected with or used or filed" in the office of a municipality must be made available for public inspection and copying.

However, case law provides that, in some instances, records may properly be deemed privileged and confidential and may be withheld. As the Court of Appeals recently held:

> "[T]he hallmark of this privilege is that it is applicable when the public interest would be harmed if the material were to lose its cloak of confidentiality" [Cirale v. 80 Pine Street Corp., 35 NY 2d 113, 117 (1974)].

The Court also stated that

> "[O]nce it is shown that disclosure would be more harmful to the interests of the government than the interest of the party seeking the information, the overall public interest on balance would then be better served by non-disclosure" [id. at 118].

Moreover, in a footnote, the Court noted that, notwithstanding enactment of the Freedom of Information Law, the common law governmental privilege remains in existence [id. at 117, footnote 1].

With respect to the issue raised in your letter, case law specifically has held that the governmental privilege may be appropriately asserted as a ground for denial of access to urban renewal records. In Sorley v. Clerk, the Mayor and the Board of Trustees of the Incorporated Village of Rockville Centre [30 A.D. 2d 822 (1968)] the Appellate Division held that

> "urban renewal correspondence, data and valuations are not to be deemed public records ... at least so long as the transactions to which they relate remain inchoate and uncompleted. In the initial stage, these papers should be treated as confidential communications and items of evidence which, in the public interest, ought not to be disclosed before the

> transactions in which they are involved are consummated. 'It may not be denied that there are papers concerning governmental matters which are properly treated as secret and confidential' [Matter of Egan, 205 NY 147, 157]. In the case at bar, we would hold that the urban renewal papers sought might be open to public inspection, if it appeared that they related to matters which have been consummated and finalized" [id. at 822-823].

Therefore, in my opinion, if the records sought relate to an "inchoate and uncompleted" transaction as described in the Sorley case, they may be appropriately denied.

I hope that I have been of some assistance. Should any further questions arise, please feel free to contact me.

Sincerely,

Robert J. Freeman
Counsel

Committee on Public Access to Records
162 Washington Avenue - 2nd Floor
Albany, New York 12231
Telephone: (518) 474-2791 or 474-2518

RJF:lbb

#296

October 10, 1975

Mr. Carl Roemer
[redacted]

Dear Mr. Roemer:

Thank you for your continued interest in the Freedom of Information Law.

The authority of the Committee is advisory; it does not have power either to investigate or enforce the provisions of the Freedom of Information Law or the regulations promulgated thereunder. Consequently, enforcement of the Law rests on the shoulders of the public.

As you stated in your letter, the school district has the obligation to perform numerous duties under the Law. A records access officer [see enclosed Regulations, Section 1401.2] and an appeals person or body [Regulations, Section 1401.7; Freedom of Information, Section 88(8)] must be designated. A subject matter list of "any records which shall be produced, filed or first kept or promulgated" after September 1, 1974, must be compiled [see Freedom of Information Law, Section 88(4); Regulations, Section 1401.6]. In addition, regulations no more restrictive than those promulgated by the Committee must be adopted by the school district.

As stated earlier, the Committee does not have the authority to enforce the requirements imposed by the Law, nor can the Committee require the school district to produce records.

Since you have been denied access and the right to appeal has been constructively denied, it would appear that your only recourse, under the circumstances, is judicial review pursuant to Article 78 of the Civil Practice Law and Rules [see Section 88(8), Freedom of Information Law].

I regret that I cannot be of greater assistance. Should any further questions arise, please feel free to contact me.

Sincerely,

Robert J. Freeman
Counsel

Committee on Public Access to Records
162 Washington Avenue - 2nd Floor
Albany, New York 12231
Telephone: (518) 474-2791 or 474-2518

Enclosures

cc: Board of Education
Cooperstown Central School District
Chestnut Street
Cooperstown, New York 13405

RJF:lbb

#297 C

October 10, 1975

Mr. Donald A. Cardwell
[redacted]

Dear Mr. Cardwell:

Your letter of October 4 addressed to the Attorney General has been forwarded to the Committee on Public Access to Records, which has the responsibility of advising with respect to the Freedom of Information Law.

The Freedom of Information Law provides a right of public access to numerous categories of records in possession of government. However, notwithstanding rights of access granted, the Law states that its access provisions do not apply to some categories of information.

With regard to your question, Section 88(7) of the Law states that rights of access do not apply

> "to information that is:
>
> (a) specifically exempted by statute..."

The attorney for the Town of Oyster Bay stated that the documents sought were prepared for litigation. The applicable provision of law upon which he based the denial is Section 3101(d) of the Civil Practice Law and Rules, which provides that:

> "[T]he following shall not be obtainable unless the court finds that the material can no longer be duplicated because of a change in conditions and that withholding will result in injustice or undue hardship:
>
> 1. any opinion of an expert prepared for litigation; and

2. any writing or anything created by or for a party or his agent in preparation for litigation."

The title search reports in question were, according to the Town Attorney, prepared for litigation, and they can be duplicated by the title company which prepared them. Therefore, it appears that the Town need not provide access to the reports, because disclosure is exempted by statute as envisioned by Section 88(7) of the Freedom of Information Law.

Nevertheless, one of the few cases decided under the Law held differently. In essence, the court held that "specifically exempted by statute" does not refer to exemptions under Article 31 of the Civil Practice Law and Rules, but refers instead to records specifically exempted, such as income tax or juvenile offender records [Burke v. Yudelson, 368 NYS 2d 779 (1975)]. However, it is emphasized that the decision is the first of its kind, it emanated from Monroe County, and it is open to question whether judges in Nassau County or appellate courts would hold similarly.

As such, it is impossible to provide a definitive response as to the propriety of the Town's denial. Greater judicial direction must be given before the issue can be answered with certainty.

I hope that I have been of some assistance. Should any further questions arise, please feel free to contact me.

Sincerely,

Robert J. Freeman
Counsel

Committee on Public Access to Records
162 Washington Avenue - 2nd Avenue
Albany, New York 12231
Telephone: (518) 474-2791 or 474-2518

cc: Robert W. Schmidt, Deputy Town Attorney

Mr. Albert Singer, Administrative Director
Department of Law

RJF:lbb

#298

October 29, 1975

Mr. Ellis Mott
Records Access Officer
Office of Public Affairs
New York City Board of
Education
Room 1214
110 Livingston Street
Brooklyn, New York 11201

Dear Mr. Mott:

Thank you for your interest in complying with the Freedom of Information Law.

The Law provides little guidance with regard to the specificity required in a "subject matter list." However, several school districts have compiled such lists based upon records disposition schedules prepared by the State Education Department.

I am enclosing a copy of the schedule, which I believe will be of substantial aid in preparing a subject matter list.

I hope that I have been of some assistance. Should any further questions arise, please feel free to contact me.

Sincerely,

Robert J. Freeman
Counsel

Committee on Public Access to Records
162 Washington Avenue - 2nd Floor
Albany, New York 12231
Telephone: (518) 474-2791 or 474-2518

Enclosure

RJF:lbb

#299 w

October 31, 1975

Ms. Ristiina Wigg
Unit President
103 Market Street
Poughkeepsie, New York 12601

Dear Ms. Wigg:

Thank you for your interest in the Freedom of Information Law.

While it is true that agencies of government must provide access to payroll information, it appears that the Mid-Hudson Library System is not an "agency" as defined by the Law and therefore is not subject to its provisions.

Section 87(1) of the Law defines "agency" as

> "any state or municipal board, bureau, commission, council, department, public authority, public corporation, division, office or other governmental entity performing a governmental or proprietary function for the state of New York or one or more municipalities therein."

The System does not fall within any of the specific kinds of agencies within the definition, but is it a governmental entity performing a governmental function? In my opinion, it is not.

Although the System has many of the trappings of a governmental entity (i.e., funding from government, participation in state health and retirement plans), it is a private, separate legal entity controlled by a board of trustees

which has the power to hire and fire its employees without any governmental infringement. Neither the System nor its trustees possess governmental powers; they merely provide a service (see New York Public Library v. New York State, 357 NYS 2d 522, 533, 1974).

Decisional law upholds this conclusion. The Appellate Division has held that the New York Public Library is not a government or public employer within the Taylor Law (New York Public Library, supra). The Comptroller has held that a cooperative library is not governmental in nature (Op. State Compt. 67-543) and that cooperative library service systems, although established under grant of a charter by the State Board of Regents, are not municipal corporations (Op. State Compt. 67-200). Further, neither a library system nor an association library has state sovereignty, and the Commissioner of the State Department of Education has held that obligations executed by a free association library do not in any way encumber the faith or credit of a school district from which it receives funds (Matter of Appeal of Richard L. Boyle, 1968, 7 Education Department Rep. 102).

In view of the opinions cited and their various sources, in my opinion, the Mid-Hudson Library System is not an agency as defined by the Freedom of Information Law and is therefore not within the scope of the Law.

I hope that I have been of some assistance. Should any further questions arise, please feel free to call me.

Very truly yours,

Robert J. Freeman
Counsel

cc: Leon Karpel, Director
Mid-Hudson Library System
103 Market Street
Poughkeepsie, New York 12601

RJF/sd

S
#300

October 31, 1975

Mr. Joel H. Sachs
Town Attorney
Town of Greenburgh
Box 205
Elmsford, New York 10523

Dear Mr. Sachs:

Thank you for your interest in complying with the Freedom of Information Law.

The question raised involves public access to application forms submitted to the Greenburgh Police Department by police officers requesting permission to accept off-duty employment.

The Freedom of Information Law grants public access to specific categories of records, as well as

> "any other files, records, papers or documents required by any other provision of law to be made available for public inspection and copying" [Section 88(1)(i)].

In this regard, one such provision of law is Section 51 of the General Municipal Law, which provides access to:

> "[A]ll books of minutes, entry or account, and the books, bills, vouchers, checks, contracts or other papers connected with or used or filed in the office of, or with any officer, board or commission acting for or on behalf of any county, town, village or municipal corporation in this state..."

Consequently, virtually all "papers connected with or used or filed in a municipal office are accessible.

Nevertheless, to protect against an "unwarranted invasion of personal privacy, Section 88(3) of the Freedom of Information Law enables an agency or municipality to "delete identifying details" when making records available. Therefore, an official of a municipality has discretion to withhold information if in his judgment disclosure would result in an unwarranted invasion of personal privacy.

Consequently, any "identifying details" appearing on the forms may be deleted when making the forms available to the public.

I hope that I have been of some assistance. Should any further questions arise, please feel free to contact me.

Very truly yours,

Robert J. Freeman
Counsel

RJF/sd

#301

October 31, 1975

Hon. Edwin E. Mason
The Senate
State of New York
Legislative Office Building
Albany, New York

Dear Senator Mason:

Thank you for your interest in the Freedom of Information Law.

In response to Mr. Roemer's question, I wrote the attached letter and sent a copy to the school district involved. As you know, the authority of the Committee on Public Access to Records is advisory; it has no enforcement power. Consequently, after an aggrieved individual has exhausted the administrative remedies provided by the Freedom of Information Law and the regulations promulgated thereunder, his sole recourse is to the courts.

I also telephoned Mr. Roemer this morning and further explained the nature and duties of the Committee.

I regret that I cannot be of greater assistance. Should any questions arise, I am at your service.

Respectfully yours,

Robert J. Freeman
Counsel

enc.
RJF/sd

FT302

August 11, 1975

Mr. Thomas G. Conway
Counsel
Legal Bureau
Department of Agriculture & Markets
Income Tax Bureau Building
State Office Building Campus
Albany, New York 12235

Dear Mr. Conway:

Thank you for your interest in complying with the Freedom of Information Law.

As you state the facts,the Department of Agriculture & Markets has received a request for records reflecting the names of stockholders and the percentage of their interests in several corporations which are licensed as milk dealers pursuant to Agriculture & Markets Law.

In my opinion, the Freedom of Information Law does not require the Department to disclose tho information sought.

Section 88(3) of the Freedom of Information Law authorizes the Committee on Public Access to Records to "promulgate guidelines for the deletion of identifying details for specified records." However, the Committee has not yet acted in this regard. Consequently, in my opinion, agency officials may in their discretion delete identifying details pursuant to Section 88(3) or withhold information pursuant to Section 88(7)(c) when in their judgment disclosure would constitute an "unwarranted invasion of personal privacy."

It is emphasized that several problems have arisen in interpreting these provisions. First, what is the line of demarcation between an innocuous or "warranted" invasion of personal privacy and an "unwarranted" invasion? Because the Committee has not "promulgated guidelines," decisions to disclose or deny access must be made subjectively, on a case by case basis.

Second, in cases where information is required for licensing or regulation, to what extent should personal information be provided in order to permit the public to know whether the agency is effectively performing its regulatory functions? As in the case of your Department, personal information regarding corporate officers and stockholders must be disclosed on license or registration applications to determine whether the individuals concerned have committed violations or felonies. Should their names and the amount of their interests be disclosed on request or should disclosure be considered "unwarranted"?

Although an agency may have good reason to compile personal information, the act of collection of information by a regulatory agency alone does not, in my opinion, make public access acceptable in all cases. Otherwise, it would appear that no invasion would be "unwarranted", and that Sections 88(3) and (7)(c) would be all but meaningless.

Third, it may be in the public interest to disclose the names of individuals licensed to do a particular kind of business, since the purpose of a license is to notify the public that an individual or company is qualified to perform a particular function. Nevertheless, in my view, providing access to the names of stockholders of a licensed firm and the amount of their interests is quite a different matter. Essentially, the public would be permitted access to information concerning private individuals' investments in private companies.

Under federal law, there is no statutory provision which specifically exempts from disclosure names or other identifying details concerning stockholders in possession of a federal agency.

However, Mr. Barry Rubin, an attorney for the Federal Trade Commission (FTC) informed me that a request for such information would be denied by his agency under the Federal Freedom of Information Act [5 U.S.C.A. 552] as

> "personnel and medical files and <u>similar</u> files the disclosure of which <u>would</u> constitute a clearly unwarranted invasion of personal privacy" [5 USC §552(b)(6); emphasis added].

According to Rubin, the policy adopted by the FTC is based on the holding in Wine Hobby USA, Inc. v. United States Internal Revenue Service, [502 F. 2d 133 (1974)], decided by the Court of Appeals for the Third Circuit. The Court stated that

> "[S]ince the thrust of the exemption is to avoid unwarranted invasions of privacy, the term 'files' should not be given an interpretation that would often preclude inquiry into this more crucial question. Furthermore, we believe the list of names and addresses is a file 'similar' to the personnel and medical files specifically referred to in the exemption. The common denominator in 'personnel and medical and similar files' is the personal quality of information in the file, the disclosure of which may constitute an unwarranted invasion of personal privacy" [id at 135].

In arriving at its decision, the Court found that disclosure would result in an invasion of privacy, balanced "the seriousness of the invasion with the purpose asserted for release" [id at 136], and determined that disclosure would be clearly unwarranted. The Court based its findings on the balancing test prescribed in Getman v. N.L.R.B. [450 F. 2d 670 (1971)].

Similarly, there has been no statutory or decisional pronouncement concerning public rights of access to stockholder information in possession of a state governmental entity. However, it is clear that the right of access to such information in possession of a corporate entity is limited. As such, it appears that public access to the information in question would thwart both the intent of the legislature and long standing judicial findings [see e.g. Business Corporation Law, Sections 718, 518(c), 1315(a), 624(b); Banking Law, Section 6023(2); Matter of Steinway, 159 N.Y. 250, 263 (1899); Malone v. Dimco Corp., 328 NYS 2d 65,67 (1965); Matter of Newman v. Smith, 263 App. Div. 85,87-88, 31 NYS 2d 576, 579 (1941); Lavine v. Pat-Plaza Amusements, 324 NYS 2d 145 (1971);

In re H. Verby Co., 38 A.D. 2d 855, 330 NYS 2d 92, 93 (1972); Gottdenker v. Philadelphia & Reading Corp., 295 NYS 2d 682, 685 (1968); Murphy v. Fiduciary Counsel, Inc., 40 A.D. 2d 688, 336 NYS 2d 913, 914 (1972); aff'd, 32 NY 2d 892, 346 NYS 2d 813 (1973)].

Finally, as you mentioned in your letter of May 27, the access provisions of the Law do not apply to information that is

> "confidentially disclosed to an agency and compiled and maintained for the regulation of commercial enterprise, including trade secrets, or for the grant or review of a license to do business and if openly disclosed would permit an unfair advantage to competitors of the subject enterprise..." [Section 88(7)(b)].

The information in controversy was confidentially disclosed and is maintained for purposes of both regulation and licensing. Although the courts have not yet interpreted Section 88(7)(b), it appears that three conditions must be met, i.e. that the information be confidentially disclosed, used for regulation or licensing and that disclosure would result in an unfair advantage to competitors. Therefore, if disclosure of the information would adversely affect the business position of the dealers in question, there is no right of access.

However, as stated previously, even if Section 88(7)(b) is inappropriate as a basis for denial of access, the information sought may be withheld pursuant to Section 88(3) if in your judgment disclosure would constitute an unwarranted invasion of personal privacy.

I hope that I have been of some assistance. Should any further questions arise, please feel free to contact me.

Sincerely,

Robert J. Freeman
Counsel

RJF:lbb

303

November 6, 1975

Mr. Leonard B. Wachsman
Research Director
Civil Service Merit Council
3535 DeKalb Avenue
Bronx, New York 10467

Dear Mr. Wachsman:

The opinion given regarding Tucker V. Town of Islip was an oral opinion given to a reporter; nothing was written. My response was merely an advisory opinion given after the reporter had recited a particular factual account of events. Whatever I said had no bearing on the controversy, which was settled out of court.

Having reviewed our correspondence, it appears that I provided an opinion regarding the issues you have raised in a letter dated April 16, 1975. As such, there is nothing more that I can do.

I would like to emphasize once again that my opinion in the Tucker dispute was just that, an opinion. It did not carry with it any weight; the municipality involved was free to either heed the advice given or reject it.

I regret that I cannot be of greater assistance.

Very truly yours,

Robert J. Freeman
Counsel

Committee on Public Access
to Records
162 Washington Avenue
Albany, New York 12231
telephone: (518) 474-2518
474-2791

RJF/sd

T

#304

November 6, 1975

Mr. Jordan E. Pappas
Houghton & Pappas
Attorneys and Counselors at Law
17 Main Street East
Rochester, New York 14614

Dear Mr. Pappas:

The Freedom of Information Law provides a right to inspect and copy several categories of records. It appears that the document or parts thereof in possession of the Town of Brighton prepared by the New York Fire Insurance Underwriters is accessible under the Law.

Section 88(1)(d) of the Law provides access to "statistical or factual tabulations made by or for the agency." Therefore, if the document was prepared for the Town, the statistical or factual information contained therein must be made available.

Perhaps more importantly, Section 88(1)(i) grants access to:

> "any other files, records, papers or documents required by any other provision of law to be made available for public inspection and copying."

One such provision of law is Section 51 of the General Municipal Law, which has long provided access to:

> "[A]ll books of minutes, entry or account, and the books, bills, vouchers, checks, contracts or other papers connected with or used or filed in the office of, or with any officer, board or commission acting for or on behalf of any county, town, village or municipal corporation in this state..."

Reading the Freedom of Information Law in conjunction with Section 51 of the General Municipal Law, virtually all "papers connected with or used or filed" by a municipality are accessible to the extent that the records sought do not fall within any of the four categories of information to which there is no right of access [Section 88(7)]. Briefly, these categories consist of information exempt from disclosure by statute, information confidentially disclosed relating to regulation of commercial enterprise and licensing, information which if disclosed would constitute an unwarranted invasion of personal privacy, and investigatory files compiled for law enforcement purposes.

In addition to the areas of deniable information described above, the courts have stated that some communications in possession of government should remain confidential. The Court of Appeals has held that government may withhold information if disclosure would be detrimental to the public interest [Cirale v. 80 Pine St. Corp., 35 NY 2d 113 (1974)]. Consequently, if disclosure of information contained in the document furnished to the Town would adversely affect the public interest, that information need not be disclosed.

In this regard, it is possible that the Underwriters' report includes information which if disclosed could undermine the ability of the Town to fight fires or otherwise protect its citizens. Although only a court can determine whether such information is confidential and privileged [Cirale, supra, 118-119], it would appear that disclosure of information similar to that described in the preceding sentence would be detrimental to the public interest.

Therefore, it is likely that much of the information contained in the document, such as statistical or factual findings, must be made available pursuant to the Freedom of Information Law. The Town, however, may deny access to those portions of the report which are analogous to the deniable information described in Section 88(7) or which may properly be deemed privileged.

I hope that I have been of some assistance. Should any further questions arise, please feel free to contact me.

Very truly yours,

Robert J. Freeman
Counsel

#305

November 6, 1975

Ms. Marguerite Plato
Clerk
Village of Central Square
Central Square, New York 13036

Dear Ms. Plato:

I am in receipt of your letter signifying changes in procedures adopted pursuant to the Freedom of Information Law by the Village of Central Square.

Thank you for your interest in complying with the Law and regulations promulgated thereunder by the Committee.

Very truly yours,

Robert J. Freeman
Counsel

Committee on Public Access
to Records
162 Washington Avenue
Albany, New York 12231
telephone: (518) 474-2518
474-2791

RJF/sd

H
#306

November 6, 1975

Mr. Charles P. Hervish
[redacted]

Dear Mr. Hervish:

Thank you for your interest in the Freedom of Information Law.

As the situation is described in your letter and the article published in Newsday, it appears that the Town of Huntington is acting in contravention of the Freedom of Information Law and the regulations promulgated thereunder by the Committee on Public Access to Records.

The regulations provide that unless a fee had been officially authorized by law prior to September 1, 1974, an agency can charge no more than twenty-five cents per page for photocopies. According to the Newsday article, the fee imposed by the Town is based upon policy rather than a provision of law. As such, the Town is obliged to comply with the regulations adopted by the Committee.

Moreover, the regulations specifically provide that there shall be no fee charged for search for records except where such a fee was authorized by law prior to the effective date of the Freedom of Information Law [Section 1401.8(a)(2)].

The Committee lacks power to enforce the Freedom of Information Law; it can only advise [Freedom of Information Law, Section 88(9)(a)(i)]. Therefore, enforcement of the Law rests on the shoulders of the public, which has the burden of challenging agency policies. Nevertheless, I will forward a copy of this opinion to the Town of Huntington.

I hope that I have been of some assistance. Should any further questions arise, please feel free to contact me.

Very truly yours,

Robert J. Freeman
Counsel

cc: Mr. Phillip Meyer
Office of the Town Supervisor

Committee on Public Access
to Records
162 Washington Avenue
Albany, New York 12231
telephone: (518) 474-2518
474-2791

rjf/sd

H

#307

November 6, 1975

Mr. Edward W. Heikens
[redacted]

Dear Mr. Heikens:

I apologize for the delay in responding to your letter.

Although the Committee is responsible for advising with respect to the Freedom of Information Law, requests for records should be directed to agencies in possession of the information sought.

Therefore, I have forwarded your letter to Mr. Tony Costanzo, Public Relations Officer for the Division of Military and Naval Affairs. I am sure that he will respond to your inquiry accordingly.

If I can be of further assistance, please do not hesitate to contact me.

Very truly yours,

Robert J. Freeman
Counsel

cc: Mr. Tony Costanzo

Committee on Public Access
to Records
162 Washington Avenue
Albany, New York 12231
telephone: (518) 474-2518
474-2791

RJF/sd

(L
#308

November 6, 1975

Ms. Carol S. Greenwald
Assistant Professor of Politics
Richmond College
130 Stuyvesant Place
Staten Island, New York 10301

Dear Professor Greenwald:

Thank you for your interest in the Freedom of Information Law.

As requested, I am enclosing copies of the Law, the regulations promulgated thereunder, which deal with the procedural aspects of the Law and which have the force and effect of law, and resolutions adopted by the Committee pursuant to its advisory authority.

With regard to forms used in seeking access to records, there is no specific form prescribed by the Committee. As the regulations provide [See Section 1401.6], oral requests should be accepted concerning records which have in the past been made customarily available. Additionally, failure to submit a form prescribed by an agency cannot be a valid ground for denial of access. So long as the request is reflective of "identifiable records", any writing should suffice.

I hope that I have been of some assistance. Should any further questions arise, please do not hesitate to contact me.

Very truly yours,

Robert J. Freeman
Counsel

enc. (3)

Committee on Public Access
to Records
162 Washington Avenue
Albany, New York 12231

K
#309

November 7, 1975

Mr. Kenneth W. Kitzinger
Attorney at Law
165 Merrymont Drive
Cheektowaga, New York 14225

Dear Mr. Kitzinger:

Thank you for your interest in complying with the Freedom of Information Law.

In my opinion, it is unnecessary to republish the Fire District's regulations in a newspaper to provide notice of a change in the regulations. Amendment of the regulations by the Board of Fire Commissions at an official meeting of the Board should suffice.

Further, as stated in Committee regulations, each agency

> "shall publicize by posting in a conspicuous location wherever records are kept and/or by publication in a local newspaper of general circulation..." [Section 1401.9]

the information described in subdivisions (a), (b) and (c) of Section 1401.9. Consequently, notice may be given by posting in appropriate locations.

I hope that I have been of some assistance. Should any further questions arise, please feel free to contact me.

Very truly yours,

Robert J. Freeman
Counsel

#310

November 12, 1975

Mr. Michael A. O'Connor
Coordinating Attorney
Community Action
for Legal Services, Inc.
CAP Projects
335 Broadway
New York, New York 10013

Dear Mr. O'Connor:

Thank you for your interest in the Freedom of Information Law.

The Committee on Public Access to Records has not adopted any official resolution regarding interpretation of Section 88 (1)(b) of the Law. However, as you intimated in your letter, the legislative history of the Law provides assistance concerning interpretation of the provision.

The original language of Section 88(1)(b) is reflected in McKinney's Law of 1974, Chapter 578:

> "those statements of policy and interpretations which have been adopted by the agency and any documents, memoranda, data, or other materials which led to the formulation thereof..."

The provision was amended in Chapter 579 by the insertion of the following underlined addition:

> "those statements of policy and interpretations which have been adopted by the agency and any documents, memoranda, data or other materials constituting statistical or factual tabulations which led to the formulation thereof..."

Therefore, it appears that the Legislature intended that statistical or factual materials used in the formulation of policy must be made available, while the deliberative or advisory matter need not be disclosed.

This finding is bolstered by Senator Ralph J. Marino, the Senate Sponsor of the Freedom of Information Law, who wrote:

> "In requiring the disclosure of background information the New York Freedom of Information Law goes far beyond the Federal Act's requirement regarding the disclosure of statements of policy and interpretations which provides an exemption for inter-agency and intra-agency memoranda. It is anticipated that documents or memoranda developed by staff members or outside consultants designed to provide recommendations for use in making policy determinations would not be made available, while hard statistical or factual data which led to a determination would be available. The draftsmen were fearful that to allow the disclosure of recommendations in the form of opinions would result in staff members and others becoming hesitant to express their opinions candidly in writing" [Marino, The New York Freedom of Information Law, 43 Ford. L. Rev. 83, 86-87 (1974)].

Due to the legislative history as well as the direction given by Senator Marino, in my opinion, the Law provides a right of access only to statistical or factual materials leading to formulation of policy. It is noted, however, that the Law is permissive. Although there is no right of access to advisory memoranda, and an agency need not disclose, access may be provided. The Law imposes an obligation neither to withhold nor grant access to the information in question.

I hope that I have been of some assistance. Should any further questions arise, please feel free to contact me.

Very truly yours,

Robert J. Freeman
Counsel

Committee on Public Access
to Records
162 Washington Avenue
Albany, New York 12231
telephone: (518) 474-2518
474-2791

RJF/sd

FOIL-L

November 12, 1975

Senator Norman J. Levy
The Senate
State of New York
Albany, New York 12224

Dear Senator Levy:

Thank you once again for your continued interest in the Freedom of Information Law.

The issue raised by Mrs. Lokos involves rights of access under the Freedom of Information Law coupled with protection of privacy of school district employees.

The Law grants a right of access to specific categories of records as well as those records required to be made available by any other provision of law [see enclosed Freedom of Information Law, Section 88(1)(i)]. One such provision of law is Section 2116 of the Education Law, which states:

> "[T]he records, books and papers belonging or appertaining to the office of any officer of a school district are hereby declared to be the property of such district and shall be open for inspection by any qualified voter of the district at all reasonable hours, any such voter may make copies thereof."

The Freedom of Information Law affects the quoted statute in several ways. First, all units of government must adhere to the regulations promulgated by the Committee regarding access. Second, the Committee has resolved that accessible records shall be made equally available to "any person, without regard to status or interest" (see attached resolution). Consequently, if a record in possession of a school district is accessible, it should be made equally available to any person, rather than only to qualified voters of the district. Third, and perhaps most relevant under the circumstances to which you have referred, the Freedom of Information Law provides that units of government, in their discretion, may act to prevent an "unwarranted invasion of personal privacy."

Section 88(3) states:

"To prevent an unwarranted invasion of personal privacy, the committee on public access to records may promulgate guidelines for the deletion of identifying details for specified records which are to be made available. In the absence of such guidelines, an agency or municipality may delete identifying details when it makes records available. An unwarranted invasion of personal privacy includes, but shall not be limited to:

a. Disclosure of such personal matters as may have been reported in confidence to an agency or municipality and which are not relevant or essential to the ordinary work of the agency or municipality;

b. Disclosure of employment, medical, or credit histories or personal references of applicants for employment, except such records may be disclosed when the applicant has provided a written release permitting such disclosure;

c. Disclosure of items involving the medical or personal records of a client or patient in a hospital or medical facility;

d. The sale or release of lists of names and addresses in the possession of any agency or municipality if such lists would be used for private, commercial or fund-raising purposes;

e. Disclosure of items of a personal nature when disclosure would result in economic or personal hardship to the subject party and such records are not relevant or essential to the ordinary work of the agency or municipality."

Since the Committee has not promulgated guidelines regarding privacy, the school district has discretion to determine what constitutes such an unwarranted invasion. Subdivisions "a" through "e" above are merely examples of unwarranted invasions of privacy. However, they do provide some indication of the intent of the Legislature. For example, records of a personal nature may be withheld when such records "are not relevant or essential to the ordinary work of an agency or municipality." Consequently, if the records are relevant to the work of the school district, it appears that disclosure would be favored. Additionally, since Mrs. Lokos stated that her concern is not with the names of individual employees, but the substance of the information, the school district could provide the records after having deleted the identifying details.

In the situation at issue, it is possible that some of the records may or may not be relevant to the work of the school district. Some of the records may be accessible pursuant to other provisions of law. For instance, a traffic infraction docketed by a court is accessible under Section 255 of the Judiciary Law. As such, denial of a judicial record in possession of a school district would serve no purpose.

In any event, it is reemphasized that the school district has discretion to determine what constitutes an unwarranted invasion of personal privacy. Therefore, a decision to disclose or withhold the records in question is within the power of the school district officials.

I hope that I have been of some assistance. If you would like to discuss the matter further, please feel free to contact me.

Respectfully yours,

Robert J. Freeman
Counsel

enc. (2)

STATE OF NEW YORK
COMMITTEE ON PUBLIC ACCESS TO RECORDS FOIL-AO-312

DEPARTMENT OF STATE, 162 WASHINGTON AVENUE, ALBANY, NEW YORK 12231
(518) 474-2518, 2791

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GILBERT P. SMITH
ROBERT W. SWEET
EXECUTIVE DIRECTOR
ROBERT J. FREEMAN

November 12, 1975

Michael D. Kaufman, Esq.
MFY Legal Services, Inc.
CAP Projects
214 East 2nd Street
New York, New York 10009

Dear Mr. Kaufman:

Thank you for your interest in the Freedom of Information Law.

It is important to note at the outset that the authority of the Committee is advisory; it has no enforcement power. Therefore, the Committee is incapable of ordering an agency to act.

As requested, I am enclosing copies of regulations promulgated by the Committee, which have the force and effect of law, as well as resolutions adopted pursuant to its advisory authority [§88(9)(a)(i)]. The regulations should be of substantial assistance with regard to the procedural aspects of the law and requirements relative to the compilation of a subject matter list.

Because the regulations concern procedural rather then substantive requirements of the Law [see the Law, §§88(2), (4) and (9)(a)(ii)], promulgation of any rule specifically directing the Appeal Board to provide access to certain records would be beyond the scope of the Committee's authority.

Due to the logic and structure of the Law, it appears that Mr. Trow's contentions may have merit. Section 88(1) provides a right of access to enumerated categories of records. Section 88(7) lists categories of information to which rights of access do not apply. However, there are innumerable kinds of records which fall within neither the accessible nor the deniable categories of records.

The subject of the controversy, the index cards, falls into a grey area of records in which the law does not specify a right of access. Consequently, due to the structure of §88, it appears that records not analogous with any of the categories listed in §88(1) may be denied.

In this regard, pursuant to its duty to recommend changes in the Freedom of Information Law, the Committee proposed that the logic of the statute be stated differently. In essence, the Committee recommended making all records accessible, except those categories of records specifically enumerated [see enclosed, S. 5580] as deniable records. The proposed bill will be reintroduced during the next session of the legislature.

In my opinion, although the information contained on the index cards is reflective of final opinions rendered by the Board, the cards are not reflective of "final opinions...made in the adjudication of cases" [§88(1)(a)].

Section 88(1)(d) provides access to "statistical or factual tabulations made by or for the agency." as Mr. Trow asserted in his letter, the information is neither statistical nor factual, but rather is deliberative and reflective only of an opinion reached by a staff member.

Section 88(1)(e) pertains to staff manuals and instructions to staff that affect members of the public. According to Mr. Trow, with whom I discussed the matter on your behalf, his staff has not been instructed to use the index cards as a basis for decision-making.

With regard to the subject matter list, §88(4) provides that

> "[E]ach agency...shall maintain and make available for public inspection and copying...a current list, reasonably detailed, by subject matter of any records which shall be produced, filed or first kept or promulgated after the effective date of this article. Such list may also provide identifying information as to any records in the possession of the agency...on or before the effective date of this article."

The Law does not require that the subject matter list be a compilation of every record an agency has in its possession; rather, it is a list of the subjects or file categories under which records are kept. Also, the list should be compiled and maintained in sufficient detail to permit the person seeking access to identify the file category of the record sought. Very simply, a person who is seeking a particular kind of record should be able to discover the category of records within which the particular record is filed after having perused the list.

I would also like to point out that while §88(4) requires that the list be made available for public inspection and copying, and that the list must make reference to all categories of records in possession of an agency, not all of the records referred to in the list are accessible. For example, although the list must include reference to records exempt from disclosure by statute and investigatory materials, those records need not be made available.

To reiterate, the Law requires that the subject matter list be "reasonably detailed." The requirements of this standard have not yet been outlined judicially. While it is possible that a court might require that final opinions issued by the Board must be indexed, it is also possible that a court could find that the final opinions as a whole constitute a category within the list, and need not be indexed in greater detail.

As stated earlier, the authority of the Committee is advisory. Due to the lack of clarity regarding the requirements imposed by the Law with respect to the subject matter list, it would be inappropriate to recommend that the Board is acting in contravention of the Law. Such a finding can only be made judicially.

I hope that I have been of some assistance. Should any further questions arise, please feel free to contact me.

Sincerely,

Robert J. Freeman
Counsel

enc. (2)

cc: Irving Trow, Esq.
New York State Department
of Labor

D

#313

November 12, 1975

Mr. John R. Dalton
[redacted]

Dear Mr. Dalton:

As discussed in our telephone conversation of November 3, the Freedom of Information Law grants the right to inspect and copy minutes of meetings of a volunteer fire company.

Pursuant to Section 1401.5 of the regulations adopted by the Committee on Public Access to Records

> "(a) Each agency and municipality shall accept requests for public access to records and produce records during all hours they are regularly open for business.
>
> (b) In agencies and municipalities which do not have daily regular business hours, a written procedure shall be established by which a person may arrange an appointment to inspect and copy records. Such procedures shall include the name, position, address and phone number of the party to be contacted for the purpose of making an appointment."

Therefore, if the fire company has regular business hours, you may inspect and copy the minutes during those hours. If there are no regular business hours, the fire company is obliged to provide a procedure whereby an appointment can be made.

I am enclosing copies of the Freedom of Information Law and regulations. The regulations should be particularly helpful to you, since they deal with the procedural aspects of the Law and specify your rights as well as the duties of government.

I hope that I have been of some assistance. Should any further questions arise, please feel free to contact me.

Very truly yours,

Robert J. Freeman
Counsel

enc. (2)

Committee on Public Access
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telephone: (518) 474-2518
474-2791

RJF/sd

H
#314

November 13, 1975

Ms. Mary F. Hart
Town Clerk designee
437 Bedford Road
Bedford Hills, New York 10507

Dear Ms. Hart:

I congratulate you on your recent election victory, and I thank you for your interest in complying with the Freedom of Information Law.

I am enclosing a package of materials which should prove helpful in effectively implementing and interpreting the Freedom of Information Law. With regard to your inquiry concerning the subject matter list, the list itself is not compiled by the Committee; rather, it must be compiled by agencies and municipalities. References to the subject matter list can be found in the Law [Section 88(4)], the regulations [Sections 1401.2 and 6] and in the enclosed speech [pages 10 and 23-24].

I hope that I have been of some assistance. Should any further questions arise, please feel free to contact me.

Very truly yours,

Robert J. Freeman
Counsel

enc.

Committee on Public Access
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162 Washington Avenue
Albany, New York 12231
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474-2791

RJF/sd

#315

November 17, 1975

Mr. Thomas Alden Bass
[redacted]

Dear Mr. Bass:

Your letter of November 5, 1975 addressed to the Attorney General has been forwarded to the Committee on Public Access to Records, which is responsible for advising with respect to New York's Freedom of Information Law.

Since the Committee is not a repository of records, it is impossible for this office to provide copies of the information sought. I suggest that you request the information directly from the agencies in possession of the records. For example, an inquiry concerning an arrest or a traffic infraction should be addressed to the police department which made the arrest. In making your request, it is advised that you provide as much identifying information as possible, such as dates, charges, locations and descriptions of the incidents.

With regard to the Privacy Act of 1974, that statute pertains only to federal agencies; records in possession of state governments are not within the scope of the Act. Therefore, I recommend that you contact the federal agencies which you feel have records pertaining to you in their possession.

I regret that I cannot be of greater assistance. Should any further questions arise regarding the Freedom of Information Law, please feel free to contact me.

Very truly yours,

Robert J. Freeman
Counsel

cc: Office of the Solicitor General

RJF/sd

#316

November 17, 1975

Mr. William D. Cabin, Executive Secretary
to the Board of Public Disclosure

Robert J. Freeman

Public Disclosure and Freedom of Information:
William E. Kenny, et al. v. Brendan T. Byrne, et al.;
William F. Hunter, et al. v. City of New York, et al.

Rights of public access granted by New Jersey and New York City Law are far broader than those granted by the Freedom of Information Law. Unlike the Freedom of Information Law, neither the New Jersey nor the New York City provisions classify the categories of records which must be made available to the public. Instead, the two provisions [N.J.S.A. 47: 1 A-1 et seq.; New York City Charter, Sections 1113, 1114] essentially provide that all records in possession of an agency shall be open to the public. Additionally, the Freedom of Information Law permits an agency to withhold information which if disclosed would constitute an "unwarranted invasion of personal privacy" [Section 88(3)]. Moreover, as discussed in the advisory opinion written at the request of the Board of Public Disclosure (letter to Judge Desmond, July 15, 1975), it appears that little information in possession of the Board would be accessible under the Freedom of Information Law.

In contrast, neither the New Jersey Executive Order (Executive Order No. 15) nor the New York City Law (Local Law No. 1, 1975) contains procedures to challenge public disclosure, nor do the relevant public access laws enable the custodian of the records to protect against invasion of privacy. Furthermore, due to the breadth of the access laws in New Jersey and New York City, virtually any records automatically become available to the public when they come into possession of government.

Background of the Kenny case

On January 7, 1975, Governor Brendan Byrne promulgated Executive Order No. 15 which required the heads of departments, the assistant or deputy heads of departments and the heads and assistant heads of divisions of departments in the Executive branch to file financial disclosure statements with the Governor, the Executive Commission on Ethical Standards and the Attorney General. The officials affected by the order were required to list certain information concerning themselves and their spouses, including

all assets and liabilities, sources of income (except gifts of under $1,000 from relatives), any occupation, trade, business or profession in which the officials are engaged which is subject to licensing or regulation by a state agency, and any position held with any commercial entity doing business with or licensed, regulated or inspected by a State agency.

After approval by the Executive Commission, a copy of the statement is filed with the Secretary of State for public inspection and copying pursuant to New Jersey's "Right to Know Law" [N.J.S.A. 47: 1A-1 et seq.]. A willful failure to comply with the Order constitutes cause for removal from office.

The plaintiffs were state employees who were required to file financial disclosure statements pursuant to the Executive Order.

Issues Raised by Plaintiffs

1. Was the Order promulgated in excess of the authority of the Governor under the New Jersey Constitution?

2. Is the Order overbroad and does it deny plaintiffs equal protection?

3. Does the Order unconstitutionally deprive plaintiffs of their right to privacy?

Findings of the Court

1. The Governor had the authority to promulgate the Order. Having been vested with the executive power of the State (New Jersey Constitution, Article 5, Section 1, Paragraph 1), he is responsible for administration of the executive branch, and all officers, employees, departments and bodies within that branch (Article 5, Section 4, Paragraph 2). Further, it is his responsibility to "take care that the laws be faithfully executed" (Article 5, Section 1, Paragraph 11). The court found that the executive order was constitutionally valid since the powers invoked were appropriate and the Order affected officials of only the executive branch.

2. The Order does not deny plaintiffs the constitutional right of equal protection.

> "The equal protection clause of the Fourteenth Amendment secures equality of right by forbidding arbitrary discrimination between persons similarly circumstanced...
>
> "The equal protection clause does not remove the power to classify, but admits of the exercise of a wide scope of discretion. Plaintiffs herein who assail the classification must carry the burden of showing that it does not rest upon any reasonable basis, but is essentially arbitrary. The distinction here is simply that Plaintiffs and those other "Public Officers" covered by the Executive Order occupy the highest offices in the executive branch and therefore occupy positions of greatest influence in the governmental decision-making process and most subject to conflicts of interest."

Stating that the order was consistent with the "hierarchical structure of state government", the court upheld the constitutionality of the classification.

3. Plaintiffs must bear the burden of proof in asserting the constitutional right of privacy. Clearly, much of the information submitted pursuant to the order is currently available for public inspection and copying. Therefore, Plaintiffs may assert that disclosure of those portions of the statement which may be "uniquely personal" and "totally unrelated to public employment" would be violative of their right of privacy. Claims of public officers would of necessity be required to be decided on a case by case basis.

The New Jersey Right to Know Law

In relevant part, the New Jersey Right to Know Law provides:

> "[E]xcept as otherwise provided in this act or by any other statute, resolution of either or both houses of the Legislature, executive order of the Governor, rule of court, any Federal law regulation or order, or by any regulation promulgated under the authority of any

> statute or executive order of the Governor, all records which are required to be made, maintained or kept on file by any board, body, agency, department, commission or official of the state or of any political subdivision thereof or by any public board, body, commission or authority created pursuant to law by the State or any of its political subdivisions, or by any official acting for or on behalf thereof (each of which is hereinafter referred to as the 'custodian' thereof) shall, for the purposes of this act, be deemed to be public records" (Section 47: 1A-2).
>
> "Notwithstanding the provisions of this act, where it shall appear that the record or records which are sought to be examined shall pertain to an investigation in progress by any such body, agency, commission, board, authority or official, the right of examination herein provided for may be denied if the inspection, copying or publication of such record or records shall be inimical to the public interest; provided, however, that this provision shall not be construed to prohibit any such body, agency, commission, board, authority or official from opening such record or records for public examination if not otherwise prohibited by law" (Section 47: 1A-3).

Since the Executive Order required that the financial statements be filed, the statements became accessible pursuant to the Right to Know Law. Due to the lack of exemptions from disclosure, except that described by Section 47: 1A-3, plaintiffs were forced to resort to constitutional objections to argue against disclosure.

Background of the Hunter Case

Local Law No. 1 was passed by the City Council on December 17, 1974 and signed into law by the Mayor on January 8, 1975.

The provision requires that all elected officials, candidates for office, major appointed officials and all City employees earning $25,000 or more per year must file annual reports with the City Clerk declaring income and financial interests. Information that must be submitted consists of various items, including capital gains from a single source of $1,000 or more, reimbursement for expenditures of $1,000 or more, honoraria of $500 or more, gifts aggregating $500 or more from any single source, each trust or other fiduciary relation in which the employee or spouse holds a beneficial interest of $20,000 or more, and the identity and source of each of the foregoing must be reported in detail.

The reports must be submitted to the City Clerk, who is obliged to make them available to the public in toto pursuant to Sections 1113 and 1114 of the City Charter.

Issues Raised by Plaintiffs

1. Does the Local Law unconstitutionally infringe upon plaintiffs' right of privacy?

2. Does the order have a "chilling effect" on plaintiffs regarding exercise of rights of association, belief and expression?

3. Is the Local Law unconstitutionally vague and ambiguous?

4. Is the Local Law unconstitutional by establishing a presumption that all plaintiffs must disclose the financial information required by the Law and that such disclosures must be made publicly available without establishing procedures whereby plaintiffs can challenge these presumptions in individual cases?

5. Does the Local Law violate the Equal Protection Clause of the Constitution? Is there a rational basis for distinguishing employees earning more than $25,000 from those earning less?

Rights of Access Granted by the New York City Charter.

Section 1113 of the New York City Charter provides:

> "[T]he heads of all administrations and departments, except the police

> and law departments, and the chiefs of each and every division or bureau thereof and all borough presidents, shall with reasonable promptness, furnish to any taxpayer desiring the same, a true and certified copy of any book, account or paper kept by such administration, department, bureau or officer, or such part thereof as may be demanded...The provisions of this section shall not apply to any papers prepared by or for the comptroller for use in any proceeding to adjust or pay a claim against the city or any agency or by or for counsel for use in actions or proceedings to which the city, or any agency is a party or for use in any investigation authorized by this charter."

Similarly, Section 1114 of the Charter in relevant part provides:

> "[A]ll books, accounts and papers in the office of any borough president or any division or bureau thereof, or in any city administration or any department or any division or bureau thereof, except the police and law department, shall at all times be open to the inspection of any taxpayer..."

Consequently, information submitted pursuant to Local Law No. 1 and filed with the City Clerk immediately becomes available to the public. Since there are no applicable exemptions from disclosure contained in the Charter provisions relative to financial information submitted pursuant to the Local Law, all of the information is accessible.

The Freedom of Information Law

Rights of access granted by the New Jersey and New York City provisions are far broader than rights granted under the Freedom of Information Law (hereafter "the Law"). Both of the former laws essentially provide that all records are available for public inspection and copying, unless exempted from disclosure. The Law, in contrast, lists several categories of records which must be made available [Section 88(1)], as well as four categories of records to which rights of access do not

apply [Section 88(7)]. Therefore, if a record is not analogous to any of the enumerated categories of accessible records, there is no right of access. It is emphasized, however, that the statute is permissive; unless prohibited by some provision of law, an agency may grant access to any record. Nevertheless, if there is no right of access, the record need not be disclosed.

It is important to point out, that, in my opinion, the preceding paragraph appropriately delineates the scope of rights of access granted by the Law. However, it is possible that a court could arrive at a different conclusion. In a recent lower court case (Supreme Court, Monroe County), the court found that the only restrictions imposed by the Law regarding public access to records are those prescribed by Section 88(7) [Burke v. Yudelson, 368 NYS 2d 779, 783 (1975)].

Of some relevance is the fact that the Burke decision dealt with records in possession of a municipality. In this regard, Section 88(1)(i) of the Law provides access to:

> "any other files, records, papers or documents required by any other provision of law to be made available for public inspection and copying."

One such provision of law is Section 51 of the General Municipal Law, which provides access to:

> "[A]ll books of minutes, entry or account, and the books, bills, vouchers, checks, contracts or other papers connected with or used or filed in the office of, or with any officer, board or commission acting for or on behalf of any county, town, village or municipal corporation in this state..."

Since statutory rights of access granted by other provisions of law are preserved by the Freedom of Information Law [Section 88(1)(i) and (10)], virtually all records in possession of a municipality are available to the public. There is however, no similarly broad provision of law regarding rights of access pertaining to state agencies. Consequently, rights of access to municipal records are greater than rights of access to state agency records. The court in Burke made no specific distinction as to the custodian of records. Therefore, conjecture as to judicial interpretation by higher state courts of the scope of

rights of access granted by the Law remains questionable. However, a close study of the Law in conjunction with other access provisions leads to the conclusion that rights of access to records of state agencies are restricted to the categories enumerated in Section 88(1).

In addition, the Law, unlike the New Jersey and New York City provisions, enables agencies to "delete identifying details" [Section 88(3)] or otherwise withhold information [Section 88(7)(c)] when in their judgment disclosure would constitute an "unwarranted invasion of personal privacy."

With regard to Executive Order No. 10, as stated in response to Judge Desmond's inquiry, it appears clear that the Board of Public Disclosure is an "agency" as defined by the Law [Section 87(1)], but it is unclear whether most records in possession of the Board are analogous to any of the categories of accessible records as reflected in Section 88(1).

Records now in possession of the Board may be somewhat different from those when the letter was written to Judge Desmond. The information contained in the Board's press release (November 7) refers to creation of records by the Board. However, the direction of the Board is consistent with the Law. The release (p. 7) states that

> "[T]he statements open to the public will contain...a listing of all sources of assets and liabilities."

As such, the Board will compile records containing factual tabulations, which are accessible under the Law [Section 88(1)(d)].

In addition to differences regarding access to records, Executive Order No. 10 contains unique provisions in comparison to the New Jersey Order and the New York City Local Law. The Executive Order provides an administrative procedure whereby individuals submitting statements to the Board may request deletions of items "of a highly personal nature" which do not "in any way relate to the duties of the position" or create an "actual or potential conflict of interest." Notwithstanding this procedure and the specific authority granted, the Board could delete identifying details to protect against unwarranted invasions of privacy pursuant to Section 88(3) of the Law when making records available.

In the Kenny decision, the court implied a right to an administrative hearing before the Commission on Ethical Standards to determine whether a particular item should be withheld from

public view. Under the New York City Local Law, there is no procedure providing administrative review.

In sum, there are several ingredients which contribute to the dissimilarity between the New Jersey and New York City disputes and potential disputes arising in New York. First, rights of access are less substantial under the Freedom of Information Law; additionally, the immediacy and totality of public access granted pursuant to New Jersey and New York City provisions is lacking under the state law. Second, even if the information were accessible under the Law, the Board could protect privacy through Section 88(3). Third, the Executive Order provides a review procedure lacking in the other provisions. Fourth, the Board has the authority to adopt procedures concerning privacy as well as disclosure of information to the public.

Constitutional Issues

If the constitutional arguments raised in Kenny are raised in New York, it is likely that their determination would be similar to the findings in the New Jersey decision.

In New York, as in New Jersey, the Governor is directed by the Constitution to "take care that the laws are faithfully executed" [Article 4, §3]. With regard to the Executive Order, the Board was established in part to execute Sections 73 and 74 of the Public Officers Law, which deal with conflicts of interest. There appears to be no question as to the constitutional authority to act in this manner.

Relative to the other constitutional issues raised, since the determinations in Kenny were based largely upon federal precedents, it is probable that the results would be the same if the issues are raised before New York courts.

The Local Law at issue in the Hunter case may be distinguished from the executive orders. Executive Order No. 10 pertains to specific categories of employees within the Executive branch, and makes specific reference to individuals in policy-making positions, while the Local Law pertains to all employees earning in excess of a certain figure per year. As stated in Plaintiffs' brief, the monetary dividing line indicates nothing of the level of an individual's responsibility in City government. As such, in my opinion, there may be a valid question of equal protection under the Constitution.

#317

November 18, 1975

Mr. James T. Rochford
Counsel
Rockville Centre Housing Authority
166 North Centre Avenue
Rockville Centre, New York 11570

Dear Mr. Rochford:

Thank you for your interest in complying with the Freedom of Information Law and for forwarding a copy of the Authority's regulations governing access to records. Having reviewed the regulations, the following modifications are recommended:

Section 1

The list of accessible records in the Authority regulations includes seven of the nine categories of records made available under Section 88(1) of the Freedom of Information Law. While omission of Section 88(1)(f) of the Law pertaining to police blotters and booking records is reasonable, Authority regulations should reflect the availability of payroll information to any person pursuant to Section 88(1)(g) of the Law and Section 1401.3 of the Committee regulations. In the case of payroll information, case law established a right of public access prior to the enactment of the Freedom of Information Law. In Winston v. Mangan, the court held that:

> "The names and pay scales of employees, both temporary and permanent, are matters of public record and represent important fiscal as well as operational information. The identity of the employees and their salaries are vital statistics kept in the proper recordation of departmental functioning and are the primary sources of protection against employment favortism. They are subject therefore to inspection" [338 NYS 2d 656, 662 (1973)].

With regard to payroll information, both the Freedom of Information Law and Committee regulations provide that an itemized record shall be kept setting forth name, address, title and salary of every officer or employee of an agency, except in the case of law enforcement officials. Since Section 88(1)(g) of the Law does not specify which address, home or business, shall be made available, you may in your discretion furnish either. If in your judgment disclosure of employee's home addresses would constitute an "unwarranted invasion of personal privacy" [see Section 88(3) of the Law], the business address may be provided.

Authority regulations provide for a subject matter index listing "any records which are to be produced." However, Section 88(4) of the Freedom of Information Law directs agencies to compile a list by subject matter of "any records which shall be produced, filed or first kept or promulgated after September 1, 1974." Without reference in the index to all authority records, the ability to seek records as well as the right to appeal a denial of access would be constructively abridged.

Section 2(a) and (c)

Authority regulations provide that a "reasonable time be allowed" for location, copying and delivery of records and that records shall be produced "as promptly as possible." Although this standard may be in compliance in most instances, it is noted that Committee regulations state that records must be produced promptly and no longer than five days after a request is made, except under extraordinary circumstances. In such circumstances, the request must be acknowledged in writing, stating the reason for the delay and estimating the date when a reply will be made [Committee regulations, Section 1401.6(a) and (b)].

Section 3

Subparagraph (b) provides that the fee for copies of oversize pages shall be "determined on application." Committee regulations provide that the fees for copies of records exceeding 8 1/2 by 14 inches

> "shall not exceed the actual copying cost which is the average unit cost for copying a record, excluding fixed costs of the agency such as operator salaries" [Section 1401.8(3)].

Subparagraph (c) imposes a fee of one dollar per page for certification. Unless such fee was established by law or regulation prior to September 1, 1974, it is violative of Committee regulations [Section 1401.8(a)]. If no fee for certification was established before the effective date of the Freedom of Information Law, certification must be provided free of charge.

Other Recommendations

A records access officer, designated by name or job title and business address, should be appointed to coordinate agency response to requests for access to records [Committee regulations, Section 1401.2(a)] and to assure that agency personnel carry out the duties listed in Section 1401.2(b) of Committee regulations. A fiscal officer charged with certifying the payroll and responding to requests for itemized payroll information should be designated by name or job title and business address [Committee regulations, Section 1401.3].

Authority regulations should establish procedures regarding denial of access and appeals. Denial of access must be in writing advising the person denied of his right to appeal and to whom an appeal may be directed. A person, persons, or body designated by business address and business telephone number as well as by name or job title, must be authorized to hear appeals. The appeals unit must inform the appellant in writing of its decision within seven business days of receipt of the appeal [Committee regulations, Section 1401.7].

Committee regulations also prescribe a requirement for public notice. A listing of records access officer, fiscal officer and appeals unit as well as the locations in which records can be seen or copied, should be posted everywhere records are kept [Committee regulations, Section 1401.9].

I am enclosing a copy of model regulations which I believe will be most helpful in ensuring compliance with the Freedom of Information Law.

I hope that I have been of some assistance. Should any questions arise, please feel free to contact me.

Very truly yours,

Robert J. Freeman
Counsel

enc.

RJF/sd

FOIL-AO-318

November 20, 1975

Mr. Stanley P. Bratek
Steering Committee Member
Land Use Impact Study Group
39 Van Peyma Avenue
Hamburg, New York 14075

Dear Mr. Bratek:

Thank you for your interest in the Freedom of Information Law.

As I understand the facts stated in your letter, you have been unsuccessful in obtaining records in possession of the Town of Hamburg regarding payments made to a consulting firm and a report prepared by the firm for the use of the Town.

The Freedom of Information Law provides a right of access to several categories of records. With respect to municipalities, such as the Town of Hamburg, perhaps most important is Section 88(1)(i), which grants access to:

> "any other files, records, papers or documents required by any other provision of law to be made available for public inspection and copying."

One such provision of law is Section 51 of the General Municipal Law, which provides access to:

> "[A]ll books of minutes, entry or account, and the books, bills, vouchers, checks, contracts or papers connected with or used or filed in the office of, or with any officer, board or commission acting for or on behalf of any county, town, village or municipal corporation in this state..."

Consequently, virtually all "papers connected with or used or filed" in the office of a municipality are accessible to the public. For example, the provision quoted above makes specific reference to "bills, vouchers and checks." Therefore, you have a right to inspect and copy any records of expenses incurred by the Town regarding work performed by the consulting firm.

Judicial decisions, however, have to some extent restricted the breadth of public rights of access to Section 51 of the General Municipal Law. It appears that some of the principles enunciated by the courts may be of relevance with regard to the study and the report in question.

Apparently, the Town Clerk has indicated that the study has not yet been completed. In this regard, the courts have stated that in some instances, records relating to an incomplete transaction need not be made publicly available if disclosure would result in detriment to the public interest [Sorley v. Clerk, Village of Rockville Centre, 30 A.D. 822 (1968)]. Therefore, if no detriment to the public interest would result by disclosing the incompleted study, it should be made available. In the case cited above, the court also stated that the records must be made available when the transaction to which the records relate has been completed.

Without greater knowledge of the records in question, it would be inappropriate to conjecture whether disclosure of the study in an incomplete stage would in fact be detrimental to the public interest. In any event, the state's highest court has stated that such a determination can only be made judicially and that the unit of government asserting that records should be confidential must prove that disclosure would be detrimental to the public interest [Cirale v. 80 Pine Street Corp., 35 NY 2d 113 (1974)].

It is also possible that portions of the report should be made available. Although the consulting firm may not have provided the Town with its final recommendations, it may have provided statistical or factual materials compiled thus far. The Law provides a right of access to "statistical or factual tabulations made by or for the agency" [Section 88(1)(d)]. To the extent that such information could not properly be deemed confidential or privileged, it should be made available.

Moving to another area, enclosed with your letter is a response made by the Town Clerk, requesting that, as a prerequisite to providing access, you are to furnish the Town Board with the names of members of your committee and a certified copy of a committee resolution requesting the information.

In my opinion, failure to provide the information to the Clerk would not be a valid reason for denial of access. First, the Committee on Public Access to Records has resolved that

> "information accessible under the Freedom of Information Law shall be made equally accessible to any person, without regard to status or interest" [see enclosed resolution].

Since records must be made available to "any person", neither the name or an individual seeking access nor the names of members of your committee have any relevance pertaining to a decision to grant or deny access. Second, a certified copy of a request is unnecessary. Committee regulations, which have the force and effect of law throughout the state, provide that a request may be "oral or in writing" [see enclosed Regulations, Section 1401.6(a)]. Therefore, although an agency may require that a request be made in writing, anything written that is reflective of "identifiable records" [see Freedom of Information Law, Section 88(6)] should suffice.

The regulations promulgated by the Committee are reflective of the procedural aspects of the Law. They should be most helpful to you in describing your rights as well as the duties of government.

I hope that I have been of some assistance. Should any further questions arise, please feel free to contact me.

Very truly yours,

Robert J. Freeman
Counsel

cc: Henry O. Leyh, Town Clerk
Town of Hamburg
Town Hall
S-6100 South Park Avenue
Hamburg, New York 14075

#319

November 21, 1975

Ms. Barbara Grizzuti Harrison
[redacted]

Dear Ms. Harrison:

Your letter of November 11 addressed to Secretary of State Cuomo has been forwarded to the Committee on Public Access to Records, which is responsible for advising with respect to the Freedom of Information Law.

On your behalf, I have contacted the Corporation and State Records Division of the Department of State. The Division informed me that it has no legal documents in its possession pertaining to the Watchtower Bible and Tract Society of New York. There is, however, a record of the existence of a "Watch Tower Bible and Tract Society of Pennsylvania."

It is probable that in New York the Society in question has filed its certificate of incorporation pursuant to the Religious Corporations Law. Section 3 of that Chapter provides that the certificate of incorporation shall be:

> "recorded in the county in which the principal office or place of worship of said corporation is or is intended to be situated, and shall be filed and recorded in the office of the clerk of said county."

Therefore, if you have knowledge of the county in which the Society's principal office or place of worship is located, you may be able to obtain the certificate of incorporation from a county clerk. If the certificate of incorporation has not been filed with a county clerk, I suggest that your request be directed to the Department of State in Pennsylvania.

With regard to financial records of the Society, the Freedom of Information Law grants rights of public access to records in possession of governmental entities within the State of New York [see enclosed, Freedom of Information Law, Section 87(1)]. Consequently, the Society has no legal obligation to disclose its financial records to the public.

I hope that I have been of some assistance. Should any further questions arise regarding the Freedom of Information Law, please feel free to contact me.

Very truly yours,

ROBERT J. FREEMAN
Counsel

RJF:mm
cc: Hon. Mario M. Cuomo
Secretary of State

#1320

Katie McKay November 24, 1975

Bob Freeman

Interpretation of federal Freedom of Information Act

The federal Freedom of Information Act became effective in 1967. Rights of access to federal agency records are substantially greater under the Act than rights of access granted pursuant to the New York Freedom of Information Law.

In essence, the federal Act provides that all records are publicly available except those categories of records which are specifically enumerated as deniable. Relevant to the issues before the Division of the Budget, the Act provides no right of access to:

> "inter-agency and intra-agency memorandums or letters which would not be available by law to a party other than an agency in litigation with the agency..." [5 U.S.C. 552(b)(5)].

Supreme Court Decisions

1. "Exemption 5 incorporates the privileges which the Government enjoys under the relevant statutory and case law in the pretrial discovery context; and both Exemption 5 and the case law which it incorporates distinguish between predecisional memoranda prepared in order to assist an agency decision-maker in arriving at his decision, which are exempt from disclosure, and post-decisional memoranda setting forth the reasons for an agency decision already made, which are not" [Renegotiation Board v. Grumman Aircraft, 44 L.Ed. 57, 71 (1975)].

   "...release of the Regional Board's Reports on the theory that they express the reasons for the Board's decision would in those cases in which the Board had other reasons for its decision, be affirmatively misleading" (id. at 72).

2. "That Congress had the Government's executive privilege specifically in mind in adopting Exemption 5 is clear... The contours of the privilege in the context of this case are less clear, but may be gleaned from expressions of legislative purpose and prior case law. The cases uniformly rest the privilege on the policy of protecting the 'decision making

processes of government agencies'...; and focus on documents 'reflecting advisory opinions, recommendations and deliberations comprising part of a process by which governmental decisions and policies are formulated'... The point plainly made in the Senate Report, is that the 'frank discussion of legal and policy matters' in writing might be inhibited if the discussion were made public; and that the 'decisions' and policies formulated would be the poorer as a result... As lower courts have pointed out, 'there are enough incentives as it is for playing it safe and listing with the wind'.., and as we have said in an analogous context, '[h]uman experience teaches that those who expect public dissemination of their remarks may well temper candor with a concern for appearances...to the detriment of the decision-making process...'" [N.L.R.B. v. Sears, Roebuck & Co., 44 L.Ed. 29, 47 (1975); emphasis added by the Court].

3. "The importance of this underlying policy was echoed again and again during legislative analysis and discussions of Exemption 5:

> 'It was pointed out in the comments of many of the agencies that it would be impossible to have any frank discussion of legal or policy matters in writing if all such writings were to be subjected to public scrutiny. It was argued, and with merit, that efficiency of government would be greatly hampered if, with respect to legal and policy matters, all government agencies were prematurely forced to 'operate in a fishbowl.' The committee is convinced of the merits of this general proposition, but it has attempted to delimit the exception as narrowly as consistent with efficient government operation.' S. Rep. No. 813, p. 9...

But the privilege that has been held to attach to intra-governmental memoranda clearly has finite limits, even in civil litigation. In each case, the question was whether production of the contested document would be injurious to the consultative functions of government that the privilege of nondisclosure protects... Thus...memoranda consisting only of compiled factual material contained in deliberative memoranda and severable from its context would generally be available for discovery by private parties in litigation with the Government [Environmental Protection Agency v. Mink, 410 U.S. 73, 87-88 (1974); emphasis mine].

"Exemption 5 was changed [by Committee prior to its enactment] to substantially its present form. But plainly, the change cannot be read as suggesting that all [emphasis added by the Court] factual material was to be rendered exempt from compelled disclosure. Congress sensibly discarded a wooden exemption that could have meant disclosure of manifestly private and confidential policy recommendations simply because the document containing them also happend to contain factual data... It appears to us that Exemption 5 contemplates that the public's access to internal memoranda will be governed by the same flexible, common-sense approach that has long governed private parties' discovery of such documents involved in litigation with government agencies. And, as noted, that approach extended and continues to extend to the discovery of purely factual material appearing in those documents in a form that is severable without compromising the private remainder of the documents" [id. at 91; emphasis mine].

"...[T]he agency may demonstrate, by surrounding circumstances, that particular documents are purely advisory and contain no separable, factual information" [id. at 93].

4. "The expectation of a President to the confidentiality of his conversations and correspondence, like the claim of confidentiality of judicial deliberations, for example, has all the values to which we accord deference for the privacy of all citizens and added to those values the necessity for protection of the public interest in candid, objective, and even blunt or harsh opinions in presidential decision-making. A President and those who assist him must be free to explore alternatives in the process of shaping policies and making decisions and to do so in a way many would be unwilling to express except privately" [U.S. v. Nixon, 42 U.S.L.W. 5237, 5245 (1974)].

Other Federal Court Decisions

1. "The basis of Exemption (5), as of the privilege which antedated it, is the free and uninhibited exchange and communication of opinions, ideas and points of view -- a process as essential to the wise functioning of big government as it is to any organized human effort" [Ackerly v. Ley, 420 F.2d 1336, 1341 (1969)].

2. "This exemption involved great deliberation, disagreement, and discussion in Congress during its enactment process. Upon inspection of this legislative background we fully recognize and agree that

> a full and frank exchange of opinions would be impossible if all internal communications were made public. They (agency witnesses) contended, and with merit, that advice from staff assistants and the exchange of ideas among agency personnel would not be completely frank if they were forced 'to operate in a fishbowl.' Moreover, a government agency cannot always operate effectively if it is required to disclose documents or information which it has received or generated before it completes the process of awarding a contract or issuing an order, decision or regulation...' " [American Mail Line, Ltd. v. Gulick, 411 F.2d 696, 703 (1969)].

3. "In the case at bar this factual versus deliberative distinction is inadequate to resolve the difficult question whether the factual summaries should be exempt from disclosure. The difficulty arises because of the nature of the documents. It is agreed that the summaries are in large part compilations of facts introduced in evidence at the hearings, and on the public record. Montrose contends that such factual materials must be disclosed under the prior decisions discussed above. In contrast, EPA contends that the mere compilation of a summary of the evidence on record performed by staff members for the use of the Administration in formulating his decision and final order, is itself a part of the internal deliberative process which should be kept confidential and within the agency. What will be disclosed here if the District Judge's order is upheld, argues the EPA,

> are not 'facts' not yet possessed by Montrose Chemical Corporation, but rather the judgmental evaluation and condensation of more than 10,000 pages of facts from which the Administrator gained an overview of the record in order to assist his decision-making. The only new 'information' which disclosure of these summaries would provide Montrose concerns the mental process

of the agency -- a process which Montrose is not entitled to probe.

This statement by EPA hits the heart of the issue here: Can Montrose use the FOIA to discover what factual information the Administrator's aides cited, discarded, compared, evaluated, analyzed to assist the Administrator in formulating his decision? Or would such discovery be an improper probing of the mental processes behind a decision of an agency? [Montrose Chemical Corporation of California v. Train, 491 F.2d 63, 67-68 (1974)].

"To probe the summaries of record evidence would be the same as probing the decision-making process itself. To require disclosure of the summaries would result in publication of the evaluation and analysis of the multitudinous facts made by the Administrator's aides and in turn studied by him in making his decision. Whether he weighed the correct factors, whether his judgmental scales were finely adjusted and delicately operated, disappointed litigants may not probe his deliberative process" [id. at 68; emphasis mine].

"When a summary of factual material on the public record is prepared by the staff of an agency administrator, for his use in making a complex decision, such a summary is part of the deliberative process, and is exempt from disclosure under exemption 5 of FOIA" [id. at 71; emphasis mine].

4. "...[O]ur experience with the decision-making process leads us to believe that the material in these memoranda was probably filtered and refined by the Commissioner, with the result that its ultimate decision was something more than, or at least different from, the sum of its 'parts.' Consequently, we doubt that examination of the 'parts' would give a very accurate picture of the decision" [Sterling Drug, Inc. v. Federal Trade Commission, 450 F.2d 698, 706 (1971)].

#321

November 26, 1975

Joel H. Sachs, Esq.
Greenburgh Town Attorney
Box 205
Elmsford, New York 10523

Dear Mr. Sachs:

I apologize for the delay in responding to your inquiry and thank you once again for your continued interest in complying with the Freedom of Information Law.

The question raised is whether advisory legal opinions written by you, as Town Attorney, are accessible under the Freedom of Information Law. Subsidiary to the central issue is whether a town attorney is engaged in an attorney-client relationship with a town board and other town officials.

Although there is no statutory provision specifically stating that a town attorney has a privileged relationship with town officials, case law by implication holds that municipal attorneys do have an attorney-client relationship with officials of the municipalities by which they are employed. Bernkrant v. City Rent and Rehabilitation Administration [242 N.Y.S.2d 755 (1963); aaff'd 17 App. Div. 2d 932] held that the work product and reports containing advice prepared by an attorney of a New York City agency are exempt from disclosure pursuant to the attorney-client relationship established between the attorney and the agency.

This is the same conclusion that has been reached by New York courts for almost a century. In 1839 in discussing the duties of the New York City Corporation Counsel, it was held that:

> "he is to furnish to every department and officer of the city government such advice and legal assistance as counselor or attorney, in or out of court, as may be required by such officer or department, and the advice which he gives . . . I regard as privileged under Section 835 of the Code of Civil Procedure, and the respondents are not bound to disclose it" [People ex rel. Updyke v. Gilon, 9 N.Y.S. 243, 244 (1839)].

More recently and under similar circumstances, it was held that a county attorney:

> "was following his duty to the Board as its counsel (County Law, § 500; People ex rel. Updyke v. Gilon, Sup., 9 N.Y.S. 243) and, as a lawyer (Canons of Professional Ethics, Canon 15, Judiciary Law Appendix; Civil Practice Act, § 353) and what transpired between him and his clients, the public officials, is privileged (People ex rel. Updyke v. Gilon, supra)" [Pennock v. Lane, 231 N.Y.S.2d 897, 898 (1962)].

Therefore, it appears without question that an attorney-client relationship exists between a town attorney and his clients, the town board and those other town officials to whom legal counsel is given.

With respect to the Freedom of Information Law, Section 87(7) provides:

> "[N]otwithstanding the provisions of subdivision one of this section, this article shall not apply to information that is:
>
> a. specifically exempted by statute . . ."

In this regard, Section 4503 of the Civil Practice Law and Rules states:

> "[U]nless the client waives the privilege, an attorney or his employee, or any person who obtains without the knowledge of the client evidence of a confidential communication made between the attorney or his employee in the course of professional employment, shall not disclose, or be allowed to disclose such communication, nor shall the client be compelled to disclose such communication, in any action, disciplinary trial or hearing, or administrative act, proceeding or hearing conducted by or on behalf of any state, municipal or local governmental agency or by the legislature or any committee or body thereof. Evidence of any such communication obtained by any such person, and evidence resulting therefrom, shall not be disclosed by any state, municipal or local governmental agency or by the legislature or any committee or body thereof."

It appears, therefore, that notwithstanding rights of access granted or preserved [see, e.g., Section 51, General Municipal Law] by the Freedom of Information Law, confidential communications between a town attorney and his clients are exempted from disclosure pursuant to Section 88(7)(a), which incorporates the privilege envisioned by Section 4503 of the Civil Practice Law and Rules.

It is important to emphasize that such communications remain confidential only during the period in which the client maintains the privilege.

> "A party who has the right to claim the privilege of a communication made to him by his attorney must himself respect such privilege, and, if it is disclosed by him to any one, the right to such claim is endangered, and he cannot disclose a part of the communication or knowledge received from his attorney, and close the door to future inquiry" [People v. Higgins, 160 N.Y.S. 721, 723 (1916)].

The Freedom of Information Law, like other access laws, is permissive; although there may be no right of access to certain records, a government custodian of such records may disclose them. However, in the case of communications made within the attorney-client privilege, only the client can waive the privilege [see, e.g., Republic Gear Co. v. Borg-Warner Corp., C.A.N.Y. 1967, 381 F 2d 551]. Therefore, disclosure of a privileged communication by a public officer who is attorney for a municipality [a town attorney is a public officer; see 1948 Op.St.Compt. 397; 1972 Op.Atty.Gen. Oct. 19] may be violative of the Canons of Ethics [see Appendix of Legal Ethics, Canon 4].

Notwithstanding the confidentiality requirements relative to the attorney-client privilege, communications between a town attorney and town officials may be deemed confidential judicially pursuant to the common law evidentiary governmental privilege. As the Court of Appeals stated:

> ". . . 'official information' in the hands of governmental agencies has been deemed in certain contexts, privileged. Such a privilege attaches to 'confidential communications between public officers, and to public officers, in the performance of their duties, where the public interest requires that such confidential communications or the sources should not be divulged' . . . The hallmark of this privilege is that it is

"applicable when the public interest would be harmed if the material were to lose its cloak of confidentiality" [Cirale v. So. Pine St. Corp., 35 N.Y.2d 113, 117 (1974)].

Although Cirale was decided prior to the effective date of the Freedom of Information Law, the Court, in a footnote, stated that despite enactment of the law, the common law privilege for official information continues to exist [id., see footnote 1].

To date, judicial interpretation of the Freedom of Information Law is rather sparse. However, if New York courts follow the lead of federal courts in interpreting the federal Freedom of Information Act [5 U.S.C. 552], inter-agency and intra-agency memoranda or letters would be deniable. As the Supreme Court stated recently:

> "[T]he cases uniformly rest the privilege on the policy of protecting the 'decision making processes of government agencies' . . .; and focus on documents 'reflecting advisory opinions, recommendations and deliberations comprising part of a process by which governmental decisions and policies are formulated' . . . The point plainly made in the Senate Report is that the 'frank discussion of legal and policy matters' in writing might be inhibited if the discussion were made public; and that the 'decisions' and policies formulated would be the poorer as a result" [N.L.R.B. v. Sears, Roebuck & Co., 44 L.Ed. 29, 47 (1975)].

Another Supreme Court decision quoted the Senate Report referred to above in its opinion:

> "[I]t was argued, and with merit, that efficiency of government would be greatly hampered if, with respect to legal and policy matters, all government agencies were prematurely forced to 'operate in a fishbowl'" [Environmental Protection Agency v. Mink, 410 U.S. 73, 87 (1974), citing S. Rep. No. 813, p. 9].

Whether the New York courts will interpret the Freedom of Information Law similarly is conjectural. Nevertheless, in my opinion, well-reasoned federal precedents are available to be followed.

I hope that I have been of some assistance. Should any further questions arise, please feel free to contact me.

Very truly yours,

Robert J. Freeman
Counsel

RJF/ad

#322

bcc: Norman Gross, Esq.
Office of Counsel
State Education Department

December 2, 1975

Maurice Levenbron, Esq.
Weissman, Levenbron & Stern
474 New York Avenue
Huntington, New York 11743

Dear Mr. Levenbron:

Thank you for your interest in the Freedom of Information Law.

As requested, I have enclosed a copy of the regulations promulgated by the Committee, which govern the procedural aspects of the law.

With regard to your questions, first, the Freedom of Information Law does not affect either the Thibadeau or Van Allen decisions. Second, and perhaps more important, Congress enacted the "Family Educational Rights and Privacy Act" [Public Law 93-380 (enacted August 21, 1974), as amended by Senate Joint Resolution 40 (1974); see also Federal Register, Vol. 40, No. 3 - Monday, Jan. 6, 1975)]. Generally, the Act permits parents of students under 18 years of age to inspect records identifiable to their children. Also, when a student reaches the age of 18, he or she acquires the rights of the parents.

Therefore, in my opinion, and in the opinion of the State Education Department, parents have a right to obtain copies of psychiatric reports identifiable to their children under the age of 18.

I hope that I have been of some assistance. Should any further questions arise, please feel free to contact me.

Very truly yours,

Robert J. Freeman
Counsel

Enc.

RJF/md

#323

December 9, 1975

Mr. John G. Connery
[redacted]

Dear Mr. Connery:

After reviewing copies of correspondence you were kind enough to send me, and at your suggestion, having discussed the matter with Mr. Thomas Tyree of the Department of Transportation, I feel that there may be some need to clarify the Committee's role in the dispute.

According to my telephone log, our initial communication occurred November 24th and we discussed "DOT payroll info." I recall that I assumed we were discussing the payroll record required to be compiled by section 88(1)(g) of the Freedom of Information Law and section 1401.3 of the Committee's regulations. Naturally, in our view , denial of such a record would be improper.

One of the letters I received (dated December 3 from Ms. Joan Tobin to Theodore Wenzl) states that I was approached by you "in the hope that [my] persuasion might convince DOT officials to reverse their earlier decision."

Although I did speak to Mr. Tyree, I merely attempted to obtain information concerning allotment books, which apparently contain personal information not reflected by the payroll record envisioned by Section 88(1)(g) of the Freedom of Information Law. I made no attempt to persuade him to change a decision.

I hope that I have clarified what appear to be misconceptions concerning portions of our conversations.

Very truly yours,

Robert J. Freeman
Counsel

RJF/dc
cc: Commissioner Raymond T. Schuler
Thomas Tyree, Secretary to the Commissioner
Senator Howard C. Nolan, Jr.
Assemblyman Thomas W. Brown
Ms. M. Carowe
Mr. Theodore Wenzl, President, C.S.E.A.

#324

December 9, 1975

Mr. Lewis Steele
[redacted]

Dear Mr. Steele:

Thank you for your interest in the Freedom of Information Law. In my opinion, an agency may deny access to applications for civil service examinations.

Although the Committee on Public Access to Records has not promulgated guidelines regarding prevention of unwarranted invasions of personal privacy, the Freedom of Information Law includes a list reflective of five such invasions [Section 88(3)(a) through (e)]. It is important to emphasize that the examples provided are representative only of five instances of unwarranted invasions among conceivable dozens. Also, since the Committee has not adopted privacy guidelines, an agency official has discretionary authority to determine whether in his judgment disclosure of identifiable details would result in an unwarranted invasion of personal privacy. In this instance, it is possible that disclosure of an application would result in "economic or personal hardships" [Section 88(3)(e)] if, for example, an applicant's employer discovered that an applicant is seeking other employment. Therefore, if in the opinion of the Niagara County Civil Service Commission, disclosure of applications for examinations would result in an unwarranted invasion of the applicants' privacy, access to the records in question may be denied [see also, Section 88(7)(c)].

Notwithstanding the direction contained in the Freedom of Information Law, regulations promulgated by the State Department of Civil Service provide by implication that neither applications nor applicants' names should be publicly disclosed. Section 71.1 of the Regulations states:

> "A candidate's application for examination may be exhibited, upon request, to the appointing officer to whom his name is certified, or to his representative..."

The implication of the above is that an application can be made available only to specified officials. Next, Section 71.2 provides:

> "A candidate's papers may not be exhibited except as provided in section 71.1...provided, however, that the administrative director may, upon request, authorize the inspection of a candidate's application and other papers, for legitimate official purposes, by law enforcement and other officials or their representatives, where there appear satisfactory and compelling reasons for the need for such inspection."

And third, Section 71.3 provides:

> "Eligible lists may be published with the standing of the persons named in them, but under no circumstances shall the name of persons who failed examinations be published nor shall their examination papers be exhibited or any information given about them except as provided in this regulation..."

By gaining access to applications, it would be possible to discover the names of those individuals who failed their examinations. Therefore, by implication, disclosures of applications would have the effect of circumventing the intent of the regulation promulgated by the State Department of Civil Service. Moreover, rules adopted by a municipal civil service commission, must be approved by the State Department of Civil Service [Section 20, Civil Service Law].

Consequently, in my opinion, the records in question may be withheld in conjunction with the privacy provisions of the Freedom of Information Law [Sections 88(3) and (7)(c)] or pursuant to the Civil Service Law and regulations

I hope that I have been of some assistance. Should any further questions arise, please feel free to contact me.

Very truly yours,

Robert J. Freeman
Counsel

RJF/dc
cc: Stanley Walker, Secretary
Harold Snyder, Esq.

#325

December 10, 1975

Mr. Paul J. Feiner
[redacted]

Dear Mr. Feiner:

This is in response to your letter of December 5 in which you asked whether a village board of trustees must vote publicly.

Although the section of Village Law governing procedures for meetings of a board [Section 4-412(2)] does not specifically provide that a board must vote in public, several opinions state that a board should do so.

In an informal opinion of the Attorney General interpreting the Village Law, he concluded that:

> "This Department has taken the position . . . that executive sessions may be held for the purpose of informal discussion of village problems, but that any official action of the board should be taken at a meeting open to the public . . ." [1966 Atty.Gen. (Inf.) 97].

The decision quoted above has been reaffirmed in a formal opinion of the Attorney General (1970 Op.Atty.Gen. March 18).

The State Comptroller has issued similar opinions.

> "As a general rule, meetings of the governing bodies of municipalities should be open to the public. The business of such bodies is primarily public in nature, and the conduct of their meetings should be such that the public may at all times be present . . . While the Town Law and the Village Law do not specifically provide that meetings of their governing bodies shall be public, both the Attorney General (45 St.Dept.Rep. 512) and this Department (2 Op.St.Compt. 48 (1946)) have

"previously expressed the opinion that such meetings should be open to the public. While a governing body may meet in executive session for informal discussion, all official action should be taken at meetings which are open to the public" (Op.St.Compt. 363, 1962).

Several other Comptroller's opinions have concluded similarly (2 Op.St.Compt. 46, 1946; 15 Op.St.Compt. 61, 1959; 19 Op.St.Compt. 40, 1963; 25 Op.St.Compt. 83, 1969).

I hope that I have been of some assistance. Should any further questions arise, please feel free to contact me.

Very truly yours,

Robert J. Freeman
Counsel

RJF/md

324

December 15, 1975

Mr. Stanley P. Pratek
[redacted]

Dear Mr. Pratek:

I will attempt to answer the questions posed in your letter of November 25 concerning the Social Services Law. It should be noted, however, that future inquiries regarding these matters should be addressed to your county social services department.

The public assistance program was established to provide adequately for those unable to provide for themselves. Generally, those persons eligible for assistance and care are "needy". This category includes those who are old, disabled or indigent due to an inability to work or to obtain employment. It is the intent of the Social Services Law to provide a measure of care and services that will restore these individuals to a condition of self-support.

It is also the intent of the law that its public purpose be safeguarded. Social Services Law requires that a complete investigation be made of every applicant for public assistance to determine need and eligibility. The federal government has set up the guidelines within which each applicant must be judged, which include:

> "the comparative lack of property, the severity of the affliction, the helplessness of the person applying for relief, the necessity for immediate action and the availability of his property for conversion into cash or as a basis for credit . . ." (70 Am.Jur.2d § 55)

It is for this purpose that your county social service department requested information and disclosure concerning your resources and circumstances. Because an applicant for public assistance is considered the primary source of information, the regulations adopted by the Department of Social Services (Section 351.1) state that an applicant must furnish information such as identity, residence, family composition, rent payment or cost of shelter, income from any source, savings and resources. Under Section 134 of the Social Services Law, a social services official may deny public assistance if the applicant does not provide specific information relative to eligibility.

The purpose of disclosure is not to discriminate against a middle class property owner, as you have suggested, but rather to make certain that public funds are being properly administered to those who are in need. The fact that a person has been unemployed for a long period of time does not necessarily mean that one is "needy". If length of unemployment were the only criteria to be used in determining eligibility for public assistance, many individuals with substantial savings or resources other than income might qualify. This could severely weaken the public assistance program and permit circumvention of its objectives.

According to Mr. Don Coupe of the Department of Social Services, public assistance is not mutually exclusive of other public sources of income. Rather, public assistance begins where other benefits end. It has been held that unemployment compensation:

> "is designed to cushion shock of seasonal, cyclical or technological unemployment without reference to demonstrated needs." [Lascaris v. Wyman, 31 N.Y.S.2d 396 (1972)]

If unemployment insurance benefits do not meet the statewide standard of monthly need for a wife and five children, public assistance in the form of 'Aid to Dependent Children' (ADC), might supplement income.

Section 349(B)(1)-(a) of the Social Services Law states:

> "In the event federal aid for aid to dependent children is extended to allowances granted for the aid of a child or children whose parent or parents are unemployed, and so long as such federal aid remains

> available to the State, allowances may be granted for such child or children, if otherwise eligible, notwithstanding that such child or children have not been deprived of parental support or care by reason of the death, continued absence from the home, or physical or mental incapacity of a parent . . ."

However, before ADC can be granted to a family, the applicant must disclose the necessary information to the appropriate authority of a county social services department.

Ownership of real property by an applicant does not automatically preclude the granting of ADC. In Green v. Barnes, [485 F2d 242 (1973)] it was held that:

> "only currently available resources are to be considered in determining eligibility for, and the amount of, aid under program of Aid to Dependent Children."

When considering real property owned by an applicant, officials must consider the outstanding balance of any mortgage or encumbrance on the property. The official may also, in his discretion, require that the department be given a deed or mortgage on such property.

The New York statewide standard of monthly need, which represents the minimum subsistence level for a household of seven, is $418.00, exclusive of shelter and fuel for heating. If the unemployment insurance benefits you are receiving do not meet this standard, you may be entitled to public assistance under ADC. If, after investigation, it is established that you are eligible for public assistance, you would also qualify for Medical Assistance and benefits under the Food Stamp program.

If an application for ADC is not handled by a social services official within 30 days after filing an application or an application has been denied, an applicant may appeal to the Department of Social Services (Social Services Law, § 353). The Department must then review the case and provide the applicant making the appeal an opportunity to have a fair hearing, and render its decision within 30 days.

I hope that I have been of some assistance.

Very truly yours,

Robert J. Freeman
Counsel

RJF/md

bcc: Mr. Donald Coupe
NYS Department of Social Services
Office of Public Information
1450 Western Avenue
Albany, New York

#327

December 17, 1975

Mr. Martin J. Sawma
c/o Department of Sociology
Faculty of Social Science and
Administration
State University of New York
at Buffalo
4224 Ridge Lea Road
Amherst, New York 14226

Dear Mr. Sawma:

The substantive issue raised in your letter pertains to access to records in possession of the Office of Drug Abuse Services relating to certified causes of death of individuals in drug abuse treatment programs. Although the names of such individuals may be unimportant for your purposes, federal law provides that the records in question are confidential in their entirety:

> "Records of the identity, diagnosis, prognosis or treatment of any patient which are maintained in connection with the performance of any drug abuse prevention function conducted, regulated, or directly or indirectly assisted by any department or agency of the United States shall, except as provided in subsection (e) of this section, be confidential and be disclosed only for the purposes and under the circumstances expressly authorized under subsection (b) of this section" [21 U.S.C.A. 1175(a)].

Subsection (e) referred to above permits interchange of such records within components of the Armed Forces; subsection (b) permits disclosure with patients' consent under specified circumstances to medical personnel in emergencies, for the purpose of scientific research, audit or evaluation so long as identities of patients remain undisclosed, and pursuant to court order. The Office of Drug Abuse Services provides

a "drug abuse prevention function" that is assisted monetarily by a federal agency, and is therefore subject to the provisions of Section 1175. It is important to emphasize that Section 1175 makes all records envisioned by the section confidential. There is no discretion permitted to "delete identifying details" as in the Freedom of Information Law, Section 88(3).

Moreover, the Court of Appeals has held that the federal law relating to confidentiality of patients undergoing such treatment bars disclosure [People v. Newman, 32 N.Y.2d 379 (1973)].

As such, the records need not be provided under the Freedom of Information Law, which states that the access provisions of the Law [Section 88(1)]:

> "shall not apply to information that is:
> a. specifically exempted by statute . . ."
> [Section 88(7)].

Since a federal statute provides confidentiality of the records in question, and the Court of Appeals has held there is no access to them, it appears that the Office of Drug Abuse Services has acted in compliance with the Freedom of Information Law.

I hope that I have answered your question and have been of some assistance.

Very truly yours,

Robert J. Freeman
Counsel

RJF:mm

cc: Mr. Warren Stout
Office of Drug Abuse Services

FOIL-305

December 18, 1975

Mr. Lester M. Breslauer
[redacted]

Dear Mr. Breslauer:

Thank you for your interest in the Freedom of Information Law.

Your question pertains to rights of access to personnel records in possession of a school district or the Board of Cooperative Educational Services (B.O.C.E.S.).

Sections 88(3) and (7) of the Freedom of Information Law enable agency officials to withhold records or portions of records if in their judgment disclosure would result in "an unwarranted invasion of personal privacy." The Law lists five examples of such invasions, one of which states that:

> "[A]n unwarranted invasion of personal privacy includes . . . disclosure of employment, medical, or credit histories or personal references for employment, except such records may be disclosed when the applicant has provided a written release permitting such disclosure . . ."
> [Freedom of Information Law, Section 88(3)(b)].

It appears, therefore, that personal information contained in personnel files may be denied if disclosure would result in an unwarranted invasion of personal privacy.

As requested, I am enclosing a copy of the Freedom of Information Law and the regulations promulgated thereunder. The pamphlet to which you referred, "Your Right to Know," is available at a cost of $.25 from:

NYPIRG
5 Beekman Street
Room 410
New York, New York 10038

I hope that I have been of some assistance. Should any further questions arise, please feel free to write again.

Very truly yours,

Robert J. Freeman
Counsel

RJF:mm
Encs.

#329

December 13, 1975

Mr. Clarence J. Kenway
Executive Director
Canadian Conference of Motor
Transport Administrators
9th Floor College Plaza
8215 112th Street
Edmonton, Alberta

Dear Mr. Kenway:

I thank you for your kind words and relay to you that the opportunity to converse with you was my pleasure.

There are numerous areas of difference between the federal Freedom of Information Act [Title 5, U.S.C. 552] and the New York Freedom of Information Law [Public Officers Law, Sections 85-89]. First, the federal statute has been in effect since 1967; the New York statute became effective just over a year ago.

In terms of jurisdiction, the federal act pertains to records in possession of federal agencies, while the New York law applies to any governmental entity in New York State [see definition of "agency", Section 87, Freedom of Information Law].

In my opinion, the greatest difference between the two provisions lies in their respective structures. In essence, the federal act provides that all records are accessible, except those specifically listed as deniable [see Section 552(b)]. In contrast, the New York Law lists categories of records that must be made available [Section 88(1)]. Consequently, if a record sought does not conform to one of the categories listed, there is no right of access.

The procedures for review of an agency denial are also different. Under the federal law, an agency has the burden of proving that a denial was made in compliance with the law. In New York, a petitioner has the burden of proving that the agency denial was arbitrary and unreasonable.

As requested, I am enclosing a copy of the federal Freedom of Information Act, as well as the New York Freedom of Information Law and regulations promulgated thereunder, and an article which I believe you will find interesting.

I hope that I have been of some assistance. Should any further questions arise, please feel free to contact me.

With warmest personal regards,

Robert J. Freeman
Counsel

RJF/md

Enc.

FOIL-AO-330

State of New York
COMMITTEE ON PUBLIC ACCESS TO RECORDS
MEMORANDUM

TO : Dean Abel

FROM : Bob Freeman

SUBJECT : Noncriminal Files Compiled by the Division of State Police

Although I have not yet thoroughly researched the subject, the foregoing briefly reflects my tentative opinion concerning rights of access to noncriminal files compiled by the Division of State Police.

Section 88(1) of the Freedom of Information Law (hereafter "the Law") provides a right of axcess to nine categories of records. Based upon my knowledge of the contents of the files, it appears that they do not conform to any of the categories listed. If that is the case, there is no right of access.

Moreover, Section 88(7) states that the access provisions of the Law:

> "shall not apply to information that is...
>
> d. part of investigatory files compiled for law enforcement purposes."

While the files may relate to noncriminal activity, they may have been "compiled for law enforcement purposes", and therefore be exempt from disclosure.

Nevertheless, the Law is permissive. Even though there may be no right of access, there is no provision of law which percludes the Division of State Police from permitting inspection of the files.

The amendments proposed by the Committee probably would not clarify rights of access to the files (see attached). In relevant part, the amendments provide that an agency may deny access to records that:

> "e. are compiled for criminal law enforcement purposes which if disclosed would...
>
> iii. . . . disclose confidential information relatimg to a crimianl investigation . . .
>
> h. contain advisory or deliberative matter . . ."

If one of the goals of the legislation is to clearly create a right of access to the files to the individuals to whom the files pertain, changes in language would, in my opinion, be necessary.

The privacy section of the amendments would, in effect, permit an agency to deny access to anyone but the individuals to whom the records pertain.

RJF/md

#331

December 22, 1975

Mr. George Herbert
[redacted]

Dear Mr. Herbert:

As requested, I have enclosed copies of the Freedom of Information Law and the regulations promulgated thereunder by the Committee on Public Access to Records.

With regard to your questions concerning the New York City Sheriff's and Marshall's offices, Section 88(2) of the Freedom of Information Law provides that a municipality may adopt uniform regulations for all departments within the municipality. Therefore, if New York City has adopted uniform regulations, the regulations apply to all of its departments, including the Sheriff's and Marshall's offices. If uniform regulations have not been adopted, each department must independently adopt regulations.

I suggest that you contact one of the offices in question to determine which course of action has been taken.

I hope that I have been of some assistance. Should any further questions arise, please feel free to contact me.

Very truly yours,

Robert J. Freeman
Counsel

RJF/dc
Encs.

#332

December 29, 1975

Ms. Beatrice M. Cornell
[redacted]

Dear Ms. Cornell:

Your letter of December 19 addressed to Attorney General Lefkowitz has been forwarded to the Committee on Public Access to Records, which is responsible for advising with respect to the Freedom of Information Law.

With regard to fees for copies, the regulations adopted by the Committee, which have the force and effect of law, provide that:

> "[E]xcept where fees or exemptions from fees have been established by law, rule or regulation prior to September 1, 1974...
>
> The fee for copying records shall not exceed 25 cents a page for photocopies not exceeding 8 1/2 by 14 inches" [see enclosed Regulations, Section 1401.8(c)(1)].

Therefore, if the City of Newburgh adopted the fee in question by law, rule or regulation prior to September 1, 1974, that fee can legally be charged in compliance with the Freedom of Information Law. However, if the fee was not established by law, rule or regulation prior to September, 1974, the City can charge no more than 25 cents per photocopy.

I hope that I have been of some assistance. Should any further questions arise, please feel free to contact me.

Very truly yours,

Robert J. Freeman
Counsel

RJF/dc
cc: Department of Law