Further, the scope of the exemption for "investigatory files compiled for law enforcement purposes" has not yet been defined by the courts. At this juncture, it would be inappropriate to conjecture as to the judicial interpretation of the provision.

Additionally, 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 St. Corp., 35 N.Y.2d 113, 359 N.Y.S.2d 1 (1974)]. In such case, the unit of government asserting the privilege has the burden of proving the potential detriment to the public interest. Since the decision stated that only a court can determine the propriety of an assertion that records are privileged, a challenge to a denial of access to records of incidences of criminal activity based upon potential public detriment could be determined solely by a court.

The Freedom of Information Law also provides a procedure wherein objections to disclosure based on invasion of privacy may be overcome. When a unit of government provides public access to records, it may in its discretion delete "identifying details" which if disclosed would constitute "an unwarranted invasion of personal privacy" [Section 88(3)]. Therefore, if a blotter consists of notations of all occurrences reported to a police department, "identifying details" can be deleted before permitting public inspection of the blotter. In this manner, events could be reported by the news media, while law enforcement agencies could protect personal privacy when disclosure would result in an unwarranted invasion of 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/md

cc: Mr. David Dillon
Norwich Evening Sun
45 Hale Street
Norwich, New York 13815

FT 334

January 16, 1975

John F. Petraglia, Counsel
Fire Department
City of New York
110 Church Street
New York, NY 10007

Dear Mr. Petraglia:

As requested, enclosed is a copy of regulations promulgated by the Committee.

The provisions in the regulations pertaining to the subject matter list [see Section 1401.6(c), (d) and (e)] are of necessity quite general, since they must be suitable to the needs of every unit of government in the state. While there is no obligation that an agency include every kind of record in its possession in the list, there is a standard that must be met. Essentially, a person seeking a particular kind of record should be able to discover from the subject matter list the general category of records within which the record he is seeking is filed.

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
Enc.

#335

January 22, 1976

Ronald A. Phillips, Esq.
Brent, Phillips, Dranoff & Davis
20 Old Turnpike Road
Nanuet, New York 10954

Dear Mr. Phillips:

Your question is whether school districts must provide public access to pupil census information.

As stated in our telephone conversation of January 15, the federal "Family Educational Rights and Privacy Act" (20 U.S.C. § 1232g) governs rights of access to educational information identifiable to individual students. In brief, the purpose of the Act is to ensure the availability of student records to the parents of students under 18 years of age, and to students and former students over 18 years of age, and to ensure the confidentiality of such records with respect to third parties. As such, the provisions of the Act are in general accord with the opinion of the Commissioner of the State Education Department (Matter of Thibideau, 1 Ed. Dept. Rep. 607) and New York case law (Van Allen v. McCleary, 27 Misc. 2d 81).

With regard to the question raised, the Act provides that a school or school district may establish a policy for the release of "directory information" without the consent of the parents or student [see subdiv. (a)(5)(B)]. "Directory information" may include the following: the student's name, address, telephone listing, date and place of birth, major field of study, participation in officially recognized activities and sports, weight and height of members of athletic teams, dates of attendance, degrees and awards received, and the most recent previous educational agency or institution attended. A school or school district establishing such a policy must give public notice of the categories of information included. The notice must be given to each parent, student or former student, and the school must allow a reasonable time for the parent or student to give notification that any or all such information should not be released concerning such student without prior consent.

Attached are copies of the Act and regulations proposed by the Secretary of the Department of Health, Education and Welfare.

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

Att.

RJF/md

FOIL-336

January 23, 1976

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, NY 14226

Dear Mr. Sawma:

I would like to inform you that the authority of the Committee on Public Access to Records is merely advisory [Freedom of Information Law, § 88(9)(a)(i)]. Neither the Committee nor myself has custody of any of the information that you are seeking.

As you know, both the New York Freedom of Information Law and the federal Freedom of Information Act (5 U.S.C. § 552) provide a right to review an agency determination to deny access. If, in your opinion, a denial of access by an agency is in contravention of law, you may seek review of the determination in the courts.

Very truly yours,

Robert J. Freeman
Counsel

RJF/dc

#337

January 23, 1976

Martin A. Shapiro, Esq.
City Attorney
108 East Green Street
Ithaca, New York 14850

Dear Mr. Shapiro:

Your letters of September 12, 1975 and January 9, 1976 addressed to the Attorney General have been forwarded to the Committee on Public Access to Records, which is responsible for advising with respect to the Freedom of Information Law.

The question raised is whether the City of Ithaca must compile and provide access to lists of persons who have applied for marriage licenses. In relevant part, Domestic Relations Law, § 19(1) provides:

> "[E]ach town and city clerk hereby empowered to issue marriage licenses shall keep a book supplied by the state department of health in which he shall record and index such information as is required therein, which book shall be kept and preserved as part of the public records of his office . . . All such affidavits, statements and consents, immediately upon the taking or receiving of the same by the town or city clerk, shall be recorded and indexed as provided herein and shall be public records and open to public inspection whenever the same may be necessary or required for judicial or other proper purposes."

In my view, the provisions quoted reflect an internal conflict, since the first sentence appears to provide unrestricted public access, while the second quoted sentence would appear to grant access only if "necessary or required for judicial or other proper purposes".

What is a "proper purpose" has not been described judicially, although it has been held that failure by an applicant to state the purpose of an inspection could properly result in denial of access [Goldsmith v. Hubbard, 183 Misc. 889, 52 N.Y.S.2d 871 (1945)]. Nevertheless, the Attorney General has issued two opinions stating that applications for marriage licenses filed with a town or city clerk may be inspected for purposes of a routine newspaper publication [1911 Op.Atty.Gen. 277; 1915 Op.Atty.Gen. 123 (informal)].

I would like to point out that the same "proper purposes" standard is contained in Public Health Law, § 4174, concerning access to birth and death records. In construing section 4174, it has been held that the death of an ordinary person is a matter of public interest and, therefore, the clerk in custody of death records could not deny access to the records when sought for purposes of a routine newspaper publication [Rome Sentinel Co. v. Boustedt, 43 Misc.2d 598, 252 N.Y.S.2d 10 (1964)]. By analogy, a court might arrive at a similar decision concerning marriage records.

In addition, there is an exception to the general rule stated by section 19. Domestic Relations Law, § 13-a(7) directs that:

> "[N]othing in this section shall prevent a couple already legally married from applying for and receiving a marriage license for the purpose of a second or subsequent ceremony. If requested by either party applying for such a license, the town or city clerk shall keep the contents of the application confidential and the records of the marriage thereof shall not be open for public inspection . . ."

With regard to weekly compilations of lists of persons applying for marriage licenses, there is no provision of the Domestic Relations Law or the Freedom of Information Law directing that a record, such as a list, be compiled in response to a request for the same. Both statutes provide for inspection and copying of accessible records, but neither imposes an obligation to create a new record to respond to a request for information. Therefore, in my opinion, while a member of the news media may have a right to inspect and copy marriage applications, a clerk has no duty to compile a list of applicants.

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: Hon. Louis J. Lefkowitz
Attorney General

RJF/md

#338

January 26, 1976

Mr. Anthony A. Campione
Local Government Programs Coordinator
The Civil Service Employees Association, Inc.
33 Elk Street
Box 125, Capitol Station
Albany, NY 12224

Dear Mr. Campione:

Thank you for your letter of December 17, 1975 and your interest in the Freedom of Information Law [hereafter "the Law"], a copy of which is enclosed. Your question is whether a former employee of a local government has right of access to his personnel folder under the Law.

Although the Law provides access to several categories of records [Section 88(1)], it does not specifically deal with personnel records or rights of access of individuals to records pertaining to them. I would like to emphasize also that rights of access to records in possession of local government are greater than rights of access to records in possession of state agencies due to access provisions existing prior to enactment of the Law.

With regard to state agencies, rights of access are limited to the categories of records listed by Section 88(1) of the Law. It appears doubtful that most personnel files would contain records analogous to any of the categories. Nevertheless, there may be instances in which some of the records to which Section 88(1) applies may be found within a personnel file. For example, final opinions made in the adjudication of cases [Section 88(1)(a)] or final determinations of members of a governing body of an agency [Section 88(1)(h)] may be in a personnel folder.

The Law, however, is permissive. While there may be no right of access, there is nothing in the Law which precludes an agency from making the records in question available.

In addition to the categories of particular kinds of records listed, Section 88(1)(i) 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 General Municipal Law, § 51, 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 ..."

Therefore, virtually all "papers connected with or used or filed" in the office of a municipality are accessible.

My research, however, does not indicate that there have been any judicial opinions which pertain to your specific question. In my opinion, the courts could arrive at several differing conclusions. It is possible that a court could grant public access to the file in its entirety, since the contents are "relevant to the work of the agency or municipality" [see Section 88(3)(a) and (e)]. A court could limit access to the individual to whom the records pertain, finding that public disclosure would result in an "unwarranted invasion of personal privacy" [Section 88(3)]. A court could find that some of the materials in the file need not be disclosed. For example, an agency may have obtained "investigatory files compiled for law enforcement purposes" [Section 88(7)(d)].

Perhaps of greatest importance to an employee, the file might contain subjective evaluations of performance. While it is possible that a court could determine that this material is accessible, a finding that such records are privileged could be reached.

The Court of Appeals has held that:

> "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. 80 Pine St. Corp., 35 N.Y.2d 113, 117, (1974)].

The Court continued, stating that:

> "[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, the overall public interest on balance would then be better served by non-disclosure" (id. 118).

It is important to point out that the decision held that the agency has the burden of proving the detriment to the public interest if the privilege is asserted, and that only a court has the authority to determine to propriety of the assertion (id., 119).

With regard to the issue at hand, agency officials might assert that their ability to communicate candidly would be hampered if their opinions concerning employees are available to the employees. Perhaps an argument could be made that the ability to function effectively would be so impaired that disclosure would be detrimental to the public interest.

I would like to emphasize that the preceding merely represents what in my opinion are the possible approaches that could be taken by a court. At this juncture, however, it would be inappropriate to conjecture as to the decision that a court might render.

Your second question is whether an individual's right of access is enhanced by his belief that he is being deprived of employment because of damaging material in a personnel file of a previous employer. In my opinion, such a belief is irrelevant under Section 88, since the Law requires that no particular interest be demonstrated or status met as a condition precedent for access. As the Committee has resolved, if records are accessible under the Law, they should be made equally available to any person, regardless of status or interest [see the Law, Section 88(6); Resolution "Access to Records by Any Person"].

If a former employee feels that the contents of his personnel file are being used as a means of discrimination, a different avenue of approach may be useful. The State Division of Human Rights investigates claims of discrimination in employment regarding age, race, creed, color, national origin, sex or marital status [Executive Law, Section 291]. In some instances, therefore, it may be appropriate to utilize the resources of the Division of Human Rights.

Reference may also be made to collective bargaining agreements for provisions relevant to the subject.

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

January 29, 1976

Don Croteau

Bob Freeman

Inter-agency memoranda

I. The Existing Law

In my opinion, there is no right of access to memoranda communicated between the Department of State and the Division of the Budget.

The Freedom of Information Law (hereafter "the Law") provides a right of access to specified categories of records [§ 88(1)]. Therefore, if a record fails to conform to any category, there is no right of access. However, two provisions may be of significance. Section 88(1)(b) provides a right of access to:

> "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 . . . "

Essentially, the intent of the provision is to permit public access to the working law of government, plus some of the materials leading to the formulation of policy. Interpretation of the extent to which the background material must be made available is aided considerably by review of the legislative history of the Law.

The original language of § 88(1)(b) provided a right of access to all background information leading to a policy determination (A. 3247-A, 1974). However, a Chapter amendment (A. 12456) reduced the available background information by insertion of the phrase "constituting statistical or factual tabulations." The memorandum which accompanied the Chapter amendment stated:

> "[T]his language has been added in an effort to meet the objections that all backup information should not be made public. Otherwise, staff and outside sources would not be willing to advise agency heads with regard to matters of policy. The proper balance between this viewpoint and the policy that all information should be available is achieved by making statistical and factual tabulations available."

Similarly, Senator Ralph J. Marino, the Senate sponsor of the bill has written:

> "[I]t is anticipated that documents or memoranda developed by staff members or outside consultants designed to provide recommendations for use in policy making 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 other 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, we have consistently advised that only those documents or portions thereof which constitute "statistical or factual tabulations" are accessible, while deliberative or advisory material need not be provided.

The federal Freedom of Information Act (S.U.S.C. § 552) exempts from disclosure:

> "inter-agency or intra-agency memorandums or letters which would not be available by law to party other than an agency in litigation with the agency" [S.U.S.C. § 552(b)(5)].

In determining the scope of the exemption, the federal courts have reached conclusions analogous to the Committee's interpretation of § 88(1)(b) of the Law. A memorandum providing quotations from federal cases on the subject sent to Katy MacKay, Assistant to Peter Goldmark, Director, Division of the Budget is attached.

The second category of accessible records which may be relevant to your inquiry is § 88(1)(d), which provides a right of access to:

> "internal and external audits and statistical or factual tabulations made by or for the agency . . ."

As you have described the records in question, it appears that they are not audits, but materials prepared in contemplation of an audit. As such, only the hard statistical or factual data contained in the records are accessible.

Current Litigation

The Division of the Budget is defending a denial of access to budget worksheets sought by the New York Public Interest Research Group (NYPIRG). Essentially, the worksheets contain numerical figures reflecting proposed expenditures recommended by agency officials, budget examiners and officials of the Division of the Budget. Budget has contended that the figures on the worksheet are not statistical or factual tabulations as envisioned by the Law, but are recommendations reflective of advice rather than fact.

The case was argued on January 9 before Judge Conway, Supreme Court, Albany County. No decision has been rendered as yet.

Proposed Legislation

The original Committee recommendation would permit an agency to deny access to records that:

> "contain advisory or deliberative matter . . ."

Assemblyman Lisa's bill (A. 7502) would permit an agency to deny access to records that:

> "contain wholly deliberative or hortatory matters for policy-making decisions. . ."

As discussed at the Committee meeting on January 20, both the original Committee proposal and the Lisa bill have drawbacks. For example, both proposals would permit withholding of lobbyist's' communications.

The language adopted by the Committee at the meeting would permit an agency to deny access to records that:

> "contain internal deliberative matters for policy-making decisions."

Under this standard, an advisory memorandum or an opinion prepared by staff would be deniable so long as the document remained within the agency. Due to the insertion of "internal", the document would become accessible to the public when sent to a third party. Consequently, if the Committee's proposal were enacted, the documents in question would likely be available.

If the intent is to permit denial of these kinds of records, perhaps a provision similar to that contained in the federal Act would be more appropriate.

For example, perhaps an agency should be permitted to deny access to records or portions thereof that:

> "are inter-agency or intra-agency memoranda or letters"
>
> or
>
> "reflect the deliberative processes of an agency"
>
> or
>
> "contain advisory or deliberative matter communicated within an agency or between agencies"
>
> or
>
> "contain inter-agency or intra-agency advice or recommendations."

February 4, 1976

Philip D. Brent, Esq.
Ronald A. Phillips, Esq.
Brent, Phillips, Dranoff & Davis
20 Old Turnpike Road
Nanuet, New York 10954

Dear Messrs. Brent and Phillips:

Your question is whether there is a right of access to census information pertaining to preschool children in possession of school districts.

As you are aware, the Family Educational Rights and Privacy Act (20 U.S.C. § 1232g) provides guidelines with respect to access to student records. However, in defining the term "student", the Act does not include individuals who have not attended an educational institution [see subdivision (a)(6)]. Therefore, it appears the Act does not apply to records identifiable to pre-school children who have not yet attended an educational institution. Rather, rights of access to the information in question are determined by the laws of New York.

The Freedom of Information Law provides rights of access to specified categories of records, one of which preserves rights of 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" [§ 88(1)(i)].

One such provision of law is Education Law, § 2116, which 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 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."

In addition, the Freedom of Information Law provides access to existing records. Therefore, if an individual requests information which does not exist in the form of a record, the unit of government to which the request is directed has no duty to compile a new record in response to the request. Consequently, if a school district has not compiled or does not have possession of census information pertaining to pre-school children, it is not obliged to create such a record.

I regret that I cannot provide a more definitive response, but 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

February 17, 1976

Thomas G. Conway, Counsel
NYS Department of Agriculture
and Markets
State Campus
Income Tax Bureau Building
Albany, New York 12235

Dear Mr. Conway:

Thank you for your continued interest in complying with the Freedom of Information Law (hereafter "the Law").

The question raised is whether annual financial reports filed with the Department of Agriculture and Markets by agricultural societies pursuant to Agriculture and Markets Law, § 286(3) are accessible under the Law.

Having reviewed the sample report attached to your inquiry and the pertinent provisions of the Agriculture and Markets Law, in my opinion, most of the report is accessible as of right.

Much of the report lists financial information in terms of dollars. As such, the information is accessible pursuant to § 88(1)(d) of the Law, which provides access to "statistical or factual tabulations made by or for the agency". The only information which may not be accessible pertains to the list of names of donors and the amounts of their donations (see p. 5). Disclosure of the list might constitute an "unwarranted invasion of personal privacy" [§ 88(3)].

Nevertheless, the Law is permissive. It contains no direction that an agency must withhold information; rather it enables agency officials to delete "identifying details" or withhold information when in their judgment disclosure would result in an unwarranted invasion of personal privacy. Therefore, while the Law permits an agency to protect privacy, there is no provision in the Law stating that it must do so.

In a related area, page 7 of the report requires that the officers and directors of an agricultural society be listed. In this regard, there is no provision of the Not-for-Profit Corporation Law exempting such information from disclosure. Moreover, this information is made available to any person on request by the Department of State.

With respect to those portions of the report which may not be accessible as of right, it is important to stress the permissive aspect of the Law. Although some portions of the report do not conform to any of the categories of accessible records listed in § 88(1) (see e.g., p. 2, "General Remarks"; p. 3 descriptive information concerning payment and receipt of premiums; p. 8, the affidavit), an agency may disclose any records in its possession, unless records are exempted from disclosure by statute. Since there is no statutory exemption regarding the record in question, the Department may disclose the report.

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

bcc: Senator Donald Halperin
1515 Sheepshead Bay Road
Brooklyn, New York 11235

Attn: Ms. Riffman

February 17, 1976

Mr. I. Allen Hanover
[redacted]

Dear Mr. Hanover:

Thank you for your continued interest in the Freedom of Information Law.

The question is whether the New York City Off-Track Betting Corporation is within the coverage of the Freedom of Information Law.

Section 87(1) of the Freedom of Information 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."

Since the definition quoted above includes any "governmental entity performing a governmental or proprietary function" for a municipality, the New York City Off-Track Betting Corporation is, in my opinion, 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.

Very truly yours,

Robert J. Freeman
Counsel

cc: William A. Frappollo, Esq.
Legal Staff, D/C #37, AFSCME - AFL/CIO
140 Park Place, 5th Floor
New York, New York 10007

February 17, 1976

John H. Gross, Esq.
Village Attorney
Village of Northport
167 Main Street
Northport, New York 11768

Dear Mr. Gross:

Thank you for your interest in complying with the Freedom of Information Law.

The facts, as described in your letter of February 3 and pursuant to our discussion of February 13, are as follows. Several public officials of the Village of Northport, including the mayor, gathered to discuss removal of a member of the planning board on the ground that the member is a resigned attorney. Notes were taken, minutes were compiled and a determination was reached that there was no basis for removal of the member. The question is: to what extent are the records related to the gathering accessible under the Freedom of Information Law?

Village Law, § 7-718 provides that any member of a planning board may be removed by the mayor for cause after a public hearing is held. As described above, the gathering of public officials was neither a public hearing nor a meeting during which final action could be taken.

The Freedom of Information Law provides rights of access to several categories of records [§ 88(1)] including:

> "any other files, records, papers or documents required by any other provision of law to be made available for public inspection and copying" [§ 88(1)(i)].

One such provision of law is General Municipal Law, § 51, 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 . . . ."

Therefore, virtually any "papers connected with or used or filed" in the office of a municipality are accessible to the extent that such records do not fall within any of the restrictions listed in § 88(7) of the Freedom of Information Law.

In relevant part, § 88(7)(c) provides that, notwithstanding rights of access granted by § 88(1), the Freedom of Information Law does not apply to information which if disclosed would constitute "an unwarranted invasion of personal privacy" [see also § 88(3)(a) to (e)].

In my view, the notes and minutes compiled in relation to the gathering of public officials, which dealt solely with the status of a member of the planning board as a resigned attorney, may be deniable. The Freedom of Information Law provides discretion to the custodians of records to "delete identifying details" [§ 88(3)] or withhold information [§ 88(7)(c)] when in their judgment disclosure would result in an unwarranted invasion of personal privacy. Therefore, if the clerk or whomever has possession of the notes and minutes in question feels that disclosure would result in such an invasion, access may be denied.

With respect to the determination reached, it is possible that a court might find that it is a final opinion [see § 88(1)(a); Farrell v. Village Bd. of Trustees, 372 N.Y.S.2d 905 (1975)]. If it is a final opinion, it is accessible.

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

Very truly yours,

RJF/md

Robert J. Freeman
Counsel

cc: Mr. James C. Cooper
Associate Counsel
Department of Audit & Control

344

February 23, 1976

Allan M. Kaplan, Esq.
O'Hagan, Reilly & Gorman
Reilly Building
444 Main Street
Islip, New York 11751

Dear Mr. Kaplan:

Thank you for your interest in the Freedom of Information Law.

The request directed to the Jones Beach State Parkway Authority pertains to contracts regarding repair and maintenance of guardrails located at a specific area of the Southern State Parkway, as well as compilation of lists of names and addresses of contractors and firms involved in design and maintenance of the guardrails.

In my opinion, the Authority must search for and provide access to all contracts into which the Authority entered. Traditionally, the public has had a right of access to contracts and other records reflective of expenditure of public funds. The Freedom of Information Law, § 88(10) preserves this right of access.

Nevertheless, the Authority has no duty to compile lists of names and addresses. The Freedom of Information Law provides a right of access to existing records. Therefore, an agency is not obliged to create a record to respond to a request.

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/cd

STATE OF NEW YORK
COMMITTEE ON PUBLIC ACCESS TO RECORDS FOIL-AO-345

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

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ROBERT J. FREEMAN

February 23, 1976

Mr. P. A. Nicolino
Acting Superintendent
Babylon Union Free School District
Administration Office
171 Ralph Avenue
Babylon, NY 11702

Dear Mr. Nicolino:

Thank you for your interest in complying with the Freedom of Information Law.

The question raised is whether a proposal submitted by a teachers association to a school district for the purposes of negotiating a new contract is accessible under the Freedom of Information Law (hereafter "the Law").

The Law provides a right of access to specified categories of records [§88(1)], including

> "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 Education Law, §2116, which directs 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 Law affects the statute quoted above in two ways. First, §88(6) of the Law provides 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" (Resolution of Committee on Public Access to Records, adopted October 31, 1974).

Therefore, a person need not be a "qualified voter of the district" to gain access to records in possession of a school district.

Second, §88(7) of the Law provides that a unit of government may deny access to four categories of information, notwithstanding rights of access granted pursuant to §88(1). In my opinion, however, none of the categories listed in §88(7) could properly be invoked as a ground for denial of access to the records in question.

Nevertheless, case law provides that in some instances records may be deemed privileged and confidential. As the Court of Appeals has held:

> "[T]he hallmark of this privilege is that it is applicable when the public interest could be harmed if the material were to lose its cloak of confidentiality" [Cirale v. 80 Pine St. Corp., 35 N.Y. 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 nondisclosure (id. at 118).

With regard to the issue raised in your letter, case law also held that the governmental privilege may be appropriately

asserted when records relate to an incomplete transaction and disclosure prior to completion of the transaction would be detrimental to the public interest [Sorley v. Clerk, the Mayor and the Board of Trustees of the Incorporated Village of Rockville Centre, 30 A.D. 2d 822 (1968)].

Although the records in question relate to an incomplete transaction, the negotiation of a collective bargaining agreement, I am unaware of any statutory or decisional law stating that such records are either accessible or subject to denial. The question rests on whether or not a court might find that disclosure of materials at an initial stage of negotiation would be detrimental to the public interest. As such, it would be inappropriate at this juncture to conjecture as to the finding at which a court might arrive.

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

STATE OF NEW YORK
COMMITTEE ON PUBLIC ACCESS TO RECORDS FOIL-AO-346

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

COMMITTEE MEMBERS
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PETER C. GOLDMARK, JR.
JAMES C. O'SHEA
GILBERT P. SMITH
ROBERT W. SWEET
EXECUTIVE DIRECTOR
ROBERT J. FREEMAN

February 24, 1976

Ms. Barbara J. Gilman, President
Chemung County Taxpayers Association
228 Sunset Circle
Horseheads, New York 14845

Dear Ms. Gilman:

Thank you for your interest in the Freedom of Information Law. Several questions have been raised, and I will attempt to answer all of them.

The first question deals with the manner in which a request for records is made. Committee regulations, which have the force and effect of law (see attached), provide:

> "[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 made available without written request" [§1401.6(a)].

As I interpret the provision quoted, an agency may require that a request be made in writing, except that oral requests must be accepted with respect to records that have customarily been made available without a written request. Additionally, although an agency may require that a request be made in writing, failure to use a prescribed form cannot be a valid ground for denial of access. Any writing should suffice, so long as the request reflects identifiable records.

Second, in my opinion, records in possession of the County Planning Board are accessible. The Freedom of Information Law provides a right of access to several categories

of records, including:

> "any other files, records, papers or documents required by any other provision of law to be made available for public inspection and copying" [§88(1)(i)].

One such provision of law is General Municipal Law, §51, 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..."

Therefore, all "papers connected or used or filed" with a local government official are accessible to the extent that they do not fall within any of the four categories of deniable records listed in §88(7) of the Freedom of Information Law.

With regard to Sections 6 and 7 of the County regulations, both reflect compliance with the regulations promulgated by the Committee. However, as I interpret the statements made in your letter, the appeals officer, the County Attorney, generally reviews an initial request for records. If such a policy has been implemented, it would appear to be violative of Committee regulations. Pursuant to §1401.2 of the regulations, a records access officer should respond to requests and make an initial determination to permit or deny access. There is, however, nothing in the regulations that would preclude a records access officer from consulting with another official. Nevertheless, if an initial determination is made based on consultation with the appeals officer, the right to appeal a denial as provided by the Freedom of Information Law [§88(8)] and the regulations promulgated thereunder (§1401.7) would be constructively abridged.

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.

STATE OF NEW YORK
COMMITTEE ON PUBLIC ACCESS TO RECORDS FOIL-AO-347

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

COMMITTEE MEMBERS
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JAMES C. O'SHEA
GILBERT P. SMITH
ROBERT W. SWEET
EXECUTIVE DIRECTOR
ROBERT J. FREEMAN

February 26, 1976

Honorable Ogden Reid
Commissioner
N.Y.S. Department of
Environmental Conservation
50 Wolf Road
Albany, New York 12205

Dear Commissioner Reid:

On behalf of the Committee on Public Access to Records, which was created by enactment of the Freedom of Information Law (Article Six, Public Officers Law), I would like to comment upon the rules and regulations proposed by the Department of Environmental Conservation to implement the Mined Land Reclamation Law.

Section 420.3 of the proposed regulations, which deals with confidentiality of records, provides:

> "[I]nformation supplied to the department by applicants, permittees or others in connection with the administration of this title shall be available to public inspection and copying except as limited by article 6 of the public officers law and except as hereinafter provided. Any information collected by the department regarding the mining operations and the reclamation of affected lands and control of pollution of the environment affected by mining shall be held confidential by the department when so requested by the operator, except that such information

> may be divulged in an adjudicatory proceeding authorized by law or to a governmental official when necessary to perform his duties. Any such request for confidentiality shall be made in writing within thirty (30) days of the submission of such information, shall identify specifically each item of information requested to be held confidential, and shall set forth in detail with respect to each such item the reasons for the claim of confidentiality."

The quoted provision would permit "any owner, lessee, or other person who operates, controlls or supervises a mining operation" [proposed regulations, §420.1(o)] to request that records pertaining to "the mining operations and the reclamation of affected lands and control of pollution of the environment affected by mining" be confidential.

In this regard, the courts of New York have consistently held that a mere assertion of confidentiality is insufficient as a means of denying access. While the courts have found that in some instances a public interest privilege may be appropriately asserted:

> "...the privilege does not turn upon the private purpose with which the informant made the confidential communication, but on whether the public interest is better served by disclosure or by keeping the seal of confidence... The concern here is with the privilege of the public officer, the recipient of the communication, rather than with the privilege of the maker of the communication" [Matter of Langert v. Tenney, 5 A.D. 2d 586, 588 (1958).]

The Court of Appeals has upheld and strengthened the thrust of the opinion quoted above:

> "...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. 80 Pine St. Corp., 35 N.Y.2d 113, 117 (1974)].

In determining when the privilege is properly invoked, the Court devised a balancing test whereby the competing interests are weighed:

> "[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, the overall public interest on balance would then be better served by nondisclosure" (id. at 118).

Moreover, the decision held that the propriety of an assertion of privilege must be determined on a case by case basis, that a determination regarding the privilege can be made only judicially, and the governmental agency asserting the privilege has the burden of proving that the public interest would be jeopardized by disclosure (id. at 119).

The application of the Freedom of Information Law to the records in question need not be damaging to either the interests of a mine operator or the Department of Environmental Conservation. Relevant to the subject matter at issue, the statute provides that, notwithstanding rights of access granted thereunder:

> "this article shall 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 of review of a license to do business and if openly disclosed would permit an unfair advantage to competitors of the subject interprise..." [Public Officers Law, §88(7)(b)].

In sum, first, the principles reflected by both the Freedom of Information Law and judicial decisions oppose a policy whereby information can be held as confidential merely by classifying it as such. Second, if disclosure would indeed result in detriment to the public interest, the governmental privilege provides a means of protecting that interest. And third, the provisions of the Freedom of Information Law enable an agency of government to deny access to information which if disclosed would place a mining operation at a competitive disadvantage.

For the reasons stated herein, the Committee on Public Access to Records respectfully requests that section 420.3 of the proposed regulations be reconsidered.

Sincerely,

Robert J. Freeman
Counsel

RJF:dc

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February 26, 1976

Mr. Stephen Deutsch
Town Engineer
Town of Woodbury
Building Department
Highland Hills, NY 10930

Dear Mr. Deutsch:

Thank you for your interest in complying with the Freedom of Information Law.

The question raised is whether personal notes written by a building inspector during his inspection of a building are accessible under the Freedom of Information Law (hereafter "the Law").

The Law provides a right of access to several categories of records [§ 88(1)], including

> "any other files, records, papers or documents required by any other provision of law to be made available for public inspection and copying" [§ 88(1)(i)].

One such provision of law is General Municipal Law, § 51, 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. . ."

Therefore, virtually "all papers connected with or used or filed" by a municipal official are accessible to the extent that they do not fall within any of the categories of deniable records listed in § 88(7) of the Law.

One of the categories of deniable records consists of "investigatory files compiled for law enforcement purposes" [§ 38(7)(d)]. In this regard, pursuant to Town Law, § 268, it has been held that a town inspector may be invested by a town board with authority to enforce its building code and zoning ordinances by instituting proceedings to enjoin violators [Willets v. Quinto, 225 N.Y.S.2d 301 (1962)]. As such, some of the records compiled by building inspectors may have been compiled for law enforcement purposes.

The description of the records in question in your letter does not specify whether the notes are part of investigatory files. In my opinion, the public's right to inspect and copy the records is contingent upon whether they were compiled for law enforcement purposes.

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

STATE OF NEW YORK
COMMITTEE ON PUBLIC ACCESS TO RECORDS

FOIL-AO-349

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

March 2, 1976

Ms. Jan Hebdon
Assistant Editor
Sanders Publications
Warsaw, New York

Dear Ms. Hebdon:

Your letter addressed to Secretary Cuomo has been transmitted to the Committee on Public Access to Records, of which Mr. Cuomo is a member. The Committee is responsible for advising with respect to the Freedom of Information Law (hereafter "the Law").

The question is whether penalties may be imposed when a public official refuses to provide access to records as required by the Law. The answer is that there is no sanction available when an official refuses to comply with the Law.

However, pursuant to regulations promulgated by the Committee, which have the force and effect of law, "denial of access shall be in writing stating the reason therefor" [see enclosed regulations, §1401.7(b)]. Further, when an initial denial is made, the official making the denial must inform the person seeking access of the right to appeal to the head or heads of an agency, who must decide the appeal in writing, within seven business days of its receipt [see the Law, §88(8); regulations, §1401.7].

It is also noted that failure to acknowledge a request or provide or deny access within five days of a request may be considered a denial of access [regulations, §1401.7(c)]. As such, an appeal may be made to the appeals officer or body.

When a denial of access if affirmed by the appeals officer or body, the sole means of recourse is judicial

review via institution of a proceeding under Article 78 of the Civil Practice Law and Rules. In such proceeding, the person denied access must prove that the agency acted unreasonably in denying access.

The Committee has recognized that the burden described above may be difficult to overcome. Consequently, pursuant to its statutory duty to recommend changes in the Law [§88(9)(a)(iii)], the Committee has proposed several amendments, including a shift in the burden of proof. Under the Committee proposal, an agency whose denial is challenged would have the burden of proving its compliance with the 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

RJF/md

bcc: Secretary Cuomo

March 3, 1976

Mr. Jacob Antonio
[redacted]

Dear Mr. Antonio:

I will attempt to answer the questions raised in your letters of February 12 and 21.

The first letter involves rights of access to records under the Freedom of Information Law and specifies four requests for records, three of which have been denied. The request directed to the Family Court resulted in a denial on the ground that the records are no longer in existence. Since the Freedom of Information pertains to existing records, it would appear that the response sent to you by the Family Court was appropriate.

The second request, which was directed to the New York City Police Department, involved records related to two "incidents" as stated in your letter. In this regard, the Freedom of Information Law enables an agency to deny access to "investigatory files compiled for law enforcement purposes" [§ 88(7)(d)]. If the records in question were compiled for law enforcement purposes, it would seem that the denial was proper. However, without additional information, it is impossible to determine the nature of the records in question. It is also noted that the Family Court Act, § 784, provides that "[A]ll police records relating to the arrest and disposition" of a juvenile are made confidential. After obtaining a court order, only a parent, guardian or attorney can inspect such records. Therefore, a police department is barred from disclosing records pertaining to the arrest and disposition of a juvenile.

With regard to records in possession of the Division for Youth, Social Services Law, § 372, provides that such records must remain confidential, unless disclosure is ordered by a Supreme Court justice after giving notice to interested persons and holding a hearing.

In view of the provisions of the Family Court Act and the Social Services Law, it would appear that none of the records related to your stay at the Warwick School have been made available to any person outside of the School.

The second letter seeks advice pertaining to a claim of negligence against the state. The Committee does not deal with inquiries of this nature and I suggest that you consult a private attorney on the matter. Nevertheless, having reviewed the provisions of the Court of Claims Act, I doubt that you are able to bring such an action.

The Act provides that no judgment shall be granted unless an individual files a claim

> "...within ninety days after the accrual of such claim unless the claimant shall within such time file a written notice of intention to file a claim therefor, in which event the claim shall be filed within two years of accrual of such claim" [Court of Claims Act, § 10].

As I interpret your letters, you were an "infant" when the claim accrued. In such cases, the courts have held that an infant (a person below the age of twenty-one) may file a claim for personal injuries within two years after attaining majority [Weber v. State, 267 A.D. 325 (1944)]. Since you attended a training school at age thirteen on or about 1942, you reached twenty-one years of age in approximately 1950. For two years thereafter, you could have filed a claim. Stated in another way, you could have filed a claim upon which a judgment could have been granted until you reached the age of twenty-three. Therefore, in my opinion, it is likely that you can no longer bring a claim against the 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

RJF/dc

NO
FOIL-A0-351

STATE OF NEW YORK
COMMITTEE ON PUBLIC ACCESS TO RECORDS FOIL-AO-352

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

COMMITTEE MEMBERS
[illegible]LIE ABEL - Chairman
[illegible]. ELMER BOGARDUS
MARIO M. CUOMO
PETER C. GOLDMARK, JR.
JAMES C. O'SHEA
GILBERT P. SMITH
ROBERT W. SWEET
EXECUTIVE DIRECTOR
ROBERT J. FREEMAN

March 8, 1976

E. David Wiley, Esq.
N.Y.S. Department of Mental
Hygiene
44 Holland Avenue
Albany, New York 12229

Dear Mr. Wiley:

Thank you for your interest in complying with the Freedom of Information Law (hereafter "the Law").

Pursuant to Mental Hygiene Law, §7.19(h), a board of visitors of a hospital or school within the Department of Mental Hygiene has the authority to investigate charges made against a director or employee of such a facility. The statute also provides that each board or any member thereof may report on conditions at a facility and that:

> "[A] board or member may include in the report or separately at any time any matter pertaining to the management and affairs of the department facility and may make recommendations to the governor and to the commissioner."

The questions raised concern the extent to which reports or recommendations referred to in §7.19 are accessible under the Law and whether the language quoted above restricts disclosure of the records in question to the Governor and the Commissioner.

In my opinion, the statutory language pertaining to communications made by a board of visitors to the Governor and the Commissioner may have little practical effect. Although the records may not be accessible

while in possession of a board, once they are transmitted to the Governor or Commissioner they become subject to the Law.

Nevertheless, pursuant to your letter and our ensuing discussion, it would appear that the reports and recommendations are advisory, that a board has no authority to take final action, and that the records in question are not consistent with any of the categories of records made available as of right pursuant to the Law. It is possible, however, that a court might find that a determination made by a board after investigating and taking testimony constitutes a final opinion made in the adjudication of a case [see Farrell v. Village Board of Trustees, Etc., 372 NYS 2d 905 (1975)]. Such a determination would render a board opinion accessible under §88(1)(a) of the Law.

Moreover, while there may be no right of access to records, the Law is permissive. Consequently, an agency may make any records available, barring a statutory requirement of confidentiality. Therefore, if, for example, the Commissioner determines that disclosure of an opinion of a board of visitors would benefit the public interest, the opinion may be disclosed.

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:mm

March 8, 1976

Mr. Edward W. Heikens
[redacted]

Dear Mr. Heikens:

Thank you for your continued interest in the Freedom of Information Law.

In response to your questions, first, each State agency must designate one or more persons as records access officers. The regulations promulgated by the Committee, which have the force and effect of law, provide:

> "[T]he head of an agency or municipality shall be responsible for insuring compliance with the regulations herein, and shall designate one or more persons as records access officer by name or by specific job title and business address, who shall have the duty of coordinating the agency response to public requests for access to records" [see regulations enclosed, § 1401.2(a)].

Second, § 88(4) of the Freedom of Information Law provides that each agency "shall maintain and make available for public inspection and copying" a subject matter list. The list need not specify every record any agency has in its possession. Rather, as stated in the regulations, the list must specify categories of records with sufficient detail to permit a person requesting a record to identify the file category of the record sought.

And third, the amendments proposed last year by the Committee were not enacted. However, the Committee is currently redoubling its efforts to improve 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.

Very truly yours,

Robert J. Freeman
Counsel

Enc.

RJF/md

March 8, 1976

Mr. Roland R. LaPier
Town Clerk
Town of Beekmantown
R.F.D.1, Box 178
West Chazy, NY 12992

Dear Mr. LaPier:

Thank you for notifying the Committee of your difficulties regarding the performance of your duties as Town Clerk.

The action taken by the Town Supervisor, refusing to permit you to gain custody of town records, is improper. Section 30 of Town Law clearly provides that:

> "[T]he town clerk of each town: 1. Shall have custody of all the records, books and papers of the town."

I can add title to the opinion of Mr. James Cooper, Counsel to the Department of Audit and Control, who wrote that "a town supervisor does not have a right to possess a key to the town vault...." However, I will send a copy of this correspondence as well as Mr. Cooper's opinion to the Town Supervisor.

I hope that I have been of some assistance.

Very truly yours,

ROBERT J. FREEMAN
Counsel

RJF:mm
cc: Mr. Ronald "Pete" Covey

March 8, 1976

Mr. Wallace Nolen
Asst. Director
Citizens Band Cleanup Campaign
Field Engineering Bureau
12 Chase Street
White Plains, NY 10606

Dear Mr. Nolen:

As we have discussed on several occasions, the authority of the Committee is solely advisory. Consequently, enforcement of the Freedom of Information Law rests on the shoulders of the public.

All that I can add to the opinion expressed to you in my letter of August 5, 1975, and our ensuing conversations is that the regulations promulgated by the Committee have the force and effect of law. As such, each agency and municipality as defined respectively by § 87(1) and (2) of the Freedom of Information Law must adopt procedures no more restrictive than those prescribed by the Committee.

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
Counsel

RJF/dc

March 8, 1976

Ms. Beatrice Miller Montanye
[redacted]

Dear Ms. Montanye:

Your letter addressed to Mr. Tomson, who is no longer associated with the Committee, has been transferred to me.

On your behalf, I attempted to contact Mr. VanValkenburgh of the Department of Environmental Conservation. Although Mr. VanValkenburgh is no longer with the Department, I was informed by another gentleman that the Department does not have in its possession any records pertaining to your inquiry.

With regard to statements made in your letter, please be advised that an agency need not respond to a request within forty-eight hours of its receipt. The regulations promulgated by the Committee (see enclosed) provide:

> "[A]n agency or municipal official shall respond promptly to a request for request for records. Except under extraordinary circumstances, his response shall be made no more than five working days after receipt of the request . . ." [§ 1401.6(b)].

With respect to fees for copies, the regulations state that, unless otherwise provided by law, agencies with photocopying equipment may charge no more than twenty-five center per page [§ 1401.8(c)(1)]. Agencies without photocopying

equipment may prepare handwritten or typewritten transcripts, in which case the person requesting the records may be charged for the clerical time involved in making the transcript [§ 1401.7(c)(2)]. In the case of stenographic notes that have not been transcribed, an agency may charge the actual copying cost, excluding fixed costs of the agency [§ 1401.7(c)(3)]. Therefore, if the cost of transcribing the stenographer's notes is $150.00, as stated by the County Clerk, such fee would be in compliance with the Freedom of Information Law.

I hope that I have been of some assistance.

Very truly yours,

ROBERT J. FREEMAN
Counsel

RJF/dc
Enc.

March 9, 1976

Ms. Ethel Fitzgerald
Member, Board of Examiners
Board of Education of the
City of New York
65 Court Street
Brooklyn, NY 11201

Dear Ms. Fitzgerald:

Thank you for your interest in complying with the Freedom of Information Law (hereafter "the Law").

In my opinion, the Board of Examiners is an agency as defined by § 87(1) of the Law. As such, it is obliged to effectuate the provisions of the Law.

In addition to providing access to records pursuant to § 88(1), the Board must adopt regulations no more restrictive than those promulgated by the Committee and, in some instances, create new records. For example, § 88(1)(g) of the Law and § 1401.3 of the regulations require the fiscal officer of an agency to compile a payroll record, consisting of the name, address, title and salary of each officer or employee of an agency. Additionally, § 88(4) requires compilation of a subject matter list, and § 88(5) requires that a voting record be maintained.

I have enclosed several documents for your perusal which should prove to be helpful in describing the Board's obligations under the Law.

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

Very truly yours,

RJF:mm
Encs.

ROBERT J. FREEMAN
Counsel

March 17, 1976

Mr. Paul Feiner
[redacted]

Dear Mr. Feiner:

Thank you for your continued interest in open government.

Your question concerns the propriety of action taken by the Scarsdale Village Board of Trustees, which, according to your letter, voted while in executive session.

As I advised in an opinion sent to you December 10, 1975, both the State Comptroller and Attorney General have published opinions stating that a town board should vote in public. The question of the validity of action taken in executive session has been dealt with in another opinion of the Comptroller, which stated that "an ordinance voted upon and passed by the town board in an executive session is invalid" (69 Op.St.Compt. 141).

In my opinion, if the same question were raised with respect to a village board of trustees, the result would be the same, since neither the Town Law nor the Village Law specifically direct that voting by a town board or village board of trustees must be in public.

In order to challenge a vote taken in executive session, a special proceeding must be initiated in the courts. Further, it is noted that opinions rendered by the Comptroller and the Attorney General are advisory. According to my research, there has been no judicial decision stating that a vote taken in executive session is invalid. Therefore, although a court might give great weight to an opinion of the Comptroller or the Attorney General, it has no obligation to rely upon such opinion. Consequently, the result reached by a court might differ from the opinion of either of two public officials noted.

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

359

March 17, 1976

Ms. Margaret Sherwood
Assistant Counsel
NYS Urban Development Corporation
1345 Avenue of the Americas
New York, New York 10019

Dear Ms. Sherwood:

Thank you for your interest in the Freedom of Information Law (hereafter "the Law").

The question raised in your letter is whether proposals and related documents in possession of the Urban Development Corporation which pertain to ongoing contract negotiations are accessible under the Law.

Section 88(1) of the Law provides a right of access to nine categories of records. As described in your letter, it appears that the records in question do not fall within any of the categories listed. If that is the case, in my opinion, neither the proposals nor the documents related thereto are accessible.

Nevertheless, I suggest that the contents of the materials sought be reviewed to determine whether any portions thereof must be made available pursuant to the enumerated categories of accessible records found in § 88(1).

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

360

March 19, 1976

Ms. Martha Hochberger
Brooklyn College
Lay Advocate Program
Dept. of Student Affairs
and Services
LaGuardia Hall, Room 145
Brooklyn, New York 11210

Dear Ms. Hochberger:

Thank you for your interest in the Freedom of Information Law.

As requested, enclosed are several documents, including the statute, the regulations promulgated thereunder, which have the force and effect of law, resolutions adopted by the Committee, and an article published by the Freedom of Information Center in Columbia, Missouri.

With regard to your question, in my opinion, Brooklyn College is an agency as defined by § 87(1) of the Freedom of Information Law. As described in Article 125 of the Education Law, it appears that the City University and its branches are governmental entities which perform governmental functions. Therefore, its records are accessible to the extent provided by 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.

Very truly yours,

ROBERT J. FREEMAN
Executive Director

RJF/dc
Encs.

March 22, 1976

Hon. Carol Greitzer
Councilwoman
3rd District, Manhattan
51 Chambers Street, Room 429
New York, New York 10007

Dear Councilwoman Greitzer:

Your letter addressed to Attorney General Lefkowitz has been transmitted to the Committee on Public Access to Records, which is responsible for advising with respect to the Freedom of Information Law (hereafter "the Law").

The question raised pertains to access to records in possession of the New York City Transit Authority relating to an accident occurring in 1972.

Prior to the enactment of the Law, public authorities were not obliged to disclose records in their possession unless otherwise directed to do so by statute. As stated by the Court of Appeals:

> "[T]hough we are strongly in favor of enforcing the government's duty to disclose to its citizens in the course of conduct of its various departments, in the case of a public authority it is for the Legislature, rather than the courts, to decide to what extent its operations may be subjected to public scrutiny. Where the Legislature has provided specific means for supervision, the courts may not engraft amendments which the Legislature has not even impliedly sanctioned" [Matter of New York Post Corp. v. Moses, 10 N.Y.2d 199, 205 (1961)].

By enactment of the Law, however, the Legislature specifically included public authorities. In its definition of "agency" [§ 87(1)], the Law includes public authorities, public corporations and any other "governmental entity performing

a governmental or proprietary function for the State of New York or one or more of its subdivisions. Therefore, the New York City Transit Authority is subject to the provisions of the Law.

Section 88(1) of the Law provides access to nine categories of records. Consequently, to the extent that the materials sought fall within any of the nine categories, they must be made available to you.

In addition to the specific categories of accessible records listed in § 88(1)(a) through (h), 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 [§ 88(1)(i)].

There are two other provisions of law granting rights of access that may be relevant to your inquiry.

Since litigation has been initiated, it is probable that several documents have been filed with a court. In this regard, Judiciary Law, § 255 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 at the rate allowed to a county clerk for a similar service, diligently search the files, papers, 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."

Under § 255, any person may inspect and copy documents filed with a court. Therefore, much of the information you are seeking may be accessible if included among papers filed pursuant to a judicial proceeding.

Second, § 66-a of the Public Officers Law, entitled "[A]ccident reports kept by police authorities to be open to the inspection of persons interested", states:

> "[N]otwithstanding any inconsistent provisions of law, general, special or local, or any limitation contained in the provision of any city charter, 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, shall be open to the inspection of any person having an interest or of such person's attorney or agent, even though the state or a municipal corporation or other subdivision thereof may have been involved in the accident; except that the authorities having custody of such reports or records may prescribe reasonable rules and regulations in regard to the time and manner of such inspection, and may withhold from inspection and 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."

The question raised in relation to the quoted statute is whether Transit Authority accident reports are included within its scope.

Section 66-a pertains to:

> ". . . the police department or force of any county, city, town, village or other district of the state . . . ."

Since the Transit Authority police force is not a department or force of any of the aforementioned political subdivisions, it is likely that a court would find that rights of access granted pursuant to § 66-a of the Public Officers Law do not apply to the Transit Authority. In this regard, the Appellate Division held that an accident report compiled by an employee of the New York State Thruway Authority did not fall within the scope of § 66-a and, therefore, was not accessible [Erenberg v. Brill, 10 App. Div. 2d 769 (1960)]. Nevertheless, it is possible that the significance of the decision may be limited. First, the employee who compiled the report for the Thruway Authority was not a police officer. According to the New York Times clipping attached to your letter, the accident was reported by Transit Authority police, who are "police officers", as defined by the Criminal Procedure Law, § 1.20(34). Second, the court found that the Authority was not required to investigate accidents or compile and maintain reports thereof.

However, a later case, Barnett v. Long Island State Park Commission, [66 Misc.2d 1022, 323 N.Y.S.2d 71 (1971); judgment modified, 364 N.Y.S.2d 186 (1975)], was decided somewhat differently. In construing § 66-a, the court found that accident reports in possession of the Park Commission are accessible, since the phrase "other district of the state" is nowhere defined (id. at 72), the Park Commission exercises authority over "a specific and limited geographical area" (id. at 73), and since the park patrolmen are police officers. Nevertheless, the decision was distinguished from Erenberg, supra,

> "for that case involved the Thruway Authority which, unlike the Commission, is a public corporation separate from the state . . . and the report of an investigation made by an employee who was not a peace officer" (Barnett, supra, at 73).

In my view, the quotation above, which distinguishes Barnett from Erenberg is not entirely clear. The court stated that "district of the state" is not defined, that the Park Commission has jurisdiction over a specified geographical area, and that the employees who compiled the accident records were police officers. Since "district of the state" is undefined, the reasoning behind the exemption made regarding the Thruway Authority is unclear. As described in your letter and attached materials, the facts relative to the Transit Authority are similar to those stated in Barnett, except that the Transit Authority is a public benefit corporation. Consequently, in my view, it is conceivable that a court might determine that accident reports compiled by Transit Authority police officers are within the scope of Public Officers Law, § 66-a and, therefore, are accessible. However, since I am unaware of any decision pertaining to this issue concerning the Transit Authority, it is impossible to conjecture as to the finding that a court might make.

Viewing the situation from a different perspective, the reason for denial of access postulated by the Transit Authority, that the accident reports relate to litigation, may be without merit. The courts have held that the provisions of the Freedom of Information Law and its predecessor, § 66, Public Officers Law, override Article 31 of the Civil Practice Law and Rules, which pertains to discovery, when the records sought are otherwise accessible. Materials related to litigation that are collected in the ordinary course of business of a governmental

entity, "including perhaps eventual use in any litigation which may ensue", are not shielded from disclosure [see Burke v. Yudelson, 368 N.Y.S.2d 779, 785 (1975), aff'd 378 N.Y.S.2d 165 (1976); Winston v. Mangan, 72 Misc. 2d 280, 285 (1972)]. Additionally, in a recent decision of the Appellate Division, the court found that:

> "[C]ontrary to respondent's assertion . . . the provisions of the discovery provisions of the Civil Practice Law and Rules do not restrict disclosure of records made public under the Freedom of Information Law" [Burke, supra, at 166].

Therefore, records which relate to litigation that are otherwise accessible remain accessible.

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
Executive Director

cc: Mr. Stewart Riedel
General Counsel
New York City Transit Authority
370 Jay Street
Brooklyn, New York 11201

Mr. Donald Hirschorn
Assistant Attorney General
Department of Law
The Capitol
Albany, New York 12224

RJF/md

March 24, 1976

Mr. Richard McGrady
[redacted]

Dear Mr. McGrady:

Thank you for your interest in the Freedom of Information Law.

Your question pertains to a denial of access to salary information in possession of the Haverstraw-Stony Point Central School District.

In my view, the records sought were improperly denied, and portions of the regulations adopted by the District fail to comply with these promulgated by the Committee on Public Access to Records. Section 88(1)(g) of the Freedom of Information Law requires each governmental entity to compile a payroll record consisting of the name, address, title and salary of all officers or employees of the entity. However, since the statute does not specify whether the home or business must be given, the Committee has consistently advised that either may be provided. If, for example, the official compiling the record feels that disclosure of home addresses would result in "an unwarranted invasion of personal privacy" [§ 88(3)], the business address may be provided.

Moreover, the payroll record must be made available to any person. As the Freedom of Information Law directs [§ 88(G)] and the Committee 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].

In the opinion of the Committee, the reference to "bona fide members of the news media" in § 88(1)(g) emphasizes the right of access of the news media to the record in question. Under previous access laws, a demonstration of a particular status or interest was a condition precedent to granting access. For example, under § 2116 of the Education Law, a person must demonstrate that he or she is a qualified voter of a school district before the district must provide access. In many instances, members of the news media could have been denied access on the ground that they could not meet such requirements. However, as stated previously, the Freedom of Information Law provides equal access to any person.

Furthermore, the regulations promulgated by the Committee, which have the force and effect of law, specifically provide that payroll information shall be made available to "any person including bona fide members of the news media" [see regulations, § 1401.3(b)]. The rationale for this requirement is based upon the "any person" standard noted above, as well as decisions made by the courts prior to enactment of the Freedom of Information Law. It has been 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" [Winston v. Mangan, 338 N.Y.S.2d 654, 662 (1972)].

Since § 88(10) of the Freedom of Information Law preserves rights of access previously granted by other provisions of law or by the courts, the right of access to payroll information is preserved.

Based on the foregoing, in my opinion, Section II(b) of the District regulations is violative of the Freedom of Information Law and the regulations promulgated thereunder.

With respect to employment contracts, I believe that they too have been improperly denied. As provided by both the Freedom of Information Law [§ 88(1)(i)] and the regulations adopted by the District [Section II(a)(6)], there is a right of access to:

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

One such provision of law is § 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."

Therefore, virtually all records in possession of a school district are accessible, to the extent that they do not contain deniable information within the scope of § 88(7) of the Freedom of Information Law. As described in your letter, it does not appear that the documents in question are deniable pursuant to § 88(7).

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
Executive Director

RJF/dc
cc: Office of the Assistant Superintendent - Business
117 Main Street
Stony Point, New York 10980

April 2, 1976

Hon. Matthew J. Murphy, Jr.
Member of the Assembly
Legislative Office Building
Room 547
Albany, New York

Dear Assemblyman Murphy:

Thank you for your interest in the Freedom of Information Law.

The question raised in your letter is whether a member of a town board may be barred from inspecting records regarding the fiscal operation of the town unless permission to inspect the records has been granted by the town supervisor.

First, § 30 of the Town Law provides:

> "[T]he town clerk of each town: 1. Shall have custody of all the records, books and papers of the town."

Therefore, the clerk, not the supervisor, is required by law to maintain custody of town records. The Attorney General concurs in this regard [1970 Op.Atty.Gen. (Inf.) 104].

Second, the Freedom of Information Law provides a right of access to nine categories of records, including:

> "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 § 51 of the General Municipal Law, which grants rights 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 . . ."

Therefore, all "papers connected with or used or filed" in a town office or with a town officer are accessible to the extent that they do not fall within any of the categories of deniable information listed in § 88(7) of the Freedom of Information Law.

Third, the Freedom of Information Law provides [§ 88(6)] and the Committee has resolved that accessible records must be made equally available to any person, without regard to status or interest [see attached resolution]. Consequently, records reflecting the fiscal operation of a town are accessible as of right to any person, including a member of a town board.

The procedures governing access to records are contained in regulations promulgated by the Committee, which have the force and effect of law. If access has been denied and the administrative remedies provided in the regulations have been exhausted, review may be sought in the courts pursuant to Article 78 of the Civil Practice Law and Rules. Under the circumstances described in your letter, it would appear that an Article 78 proceeding could be initiated to review a denial of access under the Freedom of Information Law or to enjoin the supervisor from acting beyond the scope of his authority.

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
Executive Director

cc: Mr. James Lombardi
Supervisor, Town of Lewiston
1375 Ridge Road
Lewiston, New York 14092

RJF/md

April 6, 1976

Mr. John McCuen
[redacted]

Dear Mr. McCuen:

Thank you for your interest in the Freedom of Information Law.

Dean Abel has informed me of the problems that you have been facing with respect to gaining access to records of the East Hampton School District.

It is important to point out that the Freedom of Information Law and the regulations promulgated thereunder by the Committee are intended to ease public access to records. The regulations, in particular, were drafted after considering both current and past practices.

It appears that you are now being asked to submit written requests for records which in the past had been available by means of an oral request. In this regard, the regulations specifically state that a written request:

> ". . . shall not be required for records that have been customarily available without written request" [regulations, § 1401.6(a)].

Moreover, in instances when written requests are required by an agency, the Committee had consistently advised that a failure to use a form prescribed by the agency cannot be a valid ground for denial of access. Any writing reflective of identifiable records should suffice.

With regard to the amount of time permissible for responding to a request, the regulations direct 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" [§ 1401.6(b)].

If access is denied, you may appeal pursuant to the procedures described in § 38(8) of the statute and § 1401.7 of the regulations. In such cases, an agency must decide the appeal within seven business days of its receipt.

Additionally, it should be noted that rights of access to school district records are extensive. The Freedom of Information Law provides access to nine categories of records, including:

> "any other files, records, papers or documents required by any other provision of law to be made available for public inspection and copying" [§ 88(1)(i)].

One such provision of law is § 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."

Therefore, virtually all records in possession of a school district are accessible to the extent that they do not fall within any of the categories of deniable information listed in § 88(7) of the Freedom of Information Law.

Furthermore, the Freedom of Information Law [§ 88(6)] provides 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 attached resolution).

Therefore, a person need not be a qualified voter of a school district to gain access to records; if the records are accessible under the statute, they are accessible to any person. Similarly, the rights of the news media under the statute are equal to those accorded 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
Executive Director

RJF/md

bcc: Dean Abel

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April 8, 1976

Mr. Richard Glazer, Supervisor
Town of Rosendale
Box 423
Rosendale, New York 12472

Dear Mr. Glazer:

I have been asked by Mr. Murray Jaros, Counsel to the Association of Towns, to advise you with respect to the legality of setting fees for searching records sought under the Freedom of Information Law.

Section 1401.8 of the regulations (see enclosed) promulgated by the Committee, which have the force and effect of law, provide:

> "[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 the following:
>
> . . . (2) Search for records."

Therefore, unless a search fee had been adopted by law prior to the effective date of the Freedom of Information Law, an agency, including a town, may not charge for searching for records.

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
Executive Director

RJF/dc
cc: Murray Jaros

366

April 9, 1976

Ms. Sharon Watson
[redacted]

Dear Ms. Watson:

As requested, please find enclosed regulations promulgated by the Committee on Public Access to Records. The regulations, which have the force and effect of law, describe the procedures with which agencies must comply under the Freedom of Information Law.

I regret that I cannot answer your question concerning access to files pertaining to you in possession of a regulatory board within the Department of Education. On your behalf, I contacted the Division of Professional Licensing Services and was informed that no response could be given without additional information. If you will inform me of the board under which you are licensed, I will be happy to attempt to gain information regarding rights of access from that board.

With respect to destruction or disappearance of records, first, the State Finance Law, § 186, provides procedures concerning destruction of records. Second, Committee regulations provide that an agency records access officer:

> "[U]pon failure to locate records, certify that:
>
> (i) The agency is not the legal custodian for such records.
>
> (ii) The records of which the agency is a legal custodian cannot be found."
>
> [§ 1401.2(b)(6)]

I hope that I have been of some assistance and that you will forward the necessary additional information mentioned above.

Very truly yours,

ROBERT J. FREEMAN
Executive Director

RJF/dc

367

April 12, 1976

Ms. Mary L. Lewis
[redacted]

Dear Ms. Lewis:

Thank you for your interest in the Freedom of Information Law.

I have enclosed copies of the Freedom of Information Law and the regulations promulgated thereunder, which govern the procedural aspects of the Law, and have the force and effect of law.

With regard to your questions, I am unaware of any provisions of law which prohibit a public body from entering into an executive session. Similarly, there are no provisions governing the amount of time that may be spent in executive session, the subjects that may be discussed in executive session, or the ability of school boards to enter into executive session.

However, it is noted that the Legislature has recognized the need for statutory guidance in this area. Several bills on the subject are before the Legislature and it is likely, in my opinion, that open meetings legislation will be enacted during the current session.

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:mm
Enc.

Art Cramer April 12, 1976

Bob Freeman

Freedom of Information Regulations

The following consists of comments regarding proposed Freedom of Information regulations. Many of the comments reiterate objections raised during our discussion of the draft.

Section 144.2(b)(4)(i)

Although a charge of fifty cents per page for copies is entirely legal under Section 96 of the Executive Law, that fee is double the maximum allowable fee for copies pursuant to Committee regulations [§ 1401.8]. Since Section 96 is mandatory, the only way in which the fee could be lowered is by amendment of the statute.

Which agencies within the Department of State are covered by Section 96? Does it include all boards, commissions and divisions?

Section 144.3(b)

The proposed regulations state that the payroll record required to be compiled pursuant to the Freedom of Information Law, § 88(1)(g), shall be made available only to bona fide members of the news media.

Contrarily, the Committee regulations, which have the force and effect of law, provide that the payroll record be made available to "any person" [§ 1401.3(b)]. The reasons for this policy were explained during our discussion.

Section 144.7

There are two objections to this section. First, it contains the requirement that written requests must be submitted on forms prescribed by the Department. In this regard, the Committee has consistently advised that failure to use a form prescribed by an agency cannot be a valid ground for denial of access. So long as a request is reflective of identifiable records, any writing should suffice.

Second, the provision requires a signature and inclusion of the name and address of the person requesting records. Since the Freedom of Information Law states [§ 88(6)] and the Committee has resolved [see attached resolution] that accessible records must be made equally available to any person without regard to status or interest, identification by means of name and address should not be a condition precedent to granting access. I realize, however, that in some instances it is necessary to obtain the name and address in order to respond appropriately.

Section 144.9

This section gives discretion to the head of a unit with regard to the number or type of records sought. In situations in which a request is so large that the records cannot be produced within five days, "extraordinary circumstances" may be cited pursuant to § 1401.6(b)(2) of the Committee regulations or its counterpart, § 144.16(b) of the Department's draft regulations. Furthermore, as stated by the courts,

> "[M]ere 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 N.Y.S.2d 215, 217 (1961); New York Post Corp. v. Moses, 12 A.D.2d 243, 210 N.Y.S.2d 88, 100 (1961)].

Although the courts have notdelineated a dividing line between harassment and "mere inconvenience", it is clear that a showing of the latter is insufficient as a ground for denial of access.

In my opinion, since the regulations include an "extraordinary circumstances" provision, Section 144.9 of the draft regulations is unnecessary and should be deleted.

Sections 144.13, 144.14 and 144.15

For basically the same reasons as stated in the preceding discussion of § 144.9, these three sections are, in my view, unnecessary.

Section 144.16

Although this section is not inaccurate, it would be appropriate to include language to the effect that responses to requests shall be made promptly.

Section 144.18

As written, this section provides for a second appeal to be directed to the Secretary. The statute [§ 88(8)] and the regulations specifically provide a single appeal. Therefore, the appeals officers should be either the deputy secretaries or the Secretary.

Additionally, paragraphs (6) and (7) of § 144.18(d) are misplaced syntactically. I believe that they should be subdivisions (e) and (f), respectively.

Any comments would be much appreciated.

RJF/dc
Enc.

STATE OF NEW YORK
COMMITTEE ON PUBLIC ACCESS TO RECORDS FOIL-AO-369

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

COMMITTEE MEMBERS
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GILBERT P. SMITH
ROBERT W. SWEET
EXECUTIVE DIRECTOR
ROBERT J. FREEMAN

April 13, 1976

TO: Patrick J. Cea

FROM: Robert J. Freeman

SUBJECT: License Application of Private Investigators

Your question pertains to access to information pursuant to the Freedom of Information Law relative to an application for a license to engage in the business of private investigation.

In my opinion, the application and related documents are accessible [see Executive Law, §96; Freedom of Information Law, §88(1)(i)] to the extent that they do not contain deniable information as reflected by §88(7) of the Freedom of Information Law. For example, fingerprints, criminal history records and investigative materials compiled for law enforcement purposes are deniable pursuant to §88(7)(d). Similarly, identifying details may be deleted [§88(3)] or records may be withheld [§88(7)(c)] if disclosure would result in an unwarranted invasion of personal privacy. Additionally, access may be denied with respect to information that is confidentially disclosed to the Department, maintained for the grant or review of a license to do business and if disclosed would permit an unfair advantage to competitors of the subject of the records.

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

RJF:dc

370

April 13, 1976

Mr. Paul Seibert
[redacted]

Dear Mr. Seibert:

Thank you for your interest in the Freedom of Information Law (see copy enclosed).

Your question deals essentially with the application and scope of the Freedom of Information Law. The opinion of the Committee on this subject was stated and disseminated to units of government and the public some eighteen months ago.

It is true that public authorities had not been covered by any access statute prior to the enactment of the Freedom of Information Law and that confusion arose with respect to its application. Consequently, pursuant to its statutory authority [§ 88(9)(a)], the Committee on Public Access to Records adopted a resolution (see attached, Resolution 4) that the Freedom of Information Law is retrospective in its coverage. Stated in another way, although the statute became effective September 1, 1974, rights of access granted thereunder apply to all records in possession of an agency, including those in possession of an agency prior to September 1, 1974.

Further, having reviewed the letter sent to you by Mr. Walter Cassidy of the New York City Housing Authority, I respectfully disagree with some of the statements made by Mr. Cassidy with regard to your rights and the duties of the Housing Authority. First, he wrote that a request for records will be honored only if the request is "related to a legitimate purpose of the requestor." In this regard, the Freedom of Information Law provides [§ 88(6)] 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 attached, Resolution 3).

Therefore, the purpose of a request is irrelevant; the sole question that arises when a request is made is whether there is a right of access.

Second, Mr. Cassidy stated that records will be provided if they are "obtainable by Authority personnell (sic) without requiring extensive time and effort." Again, the only question that should be raised is whether there is a right of access. If such a right exists, it is the duty and responsibility of the Authority to search for and provide access to the records sought. Moreover, the courts have held that

> "[M]ere inconvenience resulting from inspection cannot be equated with public detriment, nor be construed as inimical to the public welfare, or against public policy" [New York Post Corp. v. Moses, 12 A.D.2d 243, 210 N.Y.S.2d 88, 100 (1961); Sorley v. Lister, 218 N.Y.S.2d 215, 217 (1961)].

Therefore, in my opinion, even if "extensive time and effort" are required to produce accessible records, the records must be produced. Additionally, the regulations promulgated by the Committee (see enclosed), which have the force and effect of law and apply to all governmental entities in the state, include provisions whereby access can be delayed if the agency acknowledges that "extraordinary circumstances" operate to delay a prompt response [see regulations, § 1401.6(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
Executive Director

RJF/dc
Encs.
cc: Walter T. Cassidy, Esq.

371

April 14, 1976

Mrs. Barbara Diefendorf
[redacted]

Dear Mrs. Diefendorf:

Thank you for your interest in the Freedom of Information Law. Enclosed for your information are copies of the Freedom of Information Law and regulations adopted by the Committee on Public Access to Records, with which all units of government in New York must comply.

Your letter generally deals with a denial of access to records in possession of the Town Clerk. In this regard, the Freedom of Information Law provides access to several categories of records, including

> "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 municipal corporation in this state. . ."

Therefore, virtually all records in possession of a municipality, such as a town, are accessible to the extent that such records do not contain information deemed deniable pursuant to Section 88(7) of the Freedom of Information Law.

With respect to the procedural problems that you have encountered, I suggest that you consult the regulations. The regulations describe, for example, the hours during which records must be made available, the time limit within which government must respond to a request, and the manner in which a member of the public may appeal a denial of access.

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
Executive Director

RJF/dc
cc: Ms. Shirley Van Deusen, Town Clerk

STATE OF NEW YORK
COMMITTEE ON PUBLIC ACCESS TO RECORDS FOIL-AO-372

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

April 20, 1976

Ms. Katherine S. Livingston
[redacted]

Dear Ms. Livingston:

Your letter 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 (hereafter "the Law").

The Law provides rights of access to several categories of records [§88(1)]. However, notwithstanding rights of access granted, an agency may deny access to information that is "part of investigatory files compiled for law enforcement purposes." Consequently, if a law enforcement agency has records pertaining to you in its possession and such records are among investigatory materials compiled for law enforcement purposes, the records may be denied.

To the best of my knowledge, a citizen currently has limited redress with regard to a law enforcement agency in situations in which files may have been improperly maintained. However, a subcommittee of the Assembly Committee on Governmental Operations is currently researching systems of maintenance of non-criminal police files with a view toward formulation of legislation to prevent recurrence of these systems without impairing the work of police officials. The subcommittee is headed by Assemblyman Mark Siegel.

I have enclosed a copy of the regulations adopted by the Committee on Public Access to Records which govern the procedural aspects of the Law and have the force and effect of law. They

should be helpful to you in formulating requests and in specifying the reponsibility 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
Executive Director

RJF/dc
Enc.

bcc: Don Hirschorn
Assistant Attorney General

373

bcc: Morton Greenspan,
General Counsel

April 20, 1976

Mr. Joseph M. Belth
Editor
INSURANCE FORUM, INC.
P.O. Box 245
Ellettsville, Indiana 47429

Dear Mr. Belth:

Thank you for your interest in the Freedom of Information Law.

The issue raised in your letter pertains to a denial of access to records in possession of the Insurance Department. As I interpret the materials that you sent to me, the records sought are reflective of a change in the method of determining dividends on individual life insurance policies and annuities tentatively approved by the Insurance Department.

On your behalf, I have contacted several officials of the Insurance Department in order to obtain additional information concerning the denial. I was informed that, in the opinion of those officials, the records sought are deniable pursuant to the Freedom of Information Law, § 88(7)(b). The provision cited states:

> "[N]otwithstanding the provisions of subdivision one of this section, this article shall 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 . . ."

Thus, three conditions precedent must be met in order to deny access. The information must be confidentially disclosed to an agency, it must be compiled and maintained for the regulation of commercial enterprise, and disclosure must permit an unfair advantage to competitors. Additionally, information in the nature of trade secrets may be denied.

Based on my discussions with officials of the Insurance Department, it appears that the materials in question are at this juncture in the nature of a trade secret and that the requirements for a denial of access pursuant to § 88(7)(b) have been met. The records were confidentially disclosed, the Insurance Department regulates with regard to the subject matter, and immediate disclosure might in effect result in a windfall to competitors of the enterprise concerned.

Although I have no expertise with respect to the larger issues raised in your letter, it appears that in the context of the Freedom of Information Law the arguments expressed by Insurance Department have merit.

Enclosed for your perusal are copies of the Freedom of Information Law and regulations promulgated by the Committee. The regulations, which govern the procedural aspects of the Law, 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
Executive Director

RJF/dc
Encs.

374

April 22, 1976

Mr. John J. McCuen
[redacted]

Dear Mr. McCuen:

Thank you for your continued interest in the Freedom of Information Law.

The question raised in your letter pertains to a denial of access to the proposed budget of a board of education. In response, I can only reiterate statements made to you in my letter of April 6.

Again, I would like to cite Section 2116 of the Education Law, which provides:

> "[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, if the proposed budget is in the possession of a school district office or officer, in my opinion, it must be made available.

Moreover, Section 88(1)(d) of the Freedom of Information Law grants access to "statistical or factual tabulations made by or for the agency". As such, it would appear that the records in question are accessible pursuant to this provision as well.

I suggest that you cite Section 2116 of the Education Law to the officials who denied access.

I hope that I have been of assistance.

Very truly yours,

Robert J. Freeman
Executive Director

RJF/md

375

April 23, 1976

Mr. Paul Feiner
[redacted]

Dear Mr. Feiner:

Thank you for your continued interest in the Freedom of Information Law.

Your first question is whether minutes not yet approved by a village board of trustees are accessible under the Freedom of Information Law (hereafter "the Law"). In my opinion, they must be made available. The Law lists several categories of records that must be made available [§ 88(1)], including:

> "any other files, records, papers or documents required by any other provision of law to be made available for public inspection and copying" [§ 88(1)(i), see enclosed].

One such provision of law is General Municipal Law, § 51, which grants rights 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 . . . ."

Therefore, virtually all records "connected with or used or filed" in a village office or with a village official are accessible to the extent that such records do not contain information deemed deniable pursuant to § 88(7) of the Law. As such, it would appear that minutes, whether or not they have been approved, must be made available.

The second question pertains to communications between the village board of trustees and village councils or committees, or between the board and the village attorney. For the same reasons as stated previously, communications between the board and other village councils or committees would appear to be accessible. However, communications between the board and the village attorney may be denied pursuant to the attorney-client privilege that exists between the village attorney and his client, the board of trustees. Case law has long held that what transpires between an attorney for a municipality and municipal officials is privileged [see, e.g., People ex rel. Updyke v. Gilon, 9 N.Y.S. 243 (1889); Pennock v. Lane, 231 N.Y.S.2d 897 (1962); Canon of Professional Ethics, Canon 15, Judiciary Law Appendix].

The third question concerns access to "financial analysis reports". Pursuant to § 88(1)(i) of the Law in conjunction with § 51 of the General Municipal Law, it appears that the reports are accessible. Additionally, § 88(1)(d) of the Law provides access to "statistical or factual tabulations made by or for the agency". Therefore, as you have described the records in question, they must be made available under § 88(1)(d) as well.

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
Executive Director

RJF/md

376

April 26, 1976

Ms. Sharon Watson
[redacted]

Dear Ms. Watson:

Several questions are raised in your letter of April 13.

First, as I interpret Freedom of Information Law, "board" may refer to a state or municipal board. The definition of "agency" [§ 87(1)] includes "any state or municipal board". As such a state board is within the scope of the statute.

Second, you asked whether the Department of Education is responsible to the Committee with regard to access to records. While all units of government must comply with the Freedom of Information Law and the regulations promulgated thereunder by the Committee, the authority of the Committee is advisory.

Third, when I contacted the Division of Professional Licensing Services, I was told that there are various boards which govern the procedures pertaining to licensing in particular professions. The material obtained by the boards prior to the grant of a license differs due to the varied requirements related to each profession. For example, the materials required to be submitted by candidates for a teaching license may be different from those required to be submitted by psychologists, medical doctors or certified public accountants. Although each of these professional groups is licensed by the State Department of Education, individual professional boards review candidates' license applications.

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

Sincerely,

Robert J. Freeman
Executive Director

RJF/md

377

April 29, 1976

Mr. Tom McPheeters
The Times Record
501 Broadway
Troy, New York 12181

Dear Mr. McPheeters:

Thank you for your continued interest in the Freedom of Information Law.

The question raised in your correspondence pertains to a denial of access to an audit of a nursing home prepared by and in possession of the Department of Health. The denial is based on a policy of nondisclosure until administrative procedures have been exhausted and final determinations made.

In my opinion the records sought are accessible. Section 88(1)(d) of the Freedom of Information Law provides a right of access to:

> "internal or external audits and statistical or factual tabulations made by or for the agency . . . "

There is nothing in the language of the provision quoted above pertaining to the completion of the auditing process.

By reviewing the other categories of accessible records in § 88(1) of the Freedom of Information Law, it is evident that the Legislature intended that some records be made available only in their final stage. For example, § 88(1)(a) provides access to final opinions made in the adjudication of cases; § 88(1)(b) refers to final determinations made by a governing body. In my view, if the Legislature intended that only final audits be made available, § 88(1)(d) would have been written expressing that intent.

The rules of statutory construction bolster this opinion:

> "[I]t is a universal principle in the interpretation of statutes that expressio unius est exclusio alterius. That is, to say, the specific mention of one person or thing implies exclusion of other person or thing. As otherwise expressed, where a law expressly describes a particular act, thing or person to which it shall apply, an irrefutable inference must be drawn that what is omitted or not included was intended to be omitted and excluded" [McKinney Statutes, § 240].

Therefore, since "final" is specifically stated with respect to two of the categories of accesible records, but omitted with respect to § 88(1)(d), the inference is that all audits are available, regardless of the stage of a transaction or proceeding to which it relates.

For the foregoing reasons, the audits sought must, in my view, be made available pursuant to 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
Executive Director

cc: Mr. Stephen P. Krill
Records Disclosure Officer
Department of Health
Tower Building
Empire State Plaza
Albany, New York

Mr. Eugene J. Calahan
Records Access Appeals Officer
Department of Health
Tower Building
Empire State Plaza
Albany, New York

RJF/md

April 30, 1976

Mr. Daniel Bennett
Chairman, Committee of Taxpayers,
Citizens, Parents and Teachers
to Retain Brewster
31 Manheim Street
Little Falls, New York

Dear Mr. Bennett:

Thank you for your interest in the Freedom of Information Law.

Your question pertains to an unanswered request for records in possession of the Little Falls City School District. The responsibilities of units of government concerning response to requests are reflected in the enclosed regulations. The regulations, which were promulgated by the Committee on Public Access to Records, have the force and effect of law.

With respect to the issue raised, the regulations [§ 1401.6(b)] provide:

> "(1) An 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.
>
> "(2) If for any reason more than five days is required to produce records, an agency or municipal official shall acknowledge receipt of the request within five working days after the request is received. The acknowledgement should include a brief explanation of the reason for delay and an estimate of the date production or denial will be forthcoming."

According to your letter, more than five days have passed, and no acknowledgement of the request has been given by the school district.

Under these circumstances, the regulations provide that:

> "If an agency or municipality fails to provide requested records promptly, as required in section 1401.6(b) of this Part, such failure shall be deemed a denial of access by the agency or municipality" [§ 1401.7(c)].

As such, you may appeal pursuant to § 88(8) of the Freedom of Information Law (see enclosed) in conjunction with § 1401.7 of the 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
Executive Director

Enc.

RJF/md

cc: Superintendent of Schools
Little Falls City School District
770 East Main Street
Little Falls, New York 13365

Enclosed for your perusal are copies of the Freedom of Information Law and regulations promulgated thereunder, 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
Executive Director

RJF:hg
Encls.

379

May 3, 1976

Ms. Camille Coulborn
[redacted]

Dear Ms. Coulborn:

Thank you for your interest in the Freedom of Information Law.

The questions raised in your letter are as follows: when do minutes of a school board meeting become accessible; are typewritten, unapproved minutes "stenographers' work product" and, therefore, deniable; are tape recordings of meetings publicly accessible; and may the board prohibit recording of its meetings by the public and the press?

First, the Freedom of Information Law grants access to several categories of records, including:

> "any other files, records, papers or documents required by any other provision of law to be made available for public inspection and copying" [§ 88(1)(i)].

One such provision of law is § 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."

Consequently, virtually all records in possession of a school district are accessible, unless they contain

information deemed deniable pursuant to § 88(7) of the Freedom of Information Law. Therefore, in my opinion, if the minutes have been compiled, they must be made available, even if the board has not yet approved them.

Second, tape recordings of the proceedings of a school board might be deniable. Although the issue has not been decided judicially, the State Comptroller has written an advisory opinion on the subject. The opinion held:

> "[T]here is no requirement that the village clerk use a tape recorder as an aid in transcribing the minutes of proceedings of the board of trustees. This department is of the opinion that while the official minutes are public records open to inspection . . . , recording tapes employed by the clerk as an aid in transcribing the minutes of proceedings of the board are not such public records as must be made available for public inspection" (13 Op.St.Compt. 83, 1962).

If the factual circumstances relative to the school board are analogous to those presented in the Comptroller's opinion, it appears that the tape recording may be denied.

Third, there is a judicial decision pertaining to the use of tape recorders by the public or the news media at a public meeting. Matter of Davidson v. Common Council of the City of White Plains [40 Misc.2d.1053 (1963) held that:

> "[I]f in the judgment of the legislative body the recording distracts from the true deliberative process of the body it is within their power to forbid the use of mechanical recording devices" (id. at 1056).

The decision also pointed out that the Council itself had employed a tape recorder, but found that the device was in control of the Council and that the tapes were used for the benefit of the clerk in preparing the minutes. As such, the opinion differentiated between the use of a tape recorder by the public body and a privately owned tape recorder used by a member of the public.

380

May 3, 1976

Honorable Robert M. Blais
Mayor, Village of Lake George
Lake George, New York 12845

Dear Mayor Blais:

Thank you for your interest in complying with the Freedom of Information Law.

The question raised in your letter pertains to a request for correspondence concerning a project that you have proposed. Although you have possession of the correspondence sought, it is your contention that the communications are confidential and that they are not a part of the Village files, since they have not yet been presented to the Board of Trustees.

While I disagree with some of your contentions, denial of access to the records may be appropriate.

The Freedom of Information Law provides access to several categories of records, including:

> "any other files, records, papers or documents required by any other provision of law to be made available for public inspection and copying" [§ 88(1)(i)].

One such provision of law is General Municipal Law, § 51, 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..."

Therefore, virtually all papers in your possession are accessible to the extent that they contain deniable information as described by § 88(7) of the Freedom of Information Law. In my view, the sole means of denying access pursuant § 38(7) relates to information which if disclosed would result in "an unwarranted invasion of personal privacy" [§ 83(7)(c)]. However, by reviewing the examples of unwarranted invasions of personal privacy provided in § 88(3)(a) to (e), it appears that disclosure of the records in question would not constitute such an invasion, since the contents thereof are relevant to your duties as mayor.

Nevertheless, there is, as you intimated in your letter, a common law privilege which exists with respect to communications made by, to or between public officers. Moreover, the State's highest court has held that the privilege is preserved, notwithstanding enactment of the Freedom of Information Law. [see Cirale v. 80 Pine St. Corp. 35 NY 2d 113, 117 (1974)]. However, the propriety of an assertion of the privilege rests on a balancing test whereby the public officer asserting the same has the burden of proving that disclosure of the records would be detrimental to the public interest.

Also relevant to your inquiry is a decision of the Appellate Division pertaining to an urban renewal transaction. The opinion stated that

> "...urban renewal correspondence, data and valuations are not to be deemed public records within the statutory definitions... 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" [Sorley v. Clerk, the Mayor and the Board of Trustees of the Incorporated Village of Rockville Centre, 30 A.D. 2d 822, 823 (1968)].

As stated in your letter, it appears that premature disclosure of the records sought could negate the ability of the Village to engage in a proposed project. However, since only a court can determine whether the privilege of confidentiality is appropriately asserted (Cirale, supra, 119), it is impossible

to conjecture whether disclosure would in the opinion of a court be detrimental to the public interest. If the circumstances that you have described are analogous to those in the Sorley case cited above, it is possible that a court might find that, at this juncture, the records have been properly denied based upon potential detriment to the public interest.

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
Executive Director

RJF:hg

381

May 3, 1976

Mr. Leo M. Riley, President
Halfmoon Taxpayers Association Inc.
54 Dewey Avenue
Mechanicville, New York 12118

Dear Mr. Riley:

Thank you for your interest in the Freedom of Information Law. Your question pertains to a denial of access to the minutes of the Halfmoon Town Board meeting. Pursuant to the correspondence attached to your letter, the denial was based on several grounds. In my opinion, none of the reasons stated is sufficient to deny access to the records in question.

The initial reasons for denial involve failure by the Board and the Town Attorney to approve the minutes. Approval of minutes by the Board or the Town Attorney is not a condition upon which denial of access can be validly grounded. Section 51 of the General Municipal Law provides access to

> "...any papers connected with or used on 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, if the minutes have been compiled, they must be made available, whether or not they have been approved by the aforementioned town officials.

Next, access was denied on the ground that a letter must be written requesting the minutes. While in some instances an agency may require that a request be made in writing, the regulations promulgated by the Committee, which have the force and effect of law, state that

> "written requests shall not be required for records that have been customarily available without written request" [§ 1401.6(a)].

Without additional information concerning the customary practices of the Town, it is impossible to discern whether the provision quoted above has been violated. However, if minutes of meetings had customarily been made available pursuant to an oral request, failure to submit a request in writing is not a sufficient ground for denial.

The final reasons for denial of access involve inconvenience to the town clerk. In this regard, the courts have held as follows:

> "[M]ere inconvenience resulting from inspection cannot be equated with public detriment, nor be construed as inimical to the public welfare, or against public policy" [New York Post Corp. v. Moses 12 A.D. 2d 243, 210 NYS 2d 88, 100 (1961), Sorley v. Lister, 218 NYS 2d 215, 217 (1961)].

Therefore, even if the town clerk has other responsibilities to which he must attend, "mere inconvenience" is an insufficient basis for denial of access.

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

Very truly yours,

RJF:hg

Robert J. Freeman
Executive Director

382

May 5, 1976

Mr. Paul Feiner
[redacted]

Dear Mr. Feiner:

I thank you once again for your continued interest in the Freedom of Information Law.

Your letter pertains to a denial of access to minutes not yet approved by the Village Board of Trustees. The denial apparently was based on the fact that notes rather than minutes of a meeting have been written.

Although I am unaware of any judicial interpretation or advisory opinion dealing with this controversy, there is an opinion of the State Comptroller which may be relevant to the issue. The opinion states:

> "[T]his Department is of the opinion that while the official minutes are public records open to inspection..., recording tapes employed by the clerk as an aid in transcribing the minutes of proceedings of the board are not such public records as must be made available for public inspection" (18 Op. St. Compt. 83, 1962).

By analogy, it might be argued that handwritten notes compiled by the village clerk are used as an aid in transcribing the minutes and, therefore, are deniable.

Nevertheless, another argument can be made in favor of access. Section 51 of the General Municipal Law 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, it would appear that virtually all "papers connected with or used or filed" with a municipal office or officer are accessible to the extent that they contain deniable information pursuant to § 88(7) of the Freedom of Information Law.

However, due to the lack of judicial interpretation of the issue that you have raised, it would be inappropriate to conjecture as to the decision that might be reached by court.

Once again, I hope that I have been of assistance.

Very truly yours,

RJF:hg

Robert J. Freeman
Executive Director

383

bcc: Donald Herschorn
Assistant Attorney Gen'l.
Dept. of Law - Capitol

May 6, 1976

Mrs. Raymond D. Bouer
[redacted]

Dear Mrs. Bouer:

Your letter addressed to Attorney General Lefkowitz has been transmitted to the Committee on Public Access to Records, which is responsible for advising with respect to the New York Freedom of Information Law.

Although the Freedom of Information Law provides access to records generally, access to marriage records is governed by the Domestic Relations Law, Section 19. This section provides in relevant part:

> "1. Each town and city clerk hereby empowered to issue marriage licenses shall keep a book supplied by the state department of health in which he shall record and index such information as is required therein ...Whenever an application is made for a search of such records in the City of New York, the city clerk of the City of New York may make such search and furnish a certificate of the result to the applicant upon the payment of a fee of two dollars... All such affidavits, statements and consents, immediately upon the taking and receiving of the same by the town or city clerk, shall be recorded and indexed as provided herein and shall be public records open to public inspection whenever the same may be necessary or required for judicial or other proper purposes...
>
> The county clerks of the counties comprising the City of New York shall cause all original applications and original licenses with the marriage solemnization statements thereon heretofore filed with each, and all papers and records and binders relating to such original documents

pertaining to marriage licenses issued by said city clerk, in their custody and possession to be removed, transferred and delivered to the borough offices of the city clerk in each of said counties."

In sum, it appears that upon a showing of "a proper purpose," the records that you are seeking are available at the Queens County Office of the New York City Clerk.

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

Very truly yours,

RJF:hg

Robert J. Freeman
Executive Director

384

bcc: Frank Breselor
Asst.Atty Genll
Dept. of Law

May 7, 1976

Ms. Liz Carver, Editor
The Campus
Finley 338
The City College
133rd Street and Convent Avenue
New York, New York 10031

Dear Ms. Carver:

Your letter of April 29 addressed to Attorney General Lefkowitz has been transmitted to the Committee on Public Access to Records, which is responsible for advising with respect to the Freedom of Information Law.

I am in accord with your interpretation of the Freedom of Information Law. First, pursuant to the definition of "agency" [§ 87(1)], the City College of New York is a "governmental entity" performing a governmental function and is therefore within the coverage of the Freedom of Information Law.

Second, I agree that records of expenditures of the City College are "factual tabulations made by or for the agency" [§ 88(1)(d)]. As such, in my opinion, the records that you are seeking are accessible as of right.

Enclosed is a copy of regulations promulgated by the Committee which govern the procedural aspects of the statute and 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,

RJF:hg
Encl.

Robert J. Freeman
Executive Director

385

May 11, 1976

Mr. Michael B. Rosen
Director of the Law Office
NYC Board of Education
110 Livingston Street
Brooklyn, New York 11201

Dear Mr. Rosen:

Thank you for your interest in the Freedom of Information Law.

The issued raised in your letter is whether records of a probable cause investigation in possession of the New York City Commission on Human Rights are "part of investigatory files compiled for law enforcement purposes" and, therefore, deniable pursuant to the Freedom of Information Law, § 88(7)(d).

The language in question has not been widely interpreted by the courts and it is impossible to conjecture at this juncture as to the result at which a court might arrive. Nevertheless, in the opinion of the Senate sponsor of the Freedom of Information Law, § 88(7)(d) was written in order to preserve the ability of criminal law enforcement agencies to function effectively. He wrote:

> "[T]his language was included at the request of the criminal justice community. It reflects the need to maintain the integrity of criminal justice files..." [Marino, The New York Freedom of Information Law, 43

As such, it appears that the Legislature intended to restrict the application of § 88(7)(d) to records in possession of criminal law enforcement agencies. If a court agrees with the opinion stated by Senator Marino, it is likely that the records that you are seeking would be made available.

Approaching the issue in a different manner may result in a similar conclusion. The Freedom of Information Law grants access to several specified categories of records [§ 88(1)] including:

> "any other files, records, papers or documents required by any other provision of law to be made available for public inspection and copying" [§ 88(1)(i)].

One such provision of law is the New York City Charter, § 1113, which states:

> "[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 of for the comptroller 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 for use in any investigation authorized by this charter."

As I interpret the quoted Charter provision, all New York City agencies, except the police and law departments, must provide access to any "papers," unless such papers are prepared by the Comptroller pursuant to a claim against the City or by Counsel for use in an investigation. With respect to the issue raised in your letter, the Charter appears to evince an intent to permit criminal law enforcement agencies to function without hindrance and preserve the ability to withhold attorney work product and records privileged pursuant to an attorney client relationship. According to our discussions of the controversy, the records in question do not conform to any of the Charter exceptions. Consequently, it appears that the records are accessible pursuant to the Charter.

Moreover, a court has found that Charter exceptions more restrictive than the Freedom of Information Law are deemed superseded and have no application [Matter of Elisofon, N.Y.L.J., July 3, 1975, P.11, c.8 (Sup. Ct., Kings Co., 1975)].

Additionally, the Freedom of Information Law, § 88 (10), provides that:

> "[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."

Pursuant to the provision quoted above, one could argue that since the records in question are available under the Charter, they must continue to be made available even if they fall within the "investigatory files" exception of the Freedom of Information Law [§ 88 (7)(d)].

For the reasons stated herein, in my opinion, the records that you are seeking are accessible.

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

Very truly yours,

RJF:hg

Robert J. Freeman
Executive Director

386

May 11, 1976

Mr. Robert B. Schwartz
#83250
P.O. Box 1000
Lewisburg, Pennsylvania 17837

Dear Mr. Schwartz:

Thank you for your interest in the Freedom of Information Law.

The coverage of the statute includes:

> "... any state or municipal board, bureau, commission, council, department, public authority, public corporation, division, office or other governmental entity performing a governmental or proprietory function for the State of New York or one or more municipalities therein." [Freedom of information Law, § 87(1)].

As such, both the New York City Police Department and District Attorneys' offices are within the scope of the Law.

When making a request, I suggest that you write to the New York City Police Headquarters, 1 Police Plaza, New York, New York, and to the offices of the district attorneys in possession of the records sought. There is no specified form that must be used to make a request. In my opinion, so long as a request is in writing and is reflective of identifiable records, it is sufficient.

It is important to emphasize, however, that some categories of information are deniable under the Freedom of Information Law, including, "investigatory files compiled for law enforcement purposes" [s 88(7)(d)]. Therefore, if the records that you are seeking fall within this category, they may be denied.

It is also important to point out that records in possession of a court clerk are available pursuant to the Judiciary Law, § 255. Therefore, even if information was compiled for a law enforcement purpose, if it is part of a court record, it is accessible.

Enclosed are copies of the Freedom of Information Law and 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.

Very truly yours,

RJF:hg
Encls.

Robert J. Freeman
Executive Director

387

bcc: Secretary Cuomo
Fred Oettinger-Encon

May 11, 1976

Mr. Steven Gordon
First Deputy Commissioner
Department of Environmental Conservation
50 Wolf Road
Albany, New York

Dear Mr. Gordon:

Thank you for your interest in complying with the Freedom of Information Law.

The question raised pertains to access to Aircraft Flight Logs and passenger manifests in possession of the Department used with respect to aircraft owned and operated by the State. Having reviewed samples of the records in question, it is my opinion that they are accessible pursuant to the Freedom of Information Law § 88(1)(d).

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

Very truly yours,

RJF:hg

Robert J. Freeman
Executive Director

STATE OF NEW YORK
COMMITTEE ON PUBLIC ACCESS TO RECORDS FOIL-AO-388

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

COMMITTEE MEMBERS
[redacted]E ABEL - Chairman
[redacted]LMER BOGARDUS
MARIO M. CUOMO
PETER C. GOLDMARK, JR.
JAMES C. O'SHEA
GILBERT P. SMITH

EXECUTIVE DIRECTOR
ROBERT J. FREEMAN

May 20, 1976

Mr. Ronald Robinson
[redacted]

Dear Mr. Robinson:

Your letter addressed to the Attorney General has been transmitted to the Committee on Public Access to Records, which is responsible for advising with respect to the New York Freedom of Information Law.

For the purpose of clarification, the New York statute [Public Officers Law, §§ 85-89] is separate and distinct from the federal statute [5 U.S.C. 552]. The former pertains to agencies of government in New York, while the latter pertains to federal agencies. With respect to your request, the New York statute would be applicable.

It is important to note that the New York Freedom of Information Law provides that rights of access do not apply to information that is:

> "part of investigatory files compiled for law enforcement purposes." [§88(7)(d)].

Therefore, in my opinion, it is likely that a request directed to the New York City Police Department would be denied. However, § 255 of the Judiciary Law provides access to all records in possession of a court clerk. Therefore, I suggest that you direct your request to the clerk of the court in which your case was decided.

I have enclosed copies of the Freedom of Information Law and regulations, which govern the procedural aspects of the statute, such as the procedures concerning appeal of a denial of access.

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
Executive Director

RJF:hg
Encls.

bcc: Department of Law
W. Cabin

FOIL-AO-389

May 20, 1976

Mr. Stanley P. Bratek
[redacted]

Dear Mr. Bratek:

As I interpret your letter, you have requested that a list of employees of the Town of Hamburg be compiled and made available to your taxpayers' group.

Both the Freedom of Information Law and the regulations promulgated thereunder, which have the force of law, direct that the individual who prepares the payroll must compile a record consisting of the name, address, title and salary of all government employees, except law enforcement officers, whose names and addresses need not be provided. The relevant provisions of law are marked for your convenience in the attached documents.

It is noted that Section 88(1)(g) of the Law appears to provide access to the payroll record only to members of the news media. However, due to rights of access previously granted by the courts, the regulations direct that the payroll record must be made available to any person. In Winston v. Mangan, which was decided prior to the enactment of the Freedom of Information Law, it was held that:

> "[T]he names and pay scales of the ...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 of protection against employment favoritism. They are subject therefore to inspection." [338 NYS 2d 654, 662 (1972)].

Since the Freedom of Information Law preserves rights of access granted by the courts [Section 88(10)] and requires that the payroll record be compiled [Section 88(1)(g)], the information sought must be made available to you.

I hope that I have been of some assistance.

Very truly yours,

RJF:hg

Robert J. Freeman
Ececutive Director

Lec: Wm Cabin 390

May 20, 1976

[redacted]

Dear [redacted]:

The issue raised in your letter pertains to a denial of access to records relative to the Little Falls City School Board's refusal to grant tenure to you.

I can only reiterate that Section 2116 of the Education Law provides broad rights of access and that the regulations adopted by the Committee provide a means to appeal a denial of access [see regulations enclosed]. The regulations direct that the reasons for a denial of access be stated in writing and that you must be apprised of your right to appeal. Since more than five days have elapsed since you made the request, you have been constructively denied access. Therefore, you may appeal the denial to whomever has been designated to hear appeals. If the denial is upheld on appeal, you may seek review of the determination in the courts.

With regard to the denial of tenure, Section 3031 of the Education Law states:

> "[N]otwithstanding any other provision of this chapter and except in cities having a population of one million or more, boards of education and boards of cooperative education services shall review all recommendations not to appoint a person on tenure, and, teachers employed on probation by any school district or by any board of cooperative educational services, as to whom a recommendation is to be made that an appointment on tenure not be granted or that their services be discontinued, shall,

at least thirty days prior to the board meeting at which such recommendation is to be considered, be notified of such intended recommendation and the date of the board meeting at which it is to be considered. Such teacher may, not later than twenty-one days prior to such meeting, request in writing that he be furnished with a written statement giving the reasons for such recommendation and within seven days thereafter such written statement shall be furnished. Such teacher may file a written response to such statement with the district clerk not later than seven days prior to the date of the board meeting."

According to your letter, the decision to deny tenure was reached at a special meeting held March 29. As I interpret the provision quoted above the school district acted improperly if you were not notified of the recommendation to deny tenure "at least thirty days prior to" the board meeting. However, if you did receive such notification, it appears that the statutory time limit for requesting the reasons for the recommendation has elapsed.

Since I have no expertise with respect to the legal issues concerning tenure, I suggest that you consult a private attorney on the matter.

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,

RJF:hg

Robert J. Freeman
Executive Director

FOIL-AO-391

May 26, 1976

Mr. Anthony J. Maurino
Deputy Town Attorney
Town Hall
Oyster Bay, New York 11771

Dear Mr. Maurino:

Thank you for your interest in complying with the Freedom of Information Law.

The issue raised in your letter pertains to a request made by an assemblyman for a list of names and addresses of senior citizens who participate in programs sponsored by the Town of Oyster Bay. Four questions have been raised with respect to the issue: Must the Commissioner of Community Services furnish a list of names of senior citizens participating in the programs; may the Commissioner permit examination of Rolodex cards containing names and addresses of such senior citizens; is the town obliged to prepare a typewritten list of senior citizens from its card files in response to the request; and do the Committee's regulations pertaining to fees apply under the circumstances described?

In my opinion, since the Freedom of Information is permissive, the Commissioner may provide access to the information in question. However, the Law lists five examples of unwarranted invasions of personal privacy, including:

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

As described in your letter, it appears that the Assemblyman intends to use the information for the purpose of publicizing his stance on legislation affecting senior citizens. To the best of my knowledge, there has been no judicial interpretation concerning access to lists of names and addresses pertinent to this situation. As such, it is impossible to conjecture at this juncture whether a court would find that disclosure of such lists would constitute a public or a private purpose. Nevertheless, in my view, the five examples of unwarranted invasions of personal privacy in the statute are merely illustrative and represent five among conceivable dozens of unwarranted invasions of personal privacy. Consequently, if the Commissioner feels that disclosure would constitute such an invasion, the names and addresses may be denied.

With respect to inspection of the card files, the Commissioner may permit examination by a member of the Assemblyman's staff. However, since the statute pertains to existing records, the Town has no obligation to prepare a new record in response to a request, specifically a list of names and addresses of senior citizens. Therefore, while the Commissioner may permit inspection of the card files, he has no duty to create a new record on behalf of the Assemblyman or any other member of the public.

The regulations promulgated by the Committee, which have the force and effect of law, apply to all agencies of government as well as individuals. Therefore, fees consistent with the Committee's regulations may be assessed for copies of records sought by the Assemblyman.

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

Very truly yours,

RJF:hg

Robert J. Freeman
Executive Director

392

May 27, 1976

Edward J. Degnan, Esq.
Attorney and Counselor at Law
P.O. Box 25
Canisteo, New York 14823

Dear Mr. Degnan:

Thank you for your interest in the Freedom of Information Law.

As we discussed earlier this afternoon, it would be all but impossible for the Committee to conduct an investigation of the practices of the Village of Wayland to which you referred. Nevertheless, in my opinion, as I interpret your letter, the Village has in several respects acted in violation of the Freedom of Information Law.

It appears that the Village has not adopted procedures for implementation of the Law. Pursuant to s 88(2) of the Law, each agency and municipality must adopt regulations consistent with those promulgated by the Committee (see enclosed regulations), which have the force and effect of law. The regulations provide that a records access officer must be designated, who must act in accordance with the directions set forth in s 1401.2 of the regulations. His or her duties include assisting a member of the public in identifying records sought and promptly either granting or denying access. As described in your letter, the custodian of the records, the Village Clerk, refused to provide or deny access until having first consulted with the Mayor. In my view, this practice is inconsistent with the regulations.

One of the tools by which the public can identify records sought is the subject matter list, which must be compiled by every agency or municipality. The list need not specify every

kind of record in possession of the Village; rather it is a list by category of all records in possession of the agency which have been produced, filed or first kept since September 1, 1974, the effective date of the Law [see Freedom of Information Law, § 88(4); regulations §§ 1401.2(1); 1406.6(c) through (e)]. While there is a requirement that a request be reflective of identifiable records, the subject matter list must be "reasonably detailed" and the records access officer must assist an individual in formulating his request. Procedures concerning time limits for response to a request for records, denial of access and appeal are contained in the regulations.

With respect to fees for copies, the regulations provide that no more than 25¢ per copy can be charged, unless a higher fee was established by law prior to enactment of the Freedom of Information Law (see regulations, § 1401.8). Additionally, the provision pertaining to fees states that:

> "[T]his section shall not be construed to mandate the raising of fees where agencies in the past have charged less than 25¢ for such copies" [regulations, § 1401.8(c)(1)].

Therefore, if, for example, the Village had customarily charged ten cents per copy prior to enactment of the Law, the fee should not be raised merely because the regulations permit a fee of up to 25¢ per copy.

Your letter also refers to practices of the Village concerning meetings of the Board of Trustees. Although the Freedom of Information Law does not deal with this subject, I would like to bring to your attention an open meetings bill now pending before the Legislature [A.7501-C; S.6135-B]. If enacted, the legislation will define the rights of individuals and the duties of government in relation to meetings of public bodies.

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

Very truly yours,

RJF:hg
Encls.

Robert J. Freeman
Executive Director

cc: Hon. Bert Bonadonna
Mayor, Village of Wayland
Charles Sullivan, Esq.

May 28, 1976

Mr. Ronald Robinson
[redacted]

Dear Mr. Robinson:

It appears that the contents of my letter of May 20 have been misunderstood. As such, I would like to clarify the functions of the Committee on Public Access to Records.

First, the Committee does not have possession of the records of any agency of government. Second, the Committee has no authority to force an agency to provide access or comply with the Freedom of Information Law. Third, the Committee's authority is advisory only. If a member of the public or a government official has questions with respect to the Law, it is the responsibility of the Committee to advise them regarding their rights and duties.

Having reviewed the letter sent to you, it is clear that I advised that your request be directed to the agencies of government in possession of the records sought, the New York City Police Department and the court in which your case was tried. I would also suggest that you consult the regulations that were enclosed with the first letter. The regulations, which have the force and effect of law, describe the manner in which a request is made and the responsibilities of the agencies to which the request is directed.

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

Very truly yours,

RJF:hg

Robert J. Freeman

394
A.O.

June 1, 1976

Mr. Ronald J. Robare
[redacted]

Dear Mr. Robare:

Having reviewed the correspondence attached to your letter, which is reflective of a request for twenty items of information, it appears that all but six have been denied. In each instance of denial, the response of the School District was that the Board of Education does not maintain "official" documents or records relative to the information sought.

Your question is whether the reply from the School District constitutes a denial of access. As I interpret the reply, access has been denied with respect to fourteen of the twenty items sought. Another question involves the meaning of "official" records or documents. In my view, whether a record is "official" or not is irrelevant. Reading §88(1)(i) of the Freedom of Information Law in conjunction with §2116 of the Education Law, all records in possession of a school district must be made available, unless information contained therein falls within any of the four categories of deniable information listed in §88(7) of the Freedom of Information Law.

In addition, the regulations promulgated by the Committee, which have the force and effect of law, provide that, upon failure to locate records, the records access officer must certify either that the District does not have possession of the records sought, or that the District does have possession of the records, but the records cannot be found [see Regulations, §1401.2(b)(6)].

In view of the foregoing, I suggest that you inquire as to the meaning of "official" records and seek the certification envisioned by the 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
Executive Director

cc: Mr. William Cabin
Board of Public Disclosure
270 Broadway
New York, New York

RJF:lbb

A.O.

June 1, 1976

Mr. John J. McCuen
[redacted]

Dear Mr. McCuen:

Thank you for your continued interest in the Freedom of Information Law.

As requested, I am sending copies of regulations promulgated by the Committee, which have the force and effect of law, as well as other documents, to the school district officials to whom reference is made in your letter.

With respect to the substantive issues raised in your letter, I can only reiterate that the Freedom of Information Law [§88(1)(i)] read in conjunction with the Education Law [§2116] provides access to all school district records to the extent that the records contain information deemed deniable pursuant to §88(7) of the Freedom of Information Law. As such, in my opinion, tentative budget proposals are available as a matter of right prior to adoption of the budget.

The questions raised regarding the procedural aspects of implementation of the Law are answered by the regulations. Having reviewed the policy adopted by the School Board, Article XVIX (sic), I would like to point out the following deficiencies. First, the second paragraph states that the policy is intended to pertain only to records "produced, filed, first kept or promulgated after September 1, 1974." The Committee has resolved, however, that the Law is retrospective and that the date stated pertains to responsibilities of government with regard to compilation of the subject matter list [Freedom of Information Law, §88(4); see also resolution entitled "Retrospective Application of the Freedom of Information Law].

Second, the third paragraph requires that requests be made on "proper form, at least ten days in advance." The Committee has not prescribed a specific form to be used. Consequently, in my opinion, so long as a request is reflective of identifiable records, any request in writing should suffice. It is also noted that the regulations state that a written request shall not be required for records which in the past were customarily made available upon oral request [Regulations, §1401.6(a)]. Additionally, the regulations provide that a response to a request must be given promptly and within five business days of receipt of the request unless extraordinary circumstances are explained and the request acknowledged [Regulations, §1401.6(b)].

Third, payroll information must be made available to any person, including members of the news media [Regulations, §1401.2]. Since rights of access granted by statute or by the courts are preserved [Freedom of Information Law, §88(10)] and since the courts established a right of public access to payroll information prior to the enactment of the Law [see e.g. Winston v. Mangan, 338 NYS 2d 654 (1972)], that right of access remains unabridged. Therefore, the payroll record required to be compiled pursuant to §88(1)(g) of the Freedom of Information Law must be made available to any person [see resolution entitled "Access to Records to Any Person"].

Fourth, the fee of fifty cents per copy adopted by the Board is in violation of the Committee's regulations. The regulations state that, unless a different fee had been established by law prior to the effective date of the Freedom of Information Law, no more than twenty-five cents per copy may be charged [Regulations, §1401.8]. Since the Board resolution appears to have been adopted after the effective date of the Freedom of Information Law, the fee of fifty cents per copy is violative of the Regulations.

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

Sincerely,

Robert J. Freeman
Executive Director

cc: Mr. Robert J. Freidah
District Principal

Mr. William O. Crommett
District Clerk

Mr. Anthony P. Cangiolosi
President
Board of Education

Mr. William Cabin
Board of Public Disclosure

RJF:lbb

A.O. 396

June 3, 1976

Al Levine

Bob Freeman

Disclosure of Applications for Real Estate Brokerage Licensing Examination

The question raised involves an interpretation of the Freedom of Information Law with respect to disclosure of applications submitted by individuals who are scheduled to take real estate brokerage licensing examinations.

The central issue is whether disclosure of the records in question would constitute an "unwarranted invasion of personal privacy" [Freedom of Information Law, §88(3) and (7)]. In this regard, the Freedom of Information Law provides a list of five examples of unwarranted invasions of privacy, none of which specifically pertain to the applications. However, the five examples are not exhaustive, but merely represent five such invasions among conceivable dozens. Because the Law is permissive, an agency may disclose any records, unless the records are specifically exempt from disclosure by statute. Nevertheless, the privacy provisions enable the custodian of records to use discretion in disclosing personally identifiable information in his possession. Therefore, if in your judgment disclosure of the applications would constitute an unwarranted invasion of personal privacy, they may be withheld.

In my opinion, there is a substantial difference between disclosing information relative to applicants as opposed to licensees. A license in effect is a notification to the public that an individual is qualified to engage in a particular vocation.

Disclosure of an application may, however, have embarrassing effects, if, for example, an applicant fails the examination. In a related area, the regulations promulgated by the Department of Civil Service limit dissemination of applications for state and local

government civil service examinations to specified individuals [see §71.1]. I believe that the rationale for such limited disclosure is that disclosure of a failing candidate's application might result in undue embarrassment. However, as in the case of a license, the regulations state that a list of those individuals who passed the examination may be published.

In view of the foregoing, in my opinion, the applications in question may be withheld pursuant to the Freedom of Information Law.

cc: William Cabin
Board of Public Disclosure
270 Broadway
New York, New York

RJF:lbb

A.O. - 397

June 3, 1976

Mr. George Strokes
President
AFSCME - Council 66
63 Colvin Avenue
Albany, New York 12206

Dear Mr. Strokes:

Thank you for your interest in the Freedom of Information Law.

Your letter pertains to a denial of access by the City of Albany to records of payments for services performed for the City. According to the decision written by the Freedom of Information Appeals Board, the denial was upheld on the grounds that the request was not sufficiently detailed to identify the records sought and because the request was

> "unreasonable and frivolous in that it constitutes an attempt to burden the City's public resources to an end which serves no useful public service or purpose" (Appeals Board decision, March 18, 1976).

In my opinion, the reasons for denial posited by the Appeals Board are insufficient. While the Freedom of Information Law provides that a request reflect identifiable records [§88(6)], the burden of identifying the records falls both on the public and the agency of government in possession of the records. The regulations promulgated by the Committee, which have the force and effect of law (see enclosed), state that

> "[W]here possible, the requester should supply information regarding dates, titles, file designations or other information which may help identify the records" [§1401.6(d)].

However, the Regulations also state that agency personnel shall "assist the requester in identifying requested records, if necessary" [§1401.2(b)(2)]. Having reviewed your request, it appears that in each instance, the name of the contractor, the agency for whom services were performed and the approximate dates of performance are indicated. It would appear that greater specificity could be provided only by inspecting the records themselves. As such, it appears that you have met the requirement that records be identifiable. To bolster this finding, in a recent decision of the Supreme Court, Albany County, Judge Conway held:

> "[I]t is not necessary that the party requesting the information identify it down to the last detail. The language of the Law places part of such responsibility on the public agency from whom the information is sought. The responsibility of the person requesting the records is that he provide sufficient information to permit the agency to accomplish this duty. The...files on the... commission, even though it might consist of forty individual folders as alleged by respondents, is sufficiently identifiable as to meet the requirements of the Law" [Dunlea v. Goldmark, 380 NYS 2d 496, 499 (1976)].

As stated earlier, the Board found that the request was frivolous, unduly burdensome and that it served no useful public purpose. With respect to the burden on the City, the courts have long held that

> "[M]ere inconvenience resulting from inspection cannot be equated with public detriment, nor be construed as inimical to the public welfare, or against public policy" [New York Post Corp. v. Moses, 12 AD 2d 243, 210 NYS 2d 88, 100 (1961); Sorley v. Lister, 218 NYS 2d 215, 217 (1961)].

As such, although searching for the records may result in inconvenience and something of a burden to the City, City officials are obliged to produce the records. Moreover, the purpose of the request is irrelevant. As the Law directs [§88(6)] and as the Committee has resolved,

> "...information accessible under the Freedom of Information Law shall be made equally accessible to any person without regard to status or interest" (resolution adopted October 31, 1974).

Therefore, the sole question asked by government upon receipt of a request is whether the records are accessible. The purpose or interest of the person seeking the records is immaterial.

In view of the foregoing, the Appeals Board should be urged to reconsider its decision.

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

Sincerely,

Robert J. Freeman
Executive Director

cc: T. Carry Burns
City Clerk
City Hall
Albany, New York

Mr. William Cabin
Board of Public Disclosure
270 Broadway
New York, New York

A.O.
398

June 7, 1976

Mr. Joseph Welch
Business Agent - Financial Secretary
Division 580
Amalgamated Transit Union
617 Wolf Street
Syracuse, New York 13208

Dear Mr. Welch:

Your letter addressed to Attorney General Lefkowitz has been transmitted to the Committee on Public Access to Records, which is responsible for advising with respect to the Freedom of Information Law (hereafter "the Law").

The questions raised pertain to rights of access to records in possession of the New York Regional Transportation Authority, which is a public corporation.

First, §87(1) of the Law, which defines "agency", specifically includes public authorities and public corporations. Therefore, the Authority in question is subject to the Law. Second, §88(1) of the Law lists nine categories of records which must be made available. To the extent that the records sought are contained in any of the categories, they are accessible. According to your letter, you are seeking access to four areas of records: pension information submitted to the Internal Revenue Service, present and projected budget information, personnel files and minutes of meetings of the Authority.

With regard to pension information, there are two categories of accessible records that may be relevant. They are §88(1)(b), which grants access to statements of policy and §88(1)(d), which grants access to audits and statistical or factual tabulations.

In my opinion, any statements of policy, audits or statistical or factual tabulations included among the materials transmitted to the Internal Revenue Service are available.

Budget information also falls within the category of statistical or factual tabulations. Consequently, budget figures that have been adopted and are in effect accessible. The right of access to proposed budget information, however, is questionable. It is noted that, in a recent decision, the Supreme Court, Albany County, held that budget worksheets containing columns of actual appropriations for the current fiscal year and recommended appropriations for the coming year are accessible [Dunlea v. Goldmark, 380 NYS 2d 496 (1976)]. As I stated in our conversation, I do not totally agree with the decision, which has been appealed. Until the controversy has been finally decided, it would be inappropriate to conjecture as to the status of the records in question.

Access to personnel records is not directly dealt with by the Law. Access to individuals other than those individuals to whom the records pertain may be denied as an unwarranted invasion of personal privacy pursuant to §88(3). Access by individuals to files pertaining to themselves is generally dealt with by means of policy adopted by the agencies in custody of the records. It is noted that the Committee has recommended legislation (A. 7502-A; S. 5580-A) which, if enacted, would permit individuals to inspect and copy records pertaining to them, unless otherwise deniable.

Minutes of Authority Board meetings are clearly accessible under §88(1)(c) of the Law. However, it is important to point out that an agency has no obligation to create a record. Therefore, if no minutes have been compiled, the Authority has no obligation to do so unless otherwise required to do so by law.

Nevertheless, whether or not minutes have been compiled, governing body of the Authority must compile a record of votes of each member in every proceeding in which the member votes [§88(5)].

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

Sincerely,

Robert J. Freeman
Executive Director

cc: Mr. William Cabin
Board of Public Disclosure
270 Broadway
New York, New York

RJF:lbb

A.O. 399

June 9, 1976

Mr. Paul Feiner
[redacted]

Dear Mr. Feiner:

The question raised in your letter pertains to rights of access to budget requests submitted by county agency officials to the County Executive. According to your letter, both the County Executive and the Budget Director have stated that the requests are considered to be confidential memoranda.

The Law regarding the issue is unclear. County Law, §353, requires the head of each administrative unit of county government to submit estimates of expenditures and revenues for the ensuing fiscal year to the county budget officer. Having received the estimates, the budget officer is required to prepare and file with the county legislative body a tentative budget (County Law, §354). Once the tentative budget is filed, it becomes available to the public pursuant to County Law §208(4), which provides that any papers recorded or filed in any county office are publicly accessible. Your question, however, is whether the estimates submitted to the budget officer prior to preparation of the tentative budget are available.

In my opinion, arguments can be made both against and in favor of access. Arguing in favor of access, General Municipal Law, §51, provides that virtually all records in possession of an officer of a municipality are accessible. Nevertheless, since §51 is a statute of general application, a court might find that its provisions are superseded by §354 of the County Law, which might be considered a special statute. Moreover, under §354, it is

implied that records related to the budget become accessible only after a tentative budget has been filed with the county legislative body. In a similar situation, however, information submitted by town officials prior to preparation of the town's tentative budget were held to be accessible (Dullea v. Sheaffer, Sup. Ct., Albany, 1975). Although the court granted access, no opinion was written.

In view of the lack of clarity of the law in this area, it would be inappropriate to conjecture with regard to the decision at which a court might arrive.

I regret that I cannot be of greater assistance.

Sincerely,

Robert J. Freeman
Executive Director

cc: Mr. William Cabin
Board of Public Disclosure
270 Broadway
New York, New York

RJF:lbb

A.O. - 400

June 10, 1976

Mr. Harris D. Le Vine
[redacted]

Dear Mr. Le Vine:

Your letter pertains to a denial of access to numerous records in possession of the Department of Health. The records were denied on the grounds that they relate to matters which are now in litigation and that they are not accessible under the Freedom of Information Law.

Although the denial may have been proper with respect to some of the records sought, I disagree with the denial in part. Specifically, refusal to produce records on the ground that the records relate to litigation is, in my opinion, improper. In upholding a lower court decision to provide access, the Appellate Division recently held that

> "...the discovery provisions of the Civil Practice Law and Rules do not restrict disclosure of records made public under the Freedom of Information Law. If the documents are available to the public under the latter, they are not restricted ipso facto solely because the applicant is also a litigant" [Burke v. Yudelson, 378 NYS 2d 165, 166 (1976)].

The Court also cited the Committee's resolution (see attached) which states that

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

Therefore, if records are available under the Freedom of Information Law, they remain available even though they relate to litigation. Further, it appears that the records sought do not consist of material prepared for litigation, attorney work product or are otherwise privileged.

As we have discussed on several occasions, the Law provides access to nine categories of records [§88(1)]. Consequently, to the extent that the records sought conform to any of the categories, they must be made available. Having reviewed your request, there are several instances in which rights of access are apparent. For example, reports, surveys, statements of policy and other records containing statistical or factual material would appear to be accessible.

Although the remainder of the records sought pertain to you, they do not conform to any of the categories of accessible records. However, it is possible that a court might find that, since you have an interest in the records, a right of access exists. At common law, a person had to demonstrate an interest in records in order to gain access to them (see, e.g. King v. Justices of Straffordshire, Adolphus & Ellis, 84, 96 (1835); Matter of Egan, 205 NY 147 (1912)]. Despite enactment of a number of access statutes, vestiges of the common law principle which grants access to interested persons remain [see, e.g., Marmo v. New York City Board of Education, 56 Misc. 2d 517 (1968); Scott v. County of Nassau, 23 Misc. 2d 648 (1964); Nunziata v. Police Department of the City of New York, 341 NYS 2d 22 (1975)]. Although I am unaware of any decisions

rendered since the enactment of the Freedom of Information Law which have dealt with rights of access of "interested" persons, it is possible that a court might consider the common law principle in reaching a decision. Nevertheless, it would be inappropriate at this juncture to conjecture as to the manner in which a court would interpret the Freedom of Information Law in relation to the common law right of access of interested persons.

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

Sincerely,

Robert J. Freeman
Executive Director

Attachment

cc: Mr. Donald A. Macharg
Counsel
Department of Health
Tower Building
Empire State Plaza
Albany, New York 12237

bcc: Mr. Bernard Schachne
Assistant Attorney General
Department of Law
Justice Building
Albany, New York

RJF:lbb

Copy to Wm. Cabin for Files

A.O. -401

June 14, 1976

Ms. Carolyn Pine Daniel
[redacted]

Dear Ms. Daniel:

Your letter addressed to the Attorney General has been transmitted to the Committee on Public Access to Records, which is responsible for advising with respect to the New York Freedom of Information Law (see enclosed). I will attempt to answer your inquiries regarding access to records. With respect to questions dealing with discrimination, I suggest that you contact the Division of Human Rights, which is located at 217 Lark Street, Albany, New York, 12210.

The first question is whether either the federal Freedom of Information Act [5 U.S.C. §552] or the New York Freedom of Information Law provides access to inter-office memoranda. The federal statute provides that all agency records are available, except specified categories of records, one of which includes

> "inter-agency or intra-agency memorandums or letters which would not be available by law to a party other than an agency in litigation with the agency..." [§552(b)(5)].

In essence, this exemption permits an agency to deny access to

> "internal drafts, memoranda between officials or agencies, opinions and interpretations prepared by agency staff personnel or consultants

> for the use of the agency, and records of the deliberations of the agency or staff groups..." [Attorney General's Memorandum on the Public Information Section of the Administrative Procedure Act, June, 1967].

The New York Statute conversely provides that nine categories of records must be made available to the exclusion of all other records [§88(1)]. In reviewing the categories of accessible records, it is possible that an interoffice memoranda may contain a statement of policy [§88(1)(d)] or statistical or factual tabulations [§88(1)(d)]. Therefore, to the extent that records contain statements of policy or statistical or factual tabulation, they are, in my opinion, inaccessible.

The second question is whether a member of the staff of a hospital can demand to inspect his or her personnel files. It is important to note that the federal statute applies to federal agencies, while the New York law applies to governmental entities in New York. Consequently, neither provision applies to records of a hospital. It appears that the only means of gaining access to these records is by court order.

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

Sincerely,

Robert J. Ffeeman
Executive Director

RJF:lbb

1102

June 14, 1976

Mr. Eugene P. Devany
[redacted]

Dear Mr. Devany:

Thank you for your interest in the Freedom of Information Law. The issue raised concerns access to records relative to the development of a salary grade for a particular job title.

Having reviewed the correspondence attached to your letter, it is unclear whether the records sought exist. However, if administrative staff manuals or statistical or factual tabulations have been compiled that are pertinent to your request, such records are accessible. It is important to note that the Freedom of Information Law provides access to existing records. Therefore, if there are no records reflective of those requested, the agency to which the request was directed has no obligation to create a record in response to the request.

However, I suggest that you obtain a clarification of the reasons for the denial of access. As provided in the regulations promulgated by the Committee, which have the force and effect of law, a denial must be in writing [§1401.7]. Additionally, if records cannot be found, the agency must certify either that it does not have possession of the records, or that it does have possession but cannot locate them [§1401.2(b)(6)].

Further, it appears that the Nassau County Civil Service Commission has not compiled a subject matter list as required by §88(4) of the Freedom of Information Law. The list may be a useful tool for identifying records sought. While it need not make reference to every record

in possession of the agency, it should be sufficiently detailed so that a person requesting records can identify the file category of the record sought.

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

Sincerely,

Robert J. Freeman
Executive Director

cc: Mr. James M. Catterson, Jr.
Nassau County Attorney
County Executive Building
1 West Street
Mineola, New York 11501

Mrs. Adele Leonard
Executive Director
Nassau County
Civil Service Commission
140 Old Country Road
Mineola, New York 11501

Committee on Public Access to Records
162 Washington Avenue - 2nd Floor
Albany, New York 12231
Telephone: (518) 474-2791 or 474-2518

RJF:lbb

FOIL-AO-403

June 16, 1976

Mr. Charles M. Feuer
McCarthy, Fingar, Donovan & Glatthaar
175 Main Street
White Plains, New York 10601

Dear Mr. Feuer:

Your letter pertains to a denial of access by the City of Yonkers to a police report concerning the death of an individual in the City Jail. The denial was based on two contentions: first, that the report is "part of investigatory files compiled for law enforcement purposes" [Freedom of Information Law, §88(7)(d)]; and second, that the report consists of material prepared for litigation and therefore is not discoverable by a third party.

The Freedom of Information Law (Hereafter "the Law") provides access to nine categories of records, including:

> "any other files, records, papers or documents required by any other provision of law to be made available for public inspection and copying" [§88(1)(i)]

One such provision of law is General Municipal Law, §51, 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..."

Reading the quoted provision in conjunction with the Law, virtually all "papers connected with or used or filed" in the office of a municipality are accessible unless they contain information deniable pursuant to §88(7) of the Law.

One of the categories of deniable information which was noted as one of the grounds for denial includes "investigatory files compiled for law enforcement purposes" [§88(7)(d)]. It appears that there is a question of fact that must be determined with respect to this provision. Was the report compiled by the police in the ordinary course of business, or was it compiled for a law enforcement purpose, such as prosecution of a crime? According to a letter written by Eugene Fox, Corporation Counsel for the City of Yonkers, to David Hartley, Editor of the Yonkers Herald Statesman, the report was withheld due to anticipation of "civil litigation." In my opinion, if this is the case, the report was not compiled for law enforcement purposes and, therefore, cannot be denied pursuant to §88(7)(d).

Similarly, although it appears that the report in question may have a bearing on future litigation, it does not appear that it is "material prepared for litigation" and therefore privileged [Civil Practice Law and Rules, §3101(d)]. As the courts have held on several occasions,

> "...material collected in the 'ordinary course of business' in governmental operations including perhaps eventual use in any litigation which may ensue...is not shielded from disclosure" [Burke v. Yudelson, 368 NYS 2d 779, 785 (1975), aff'd 378 NYS 2d 165 (1976); Winston v. Mangan, 72 Misc. 2d 280, 338 NYS 2d 654, 661 (1972)].

Consequently, even if the report may be eventually used in litigation, that contention alone is insufficient to deny access.

Additionally, in the letter referred to above, the Corporation Counsel stated that the report would be made available if no notice of claim is served within the statutory time limit. This statement also leads to a finding that the report was neither compiled for law enforcement purposes, nor is it material prepared for litigation.

Therefore, based on the background correspondence that you have supplied, the report is, in my opinion, accessible.

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

Sincerely,

Robert J. Freeman
Executive Director

cc: Mr. Eugene J. Fox
Corporation Counsel

RJF:lbb

A.O. 404

June 16, 1976

[redacted]

Dear [redacted]:

According to your letter, you are interested in obtaining copies of records pertaining to you in possession of the Central Intelligence Agency, the Federal Bureau of Investigation, the Mary Imogene Bassett Hospital, the Institute of Living and the State Hospital at Binghamton.

It is noted that records in possession of federal agencies (e.g. the CIA and FBI) are subject to the federal Freedom of Information Act [5 U.S.C. §552; see enclosed], while state agencies are subject to the New York Freedom of Information Law [Public Officers Law, §§85-89; see enclosed]. With respect to both statutes, a request must be made directly to the agency in possession of the records. Also, I would like to point out that these access provisions apply only to units of government. Therefore, if the Mary Imogene Bassett Hospital or the Institute of Living are not governmental entities, the only means of obtaining records is by court order.

Additionally, access to clinical records in possession of the State Hospital at Binghamton is governed by §15.13 of the Mental Hygiene Law (see enclosed). Generally, the statute provides for confidentiality of such records, unless disclosure is made pursuant to one of the exceptions contained in subdivision (c) of the statute.

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

Sincerely,

Robert J. Freeman
Executive Director

Enclosures

R.JF:lbb

A.O. 405

June 16, 1976

Mr. Joseph Dunbar
76-A-2153
Cell Location 0-530
Ossining Correctional Facility
354 Hunter Street
Ossining, New York 10562

Dear Mr. Dunbar:

Pursuant to your letter, you are seeking access to the minutes of a judicial proceeding held in Nassau County.

The Committee on Public Access to Records does not have possession of government records; rather its responsibility is to provide advice with respect to the Freedom of Information Law.

Since the Committee cannot produce the records for you, I suggest that you direct your request to the clerk of the court in which your case was tried. The clerk is obligated to search for and provide access to the records under the Judiciary Law, §255.

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:lbb

A.O.406

June 17, 1976

William D. Cabin, Executive Secretary
Board of Public Disclosure

Robert J. Freeman, Executive Director

Accesstto Data Submitted to DOH and DMH Pursuant to Agency Regulations on Conflicts and Outside Employment

The Freedom of Information Law (Public Officers Law, §§85-89) provides access to nine categories of records [§88(1)]. Therefore, to the extent that the data in question includes information reflective of any of the categories of accessible records, such information must bemade available.

Having reviewed the Department of Mental Hygiene Policy Manual (Section 3890) and the Department of Health General Administration Manual (Item 333), little, if any, of the information relative to conflicts of interest or outside employment is clearly accessible. Although several of the categories appear to be relevant, in my opinion, only one of the categories might be used as a vehicle for disclosure.

Relevant to your inquiry, the Law provides access to final opinions made in the adjudication of cases [§88(1)], minutes of meetings of a governing body [§88(1)(c)], administrative staff manuals and instruction to staff that affect members of the public [§88(1)(e)] and final determinations of members of a governing body [§88(1)(h)]. As I interpret the policies by the Department of Health and the Department of Mental Hygiene, in neither instance is there adjudication of a case. Minutes that may be compiled would be done so by an advisory body, such as the Council on Ethics, rather than a governing body. Similarly, final determinations are made by an executive rather than the governing body of an agency. The only category of accessible records that might be applicable concerns "administrative staff manuals and instruction to staff that affect members of the public." It is possible that a court might find

that a determination to approve or disapprove a request relative to outside employment would be an instruction to staff that affects the public. The Department of Mental Hygiene Policy Manual does not cite a record specifically reflective of such a determination. Although the Department has no obligation to compile such a record, if such a record exists, it would be accessible if it is an instruction to staff that affects the public. According to the Department of Health General Administration Manual, the Commissioner endorses the request via a memorandum of recommendation. Again, if this memorandum is considered to be an instruction to staff that affects the public, it is available.

Other records related to your inquiry are, however, clearly available. The manuals used by each department are accessible as statements of policy adopted by an agency [§88(1)(b)] or as administrative staff manuals. In addition, some of the information attached to the Department of Health General Administrative Manual is accessible (see Enclosure II, New York State Department of Health Policies for Outside Employment). In the section dealing with "Approved Outside Employment, 1970-1975", there are statistical and factual breakdowns of approvals and disapprovals concerning outside employment. These statistical and factual tabulations are accessible pursuant to §88(1)(d) of the Law. Similarly, Enclosures III and IV consist of factual tabulations that are accessible. Although in some instances the names of employees appear in the tabulations, disclosure of the names would not, in my opinion, constitute an unwarranted invasion of personal privacy pursuant to §88(3), since the information is relevant to the performance of duties of the employees cited.

RJF:lbb

A.O. 407

June 18, 1976

Ms. Ruth Kissel
[redacted]

Dear Ms. Kissel:

The questions raised in your letter pertain to a denial of access to records by the East Ramapo Central School District. The information sought includes records relative to the District's decision to eliminate positions "in the area in which you presently serve," a list or order of priority concerning elimination of positions, and records reflecting the basis for determining seniority or the order of priority for maintenance or elimination of positions.

In my opinion, if the records sought exist, they are accessible. It is important to point out that the Freedom of Information Law provides access to existing records. Therefore, if, for example, there is no list containing the order of priority, the district has no duty to compile such a list in response to your request.

Assuming the records do exist, the Freedom of Information Law provides rights of access to nine categories of records, including:

> "any other files, records, papers or documents required by any other provision of law to be made available for public inspection and copying" [§88(1)(i)].

One such provision of law is §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."

Therefore, virtually all records in possession of a school district are accessible, unless they contain information deemed deniable pursuant to §88(7) of the Freedom of Information Law. Moreover, although §2116 of the Education Law provides that access must be granted only to a "qualified voter of the district," the Freedom of Information Law, which provides access to any person [§88(6)], when read in conjunction with §2116 provides access to school district records to any person. As the Committee has resolved:

> "...information accessible under the Freedom of Information Law shall be made equally accessible to any person, without regard to status or interest" (Resolution of N.Y.S. Committee on Public Access to Records, October 31, 1974).

Consequently, even though a seeker of records may not be a qualified voter of the district, he or she is not barred from gaining access to records. The only question that should be raised when a request is made is whether or not the records sought are accessible.

With respect to the specific records sought, if a list is in existence, it is available even without the broad rights of access granted by the Education Law under the Freedom of Information Law as a factual tabulation pursuant to §88(1)(d). Similarly, the basis for a determination concerning priority may be reflected in statements of policy [§88(1)(b)] or administrative staff manuals [§88(1)(e)]. It is more difficult to identify records pertaining to the area in which you serve because, in my view, the sense of the statement is unclear.

Enclosed for your perusal are copies of the Freedom of Information Law and regulations promulgated by the Committee. The regulations, which govern the procedural aspects of the statute and have the force and effect of law, should be helpful in apprising you of the duties of the District in responding to your request.

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

Sincerely,

Robert J. Freeman
Executive Director

Enclosures

cc: Dr. Robert Utter
East Ramapo Central School=District
Spring Valley, New York 10977

RJF:lbb

A.O. - 408

June 24, 1976

Mr. Paul M. Yee
Staff Attorney
Brooklyn Legal Services Corp., "A"
East Brooklyn Office
80 Jamaica Avenue
Brooklyn, New York 11207

Dear Mr. Yee:

The issue raised in your letter pertains to a denial of access to the Disability Insurance State Manual by the Bureau of Disability Determinations of the Department of Social Services.

The Freedom of Information Law [Public Officers Law, §§ 85-89] grants access to enumerated categories of records. Relevant to your inquiry, access is provided with respect to

> "administrative staff manuals and instruction to staff that affect members of the public" [§88(1)(e)]

As such, it appears that the Manual is available.

However, I suggest that you make a second request in writing identifying the document sought. It is noted that no specific form is mandated for making a request. Therefore, although an agency may require that a request be made in writing [Regulations, §1401.6], failure to use a specified form cannot be a valid ground for denial of access. Nevertheless, so long as the request is reflective of identifiable records, any writing should suffice.

Information relative to the denial, appeal and the required response by the agency are contained in the enclosed regulations, 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
Executive Director

cc: Mr. Sidney Ruben, Director
New York State
Department of Social Services
Bureau of Disability Determinations
2 World Trade Center
New York, New York

Enclosures

Committee on Public Access to Records
162 Washington Avenue - 2nd Floor
Albany, New York 12231

RJF:lbb

FOIL-AO-409

June 28, 1976

Mr. Walter Donnaruma
President
WHITA
P.O. Box 304
Kingston, New York 12401

Dear Mr. Donnaruma:

Thank you for your interest in the Freedom of Information Law.

Your letter pertains to a situation in which you have stated that your request for records has received no response, while the superintendent of the district in receipt of the request has stated that the records in question have been provided.

First, having received the request forms attached to your letter, the records sought are in my opinion available pursuant to both the Freedom of Information Law and §2116 of the Education Law, which states that virtually all records of a school district are available for public inspection and copying.

Second, in consideration of Superintendent Salzman's statement, I suggest that you simply renew your request and ask to have copies of the records made pursuant to §88(6) of the Law and in conjunction with §1401.8 of the regulations promulgated by the Committee, which have the force and effect of law. In the alternative, if in fact no response to your request has been given within five days of receipt of the request [see regulations, §1401.6(b)] by the District, you have been constructively denied [regulations, §1401.7(e)] and therefore may appeal [regulations, §1401.7; Freedom of Information Law, §88(8)].

Enclosed are copies of the Freedom of Information Law and regulations, which should be particularly helpful in describing the procedural responsibilities of government under the 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
Executive Director

Enclosures

cc: Superintendent of Schools
Kingston City Schools
61 Crown Street
Kingston, New York 12401

RJF:lbb

A.O. - 410

July 6, 1976

Mr. Richard I. Goldsmith
Associate Professor of Law
Syracuse University
Ernest I. White Hall
Syracuse, New York 13210

Dear Professor Goldsmith:

Thank you for your continued interest in the Freedom of Information Law. Your letter raises several questions which I hope to answer with reasonable clarity.

The first question pertains to §88(1)(h), which grants access to:

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

Although no advisory opinions have been written specifically dealing with this provision, I believe that it is intended to provide access to records reflective of determinations made by public bodies having authority to take final action. In some instances, its application may overlap with respect to records deemed accessible pursuant to §88(1)(a), which provides access to final opinions made in the adjudication of cases. However, the two provisions can be distinguished (see attached, letter to Theodore Spatz). There may be situations in which a public body makes determinations by means other than adjudicating cases. It is in those situations that §88(1)(h) applies. For example, a resolution adopted by a public body might be considered a "final determination" within the scope of the provision in question. It is noted further that "final opinions" and "final determinations" may also be contained in the voting record required to be compiled by §88(5).

There is some indication, however, that the courts are taking a more expansive view of §88(1)(h) than a literal reading of the provision appears to permit. In Farrell v. Village Board of Trustees, Etc., [372 NYS 2d 905 (1975)], it was held that reprimands of police officers signed by a police chief in effect constituted final determinations which the Legislature implicitly directed to be made available. Nevertheless, it would be inappropriate at this juncture to conjecture as to the course of interpretation that will be taken by the courts.

Second, the key phrase, "inchoate transaction," appearing in the index to advisory opinions, arose from the case of Sorley v. Clerk, Mayor and Board of Trustees of the Village of Rockville Centre [30 A.D. 2d 822 (1968)]. In brief, the opinion stated that records related to an "inchoate transaction" which if disclosed would result in detriment to the public interest may be withheld until the transaction to which the records relate has been consummated. It is noted that the Sorley decision is related to the common law evidentiary privilege for "official information," which was interpreted most recently by the Court of Appeals in Cirale v. 80 Pine Street Corp. [35 NY 2d 113 (1974)]. I would also like to point out that the amendments to the Law now before the Legislature represent an attempt to codify the privilege evoked in Sorley and Cirale [see S. 5580-A, §88(1)(g)].

The third question deals with the relationship between §88(1) and §88(3). It is important to note at the outset that rights of access differ among the various units of government due to rights of access granted by existing provisions of law. For example, General Municipal Law, §51, provides that virtually all records in possession of a municipality are available. Similarly, the Education Law, §2116, states that all records in possession of a school district are available for public inspection and copying. These existing statutes are considered in the Freedom of Information Law, §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."

Reading the Freedom of Information Law in conjunction with General Municipal Law, §51, for example, I have advised that all records in possession of a municipality are accessible to the extent that they contain information deemed deniable pursuant to §88(7). This opinion has been upheld judicially [see Burke v. Yudelson, 368 NYS 2d 779 (1975); aff'd., 51 A.D. 2d 673 (1976)].

With respect to state agencies, the logic is reversed. There are in but few instances in which special statutes provide rights of access to state agency records. Therefore, rights of access generally exist with regard to state agencies only if records sought conform to one of the categories of accessible records listed in §88(1)(a) to (h).

In the case of records in possession of either state agencies or units of local government, §88(3) operates to provide a means of protecting privacy by deleting identifying details [§88(3)] or by withholding records [§88(3) and (7)(c)]. It is important to note that the Law is permissive; there is no requirement that access be denied. Rather, an agency official may delete identifying details pursuant to §88(3) or withhold information pursuant to §88(7)(c) if in his judgment disclosure would result in an unwarranted invasion of personal privacy. In addition, paragraphs (a) through (e) in §88(3) are, in my opinion, merely five examples among conceivable dozens of unwarranted invasions. Moreover, the examples provided are not entirely clear. For instance, there may be circumstances in which a personal matter reported in confidence to an agency may be relevant to the ordinary work of an agency [§88(3)(a) or (3)(e)]. Lists of names and addresses may be withheld if they are to be used for "private,

commercial or fund-raising purposes" [§88(3)(d)]. However, what is a "private" purpose? In sum, the examples given are neither clearly written nor exhaustive.

Furthermore, §88(10) provides that nothing in the Freedom of Information Law shall be construed to limit existing rights of access granted by other provisions of law or by the courts. In this regard, many decisions rendered prior to the enactment of the Law held in essence that records containing personal information must be made available. Without directly considering the privacy issue, this office has advised that, in those cases, the courts in effect held that although disclosure constitutes an invasion of privacy, the invasion was not unwarranted.

§88(10) has also led to some conclusions that appear to be contrary to the Freedom of Information Law. For example, the payroll record required to be compiled pursuant to §88(1)(g) appears to be available only to "bona fide members of the news media". However, case law rendered prior to enactment of the Law held that virtually the same information must be made available to any person, which is consistent with the thrust of the Law as reflected in §88(6) [see Winston v. Mangan, 72 Misc. 2d 280; 338 NYS 2d 654, 662 (1972)]. Since this right of access is preserved by §88(10), the regulations promulgated by the Committee, which have the force of law, state that the payroll record is accessible to any person, including bona fide members of the news media [see Regulations, §1401.3].

I have enclosed a copy of a memorandum dealing with unwarranted invasion of personal privacy that was written for the Committee shortly after the Law became effective. I hope that it will be helpful to you.

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

Sincerely,

A.O. - 411

July 7, 1976

Mr. Eric Wolferman
Executive City Editor
The Standard-Star
Westchester Rockland Newspapers, Inc.
92 North Avenue
New Rochelle, New York 10802

Dear Mr. Wolferman:

Thank you for your interest in the Freedom of Information Law (hereafter "the Law"). The question raised pertains to the right of public access to the names of individuals who purchased bond anticipation notes issued by the City of New Rochelle.

The Law grants access to several categories of records [§88(1)], including:

> "any other files, records, papers or documents required by any other provision of law to be made available for public inspection and copying" [§88(1)(i)].

One such provision of law is General Municipal Law, §51, 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..."

Reading the Law in conjunction with §51, all records of a municipal corporation, such as the City of New Rochelle, are accessible to the extent that they contain information deemed deniable pursuant to §88(7) of the Law. With respect to deniable information, §88(7)(c) states that, notwithstanding rights of access granted by §88(1), the Law does not apply to information that would, if disclosed, constitute an unwarranted invasion of personal privacy pursuant to standards set forth in §88(3) of the Law. The so-called standards in §38(3), paragraphs (a) to (e), however, are confusing, poorly written, and merely represent five examples of unwarranted invasions of privacy among conceivable dozens. Moreover, in my view, none of the examples is clearly applicable to the records in question.

In reviewing the Local Finance Law, I have been unable to locate any statutory language specifically providing that the names of holders of the notes must be made public or kept confidential. Moreover, Mr. Theodore Berns, Chief Municipal Consultant of the Department of Audit and Control, confirmed that the Local Finance Law offers no specific direction in this regard. Nevertheless, several sections of the Local Finance Law appear to imply publicity. For example, §58.00 states that the notice of sale must be published, §59.00 states that bids shall be opened publicly at the time and place stated in the notice of sale and §75.00 states that obligations must be registered in the office of the chief fiscal officer of the City.

Although neither §59.00 or §75.00 is applicable to the factual situation presented in your letter, the direction of both the General Municipal Law, §51, and several provisions of the Local Finance Law is toward public disclosure concerning municipal government activities. However, it would be inappropriate to conjecture whether a court would find that disclosure of the names of purchasers of the notes would constitute an unwarranted or permissible invasion of the purchasers' privacy. Therefore, in my opinion, only a judicial interpretation of the Law can properly settle the dispute.

I regret that I cannot be of greater assistance.

Should any further questions arise concerning the Freedom of Information Law, please feel free to contact me.

Sincerely,

Robert J. Freeman
Executive Director

cc: Maxwell Charat
Corporation Counsel

A.O. - 413

July 7, 1975

Mr. Maxwell E. Charat
Corporation Counsel
City of New Rochelle
Department of Law
City Hall
New Rochelle, New York 10801

Dear Mr. Charat:

Thank you for your interest in complying with the Freedom of Information Law (hereafter "the Law"). The question raised pertains to the right of public access to the names of individuals who purchased bond anticipation notes issued by the City of New Rochelle.

The Law grants access to several categories of records [§88(1)], including:

> "any other files, records, papers or documents required by any other provision of law to be made available for public inspection and copying" [§88(1)(i)].

One such provision of law is General Municipal Law, §51, which provides access to:

> "[A]ll books, 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 Law in conjunction with §51, all records of a municipal corporation, such as the City of New Rochelle, are accessible to the extent that they contain information deemed deniable pursuant to §88(7) of the Law. With respect to deniable information, §88(7)(c) states that, notwithstanding rights of access granted by §88(1), the Law does not apply to information that would, if disclosed, constitute an unwarranted invasion of personal privacy pursuant to standards set forth in §88(3) of the Law. The so-called standards in §88(3), paragraphs (a) to (e), however, are confusing, poorly written, and merely represent five examples of unwarranted invasions of privacy among conceivable dozens. Moreover, in my view, none of the examples is clearly applicable to the records in question.

In reviewing the Local Finance Law, I have been unable to locate any statutory language specifically providing that the names of holders of the notes must be made public or kept confidential. Moreover, Mr. Theodore Berns, Chief Municipal Consultant of the Department of Audit and Control, confirmed that the Local Finance Law offers no specific direction in this regard. Nevertheless, several sections of the Local Finance Law appear to imply publicity. For example, §58.00 states that the notice of sale must be published, §59.00 states that bids shall be opened publicly at the time and place stated in the notice of sale and §75.00 states that obligations must be registered in the office of the chief fiscal officer of the City.

Although neither §59.00 or §75.00 is applicable to the factual situation presented in your letter, the direction of both the General Municipal Law, §51, and several provisions of the Local Finance Law is toward public disclosure concerning municipal government activities. However, it would be inappropriate to conjecture whether a court would find that disclosure of the names of purchasers of the notes would constitute an unwarranted or permissible invasion of the purchasers' privacy. Therefore, in my opinion, only a judicial interpretation of the Law can properly settle the dispute.

I regret that I cannot be of greater assistance.

Should any further questions arise concerning the Freedom of Information Law, please feel free to contact me.

Sincerely,

Robert J. Freeman
Executive Director

cc: Eric Wolferman
Executive City Editor
The Standard-Star

RJF:lbb

STATE OF NEW YORK
COMMITTEE ON PUBLIC ACCESS TO RECORDS

FOIL-AO-413

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

July 7, 1976

Mr. Robert B. Schwartz
#83250
P.O. Box 1000
Lewisburg, Pennsylvania 17837

Dear Mr. Schwartz:

The question raised in your letter pertains to rights of access under the Freedom of Information Law (hereafter "the Law") to records used as the basis for a wiretap application and issuance of a search warrant.

The Law grants access to several categories of records in §88(1). However, notwithstanding those rights of access, an agency may deny access to information that is:

> "part of investigatory files compiled for law enforcement purposes" [§88(7)(d)].

The records that you are seeking clearly were compiled for law enforcement purposes. Nevertheless, since the quoted provision does not contain any time limitations, in my opinion, a question arises concerning access to the records with respect to the investigation to which they relate. Are the records deniable as long as they exist, or are they deniable only until the investigation and subsequent judicial proceedings have been terminated? This is a question which has not yet been specifically considered by the courts and which, in my view, can be answered only by a court.

There is some indication that the ability to deny access remains even after the investigation has ended and no further proceedings are contemplated.

In Farrell v. Village Board of Trustees, Etc., 372 NYS 2d 905 (1975), the court considered rights of access to an investigatory report written by a chief of police concerning alleged wrongdoing involving on-duty employment of police officers. Although written reprimands of police officers were made available, the opinion held that the report was properly denied:

> "[M]ost of the 18 page report consists of investigatory matters compiled for law enforcement purposes. The Legislature specifically exempted such matters from disclosure. Investigatory files are apt to consist of remarks, gossip, guesses, impressions, hearsay, relevant information, irrelevant information, comments, surmises, data and facts. The Legislature decided it would be best not to have such medley of matters disclosed" (id. 908).

Whether the holding quoted in the case cited above has precedential value with respect to your question is open to conjecture. Therefore, I believe that the issue raised can only be decided judicially.

It is important to point out as in my first letter to you that the Judiciary Law, §255, provides access to records in possession of a court clerk. That section 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 at the rate allowed to a county clerk for a similar service, diligently search the files, papers, 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, if documents were introduced into evidence or became part of the court record, they are available under the Judiciary Law pursuant to §255.

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:lbb

A.O.-414

July 8, 1976

Mr. Kenneth B. Wolfe
County Attorney
Office of the County Attorney
Lewis County
Lowville, New York 13367

Dear Mr. Wolfe:

Thank you for your interest in complying with the Freedom of Information Law. The question raised involves rights of access of a former patient to records pertaining to him in possession of the Lewis County General Hospital.

Although there is no statutory provision dealing specifically with the issue presented, regulations promulgated by the State Department of Health, which have the force of law, prescribe rights of patients and duties of hospitals. In a section entitled "Patient's rights", the New York Code of Rules and Regulations [§720.3] states in relevant part:

> "(a) The hospital shall establish written policies regarding the rights of patients and shall develop procedures implementing such policies. These rights, policies and procedures shall afford patients the right to...
>
> (4) obtain from his physician complete current information concerning his diagnosis, treatment, and prognosis in terms the patient can reasonably be expected to understand. When it is not medically advisable to give such information to the patient, the information shall be made available to an appropriate person in his behalf..."

It is also noted that subdivision (b) of §720.3 provides that a copy of "Patient's rights"

> "...shall be available to each patient or patient's representatives upon admission and posted in conspicuous places within the hospital."

In my opinion, the requirements stated in paragraph (4) quoted above are not entirely clear with respect to rights of access. However, it is clear that a hospital must adopt procedures concerning its access policy and that paragraph (4) provides for the use of professional judgment and discretion regarding disclosures to patientes. Further, having discussed the matter with a Health Department official, I was informed that a patient may challenge a determination to withhold information by means of an Article 78 proceeding. Since ther Freedom of Information Law provides the same means of review, I concur with his opinion.

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:lbb

A.O. - 415

July 13, 1976

Mr. David G. Retchless
Ontario County Attorney
Ontario County Court House
Canandaigua, New York 14424

Dear Mr. Retchless:

Thank you for your interest in complying with the Freedom of Information Law (hereafter "the Law").

The question raised in your letter pertains to rights of access to payroll information. The Law requires that the fiscal officer charged with the duty of preparing the payroll must compile a list consisting of the name, address, title and salary of all officers or employees of a unit of government, except law enforcement officers, whose names and addresses need not be provided [see §88(1)(g)]. Although the Law appears to provide access only to "bona fide members of the news media", the Committee, pursuant to its regulatory authority [§88(9)(a)(ii)], has stated payroll records are accessible to any person.

The reasoning behind this decision is dependent upon §88(10) of the Law, which 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 public records kept by any agency or municipality."

Since rights of access to payroll information were judicially created prior to enactment of the Law, those rights remain effective. In Winston v. Mangan, it was held 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 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" [72 Misc. 2d 280, 338 NYS 2d 654, 662 (1972)].

Based upon the holding quoted above, which makes no distinction concerning the status of a person seeking the records, the payroll information sought is available. Moreover, the regulations promulgated by the Committee, which have the force and effect of law, provide that the fiscal officer of a unit of government shall make the payroll items reflected in §88(1)(g) of the Law available to "any person" [see enclosed regulations, §1401.3(b)].

I would like to point out that neither the Law nor the regulations specify which address, home or business, should be provided. As such, the Committee has advised that if in the judgment of the custodian of the record disclosure of employees' home addresses would result in an "unwarranted invasion of personal privacy" pursuant to §88(3) or §88(7)(c) of the Law, business addresses may be provided.

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

Sincerely,

Robert J. Freeman
Executive Director

Enclosures

RJF:lbb

A.O. - 416

July 15, 1976

Ms. Barbara Bernstein
Executive Director
New York Civil Liberties Union
Nassau County Chapter
210 Old Country Road
Mineola, New York 11501

Dear Ms. Bernstein:

Thank you for your interest in the Freedom of Information Law. I will attempt to answer the question raised in your letter and clarify the points of law discussed during yesterday's conversation.

The issue concerns the right of a public employee to inspect and copy personnel files pertaining to him. The Freedom of Information Law (hereafter "the Law") provides access to certain categories of records [§88(1)(a) to (i)]. The last category of accessible records includes

> "any other files, records, papers or documents required by any other provision of law to be made available for public inspection and copying" [§88(1)(i)].

One such provision of law is General Municipal Law, §51, 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 records in possession of a municipality are accessible, unless they contain information deemed deniable pursuant to §88(7) of the Law. Reading §51 of the General Municipal Law in conjunction with the Law, it appears that local government personnel records are accessible to the subject of the records.

In addition, although §88(3) and §88(7) of the Law provide protection against "unwarranted" invasions of personal privacy, it is possible that a court might find that, since personnel records are relevant to the performance of the official duties of public employees, public disclosure may be considered a permissible rather than an unwarranted invasion of the employees' privacy. Based on recent decisions, it appears that the right of privacy of public employees exists to a lesser extent than that of private citizens [see e.g. Farrell v. Village Board of Trustees, Etc., 372 NYS 2d 905 (1975); Evans v. Carey, 4th Dept. App. Div., decided July 2, 1976].

Moreover, in an opinion rendered in 1964, the Attorney General advised that "employment records" of a city fireman are accessible pursuant to §51, General Municipal Law (1964 Ops. Atty. Gen. March 9). However, as I informed you yesterday, the Attorney General no longer has the file on the opinion and the meaning of "employment records" is uncertain.

With respect to state agencies, rights of access under the Law may be more restrictive. Since there is no statute pertaining to state agencies similar to §51 of the General Municipal Law which is "grandfathered" in under §88(1)(i), records are accessible as of right only to the extent that they are subject to the categories listed in §88(1)(a) to (h). Therefore, although there may be final opinions [§88(1)(a)], final determinations [§88(1)(h)] and statistical information [§88(1)(d)] contained in a personnel file, other information not specifically covered by §88(1) would not be accessible as of right.

Nevertheless, it is possible that a public employee has a right of access to his personnel file pursuant to equitable principles [see e.g. Nunziata v. Police Department of the City of New York, 341 NYS 2d 22, 25 (1973); Kruger v. County of Nassau, 278 NYS 2d 28, 29 (1967)]. However, it would be inappropriate at this juncture to conjecture whether a court would apply these principles to the subject matter athhand.

Enclosed are copies of the Law and regulations, which govern the procedural aspects of the statute and 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
Executive Director

Enclosures

RJF:lbb

STATE OF NEW YORK
COMMITTEE ON PUBLIC ACCESS TO RECORDS FOIL-AO-417

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

July 15, 1976

Ms. Diane Steelman
[redacted]

Dear Ms. Steelman:

Thank you for your interest in the Freedom of Information Law.

After having reviewed your letter and the attached correspondence, I telephoned Mr. Agenor Castro, Public Relations Director of the Department of Correctional Services, in your behalf. He stated that his office could not respond to your request and reiterated the reasons given to you in his letter of June 29.

It is important to point out that the Freedom of Information Law provides access to certain existing records. Therefore, if information sought does not exist in the form of a record, the Department has no obligation to compile a record in response to your request. In terms of your letter, for example, if a file was created with respect to an incident and separate records within the file reflect injuries incurred by individual inmates or employees, the Department would not be obliged to review the file, compile a total of the number of persons injured and thereafter create a new record reflective of the number of persons involved.

Second, there is a special statute dealing with rights of access to records of the Department (Corrections Law, §29). There is currently litigation pending in Appellate Division which when decided may shed some light upon the scope of rights of access and the authority of the Commissioner to determine that records are confidential. The lower court decision

held in essence that the Commissioner may promulgate regulations which effectively permit him to deny information which is otherwise available under the Freedom of Information Law [Zuckerman v. Board of Parole, Supreme Court, Sullivan County, 1975]. Since no decision has yet been rendered on appeal, rights of access to Department records remain unclear.

Third, Mr. Castro told me that, in some instances, disclosure of the records sought might compromise the security of an institution or relate to a proceeding still pending. In those instances, records would be appropriately denied if they consist of investigatory files compiled for law enforcement purposes [see enclosed, Freedom of Information Law, §88(7)].

I suggest that you obtain a copy of the Department's subject matter list required to be compiled, which may be helpful in specifying records in which you are interested. Or perhaps you could seek access to records regarding a specific incident which is unrelated to any ongoing investigation or proceeding.

Enclosed are copies of the Freedom of Information Law and regulations promulgated thereunder which have the force and effect of law.

I regret that I cannot be of greater assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:lbb
Enclosures

cc: Mr. Agenor Castro

A.O. - 418

July 20, 1976

Mr. Michael Desmond
Buffalo Courier-Express
Buffalo, New York 14240

Dear Mr. Desmond:

The issue raised in your letter pertains to rights of access under the Freedom of Information Law to names of doctors and other Medicaid providers who have been accused of overbilling by the Health Department of Erie County. The records sought have been denied by the State Health Department, as well as the Erie County Health and Social Services Departments.

Based upon a review of federal law, state law, and regulations promulgated by the State Department of Social Services, my research has resulted in a finding that there is no provision of law which specifically deals with access to the information sought. In my opinion, the right of access depends on whether disclosure of the names would constitute a permissible or an unwarranted invasion of personal privacy pursuant to the Freedom of Information Law.

There is a federal statute [42 USC §1306(a) through (e)] which at first glance appears to provide that the names of providers cannot be disclosed until their administrative remedies have been exhausted. However, a study of the legislative history of the statute reveals that it is probably inapplicable under the circumstances raised in your letter. In brief, 42 USC §1306 states that performance reviews, evaluations, and survey reports are deniable until the provider whose performance is being evaluated has had a reasonable opportunity, not exceeding 60 days, to review the report and offer comments pertinent parts of which may be incorporated into a report that is later made public. However, the report of the Senate Finance Committee on the bill states that the surveys and similar reports referred to in §1306 are intended to apply to the capacity of a provider to offer proper care in a safe setting (Senate Report 92-1230, 92nd Congress, 2d Session pp. 57, 58). In another example

of legislative intent, Senator Russell Long stated that the reports are intended to pertain to potential deficiencies in the areas of staffing, fire safety, sanitation and the like [Opening Statement of Senate Debate on H.R. 1, Social Security Act of 1972, p. 34]. As such, it appears that §1306 is intended to apply to reports relative to the nature of services of providers rather than their administrative responsibilities. Consequently, it also appears that §1306 cannot be cited as a valid ground for denial of access.

With respect to state law, two statutory enactments are relevant to the inquiry. The Freedom of Information Law provides access to certain categories of records [§88(1)] including

> "any other files, records, papers or documents required by any other provision of law to be made available for public inspection and copying" [§88(1)(i)].

One such provision of law is General Municipal Law, §51, 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..."

Therefore, virtually all papers connected with, used or filed in the office of a unit of local government are accessible unless they contain information deemed deniable pursuant to §88(7) of the Freedom of Information Law. The only category of deniable information relevant to the question raised concerns information which if disclosed would result in an unwarranted invasion of personal privacy pursuant to the standards set forth in §88(3) [§88(7)(c)].

The "standards" contained in §88(3) are confusing, poorly written and hardly create a standard at all. Moreover, paragraphs (a) through (e) which reflect five unwarranted invasions of privacy are merely five examples among conceivable dozens. Therefore, there may be a situations in which disclosure might constitute such an invasion even though the situation is not analogous to any of those presented in §88(3).

Nevertheless, one of the examples given in §88(3) may be of relevance should the issue be presented before a court. Section 88(3) of the Law provides that an unwarranted invasion of personal privacy includes:

> "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."

With regard to the issue at hand, disclosure might result in "economic or personal hardship" to the providers. However, the records are relevant to the "ordinary work" of the County Health Department. Therefore, by implication, a court might find that, since the records are relevant to the work of the Department, disclosure would result in a permissible rather than an unwarranted invasion of privacy.

Viewing the matter from a different perspective, however, may lead to a different result. The notice sent by the County Health Department to the providers was merely a statement of intent to take further action. The procedures relative to the issuance of the notice are found in the New York Code of Rules and Regulations, Title 18 §515.1 - 11, entitled "Unacceptable Practices by Providers." The regulations state that the notice of intent to take further action shall inform the provider of his right to a hearing, which must be requested within fifteen days of the date of the notice, that a request for a hearing stays the intended action, that he may review the agency file and be informed of evidence against him, and that he may be represented by counsel, confront

witnesses and present evidence on his own behalf [NYCRR 18 §515.4]. If a hearing is requested, it is conducted by the Commissioner of the State Health Department or his designee [NYCRR 18 §515.6]. In short, the hearing involves due process.

According to the regulations, which are silent concerning disclosure, it is clear that the notice of intent to take further action may be only a first step in the proceeding. If a provider decides not to request a hearing, the proceeding is at an end and the intended action becomes final. In such case, the records sought would unquestionably be available after the fifteen day period during which the provider may seek a hearing.

However, if a hearing is sought and the provider is able to introduce evidence which effectively exonerates him, should his name be disclosed? There are examples that can be offered both for and against disclosure. For instance, a booking record which must be disclosed pursuant to §88(1)(f) of the Freedom of Information Law provides the name of a person who has been arrested, but not yet convicted. By implication, the Legislature and the courts have stated that disclosure of a booking record does not constitute an unwarranted invasion of personal privacy, even though guilt has not yet been established. On the other hand, the name of a provider need not be given regarding a deficiency concerning fire safety, for example, until an administrative review has been completed [42 USC §1306(e)]. In this case, perhaps Congress tacitly decided that disclosure prior to full review would result in an unwarranted invasion of privacy.

In sum, your letter raises but one question: would disclosure of the providers' names at this juncture constitute an unwarranted or a permissible invasion of personal privacy? I have discussed the matter with several individuals and have been unable to discern any clear response. Since there appears to be neither statutory nor case law on the matter, the question must, in my view, be decided judicially. If I were to state my opinion, it would reflect my point of view merely as one "reasonable man." As we all know, reasonable men may differ. As such, in order to obtain a definitive answer, a court must balance the competing interests of privacy and public disclosure of possible wrong-doing. In weighing the interests, it would appear

that a court would have several alternatives with respect to the time of disclosure. Disclosure could be ordered when the County Health Department informs the provider of its intent to take action, when the fifteen day period has expired whether or not a hearing is sought, when the provider has presented his evidence, or when the State Health Department has rendered its determination.

To reiterate, due to the dearth of law on the subject, it would be inappropriate for me to conjecture whether disclosure at this time would be proper.

I regret that I cannot be of greater assistance.

Sincerely,

Robert J. Freeman
Executive Director

bcc: Mr. T. J. Szymanski
Assistant County Attorney
Erie County
25 Delaware Avenue
Buffalo, New York 12402

Mr. Donald Macharg
Counsel
Department of Health
Tower Building
Empire State Plaza
Albany, New York 12237

ATTENTION: Charles Little, Esq.

Esq.

RJF:lbb

A.O. -419

July 21, 1976

Ms. Doris Thisse
Town Clerk
Clerk of Records
Town of Martinsburg
Martinsburg, New York 13404

Dear Ms. Thisse:

Thank you for your interest in complying with the Freedom of Information Law.

As I read your letter, two questions appear to have been raised regarding your duties as Town Clerk. First, was it proper to relinquish custody of town records? And second, was it proper to permit individuals in possession of the records to make copies thereof.

With respect to the first question, Town Law, §30, states:

> "[T]he town clerk of each town:
> 1. Shall have the custody of all the records, books and papers of the town."

Moreover, in an interpretation of the provision quoted above, the Attorney General has advised that neither a town supervisor nor anyone else should be permitted access to the official town records in the absence of the town clerk or one of his or her deputies in light of the clerk's responsibility for the custody of town records [1970 Atty. Gen. (Inf), 104]. Therefore, custody of the records should not have been relinquished.

With regard to the second question, the Freedom of Information Law [§88(b)] permits the public to inspect and copy records or request that a unit of government make copies (Regulations, §1401.8). Therefore, it is permissible to allow individuals to make copies of town records, so long as the records remain in the custody of the clerk.

Enclosed is a copy of regulations promulgated by the Committee, which govern the procedural aspects of the Freedom of Information Law and have the force and effect of law.

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

Sincerely,

Robert J. Freeman
Executive Director

Enclosure

RJF:lbb

AO-420

July 22, 1976

Ernest Ison III
[redacted]

Dear Mr. Ison:

Your letter pertains to a denial of access by the Department of Correctional Services to statistical or factual records relative to the temporary release program. Specifically, you have sought a numerical and categorical breakdown concerning release on furloughs and work and educational releases at each facility, as well as related information pertaining to inmates, that could aid in evaluation of the program.

First, it is important to point out that the Freedom of Information Law pertains to existing records. If, for example, the Department has in its possession the information sought, but it is contained in a number of separate records, it has no obligation to compile the information into a new record in order to meet your request. Therefore, if the requested information does not exist in the form of a record, there is no right of access.

Second, there is some controversy regarding rights of access to Department records. There is presently a lawsuit pending on appeal in the Appellate Division which may clarify these rights of access [Zuckerman v. Board of Parole, Sup. Ct., Sullivan Co., 1975]. Nevertheless, according to Department regulations, "administrative records" are available for inspection and copying by any person [§5.15]. Included in the definition of an "administrative record" are "statistical or factual tabulations made by or for the department" [§5.5(d)(2)]. As such, if records reflective of the numerical breakdowns sought exist, it appears that they are accessible to you.

Access to records concerning particular inmates would appear to depend on the ability of the Department to delete identifying details to the extent that personal privacy will not be compromised. Since I am not familiar with the records in question, it is impossible to conjecture whether disclosure would constitute an unwarranted invasion of personal privacy [Freedom of Information Law, §88(3) and (7)].

Enclosed is a copy of regulations adopted by the Committee. The regulations, which have the force and effect of law, govern the procedural aspects 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
Executive Director

Enclosure

bcc: Mr. Agenor Castro
Office of Public Relations
Department of Correctional Services
Correctional Services Building
State Office Building Campus
Albany, New York 12226

Mr. Patrick Fish
Counsel
Department of Correctional Services
SAME

RJF:lbb

A.O. - 421

July 23, 1976

[redacted]

Dear [redacted]:

Your letter addressed to the Attorney General has been forwarded to the Committee on Public Access to Records, which is responsible for advising with respect to the Freedom of Information Law.

The issue raised pertains to a denial of access by the Cayuga County Department of Social Services to records contained in your case file.

The Social Services Law, §136, provides that information identifiable to recipients of public assistance is confidential. The Freedom of Information Law preserves this exemption from public disclosure [see enclosed, §88(7)(a)]. However, regulations adopted by the State Department of Social Services permit disclosure to recipients of public assistance under certain specified circumstances.

Section 357.3(c) of the regulations, entitled "Disclosure to applicant, recipient, or person acting on his behalf" states:

> "(1) The case record shall not ordinarily be made available for examination by the applicant or recipient, since it contains information secured from outside sources. However, particular extracts shall be furnished him, or furnished to a person whom he designates, when the provision of such information would be beneficial to him. The case record, or any part of it, admitted as evidence in the hearing on an appeal shall be open to him and his representative.

> (2) Information may be released to a person, a public official, or another social agency from whom the applicant or recipient has requested a particular service when it may properly be assumed that the client has requested the inquirer to act in his behalf and when such information is related to the particular service requested."

In a related provision of the regulations (§358.12), examination of documents is permitted before a hearing:

> "(a) If copies of the documentary evidence which the social services official plans to use at the hearing have not already been provided to the appellant and his representative, an opportunity to examine such documents, if requested, shall be afforded to the appellant or his representative, who shall have appropriate written authorization, at a reasonable time before the date of the hearing.
>
> (b) The applicant, recipient, client, or their representative, who shall have appropriate written authorization, shall be afforded an opportunity to examine the case record at a reasonable time before the hearing..."

As such, a recipient of public assistance has a limited right of access to records pertaining to him. I suggest that you discuss the matter with an official of the County Department.

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

Sincerely,

Robert J. Freeman
Executive Director

Enclosure

cc: Attorney General

RJF;lbb

A.O. - 422

July 26, 1976

Mr. Wayne P. Busch
Supervisory Paramedic
Emergency Medical Unit
Town of Tonawanda
Police Department
1835 Sheridan Drive
Kenmore, New York 14223

Dear Mr. Busch:

Thank you for your interest in complying with the Freedom of Information Law.

Your question pertains to rights of access to medical records compiled by the Emergency Medical Unit of the Town of Tonawanda, which operates as part of the Town's police department.

While I do not believe that the records in question fall within the physician-patient privilege since the Unit is staffed by paramedics, they may nevertheless be withheld under the Freedom of Information Law. The Law provides that a unit of government may withhold information the disclosure of which would result in "an unwarranted invasion of personal privacy" [see enclosed Freedom of Information Law, §88(3) and (7)(e)]. Relevant to your inquiry, §88(3) of the Law states that an unwarranted invasion of personal privacy includes, but shall not be limited to:

> "b. Disclosure of employment, medical or credit histories or personal references of applicants for employment...
>
> c. Disclosure of items involving the medical or personal records of a client or patient in a hospital or medical facility..."

In my opinion, which is based on the provisions quoted above, the Legislature intended that an agency or unit of government be given authority to withhold the medical information at issue. Moreover, paragraphs a through e of §88(3) are merely five examples among conceivable dozens of unwarranted invasions of personal privacy. Therefore, there may be situations in which the disclosure would constitute such an invasion, even though none of the examples in the Law apply specifically to those situations. As such, in my view, it appears that the police department or any other department in custody of the records may withhold the records under 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
Executive Director

Enclosure

RJF:lbb

A.O.- 423

July 29, 1976

Mr. Clarence D. Bassett
Chief
United Press International
P.O. Box 7271
Capitol Station
Albany, New York 12224

Dear Mr. Bassett:

The issue raised in your letter concerns the propriety of action taken by Peter Goldmark, Director of the Division of the Budget, with respect to the Freedom of Information Law. In brief, the controversy pertains to information regarding the state's collection of taxes from the Department of Taxation and Finance.

According to your letter, the Department of Taxation and Finance and other departments collecting revenues had in the past issued monthly releases reflecting the information that they had gathered. Recently, however, Taxation and Finance as well as the other departments have ended that practice and now transmit their figures to the Director of the Budget. The Director then compares the data received from the various departments, attempts to reconcile it and finally compiles a composite tabulation of state revenues with comments related to the figures.

I have discussed this action with several officials of the Division of the Budget and have been informed that the change in policy was adopted in consideration of the tenuous financial position of New York State. According to these officials, the tabulations compiled by departments collecting taxes may be inaccurate and incomplete until reconciled and,

therefore, may be misleading. In an effort to avoid disruption in the financial community and promote stability among bond and note holders, a policy was adopted to prevent the potentially devastating effects of release of inaccurate or incomplete information.

Under the Freedom of Information Law, the records at issue appear to be accessible pursuant to §88(1)(d), which provides access to "statistical or factual tabulations made by or for the agency." However, it is important to point out that the Law provides access to existing records. Therefore, if a record does not exist, an agency has no duty to create it in order to fulfill a request. For example, as you stated in your letter, perhaps the Department of Taxation and Finance could create a record reflecting daily receipts of revenues. However, I have been informed by the Tax Research Bureau of the Department that such records are neither created on a daily basis, nor have they ever been created daily.

Furthermore and perhaps more important, Mr. Goldmark's action was taken based upon the potentially harmful effects of premature disclosure of inaccurate data. In this regard, the Court of Appeals has held that if disclosure would on balance result in detriment to the public interest, records may be withheld notwithstanding rights of access granted by the Freedom of Information Law [see Cirale v. 80 Pine Street Corp., 35 NYS 2d 113, 117 (1974)]. The Court also stated that an agency asserting the governmental confidentiality privilege has the burden of proving that disclosure would in fact be detrimental to the public interest and that only a court can decide whether the privilege is properly asserted.

Since the issues raised in your letter deal in essence with Mr. Goldmark's contention that premature disclosure would be detrimental to the public interest, the controversy can be settled only by judicial means.

I regret that I cannot be of greater assistance. Should any further questions arise, please feel free to contact me.

Sincerely,

Robert J. Freeman
Executive Director

A.O. - 424

July 30, 1976

Ms. Ometa C. Guest
[redacted]

Dear Ms. Guest:

Your letter concerns rights of access under the Freedom of Information Law to records pertaining to you in possession of the New York State Registry of Nurses, the Beth Israel Hospital and the New York Hospital.

It is important to note that the Freedom of Information Law (see enclosed) provides access to certain records in possession of governmental entities in New York State (see definition of "agency," Freedom of Information Law, §87). Since neither hospital referred to in your letter is an agency as defined by the Law, there is no right of access. As such, it would appear that records in possession of those hospitals are obtainable only by means of court order.

However, the New York State Registry of Nurses operates within the State Department of Labor. Consequently, it is a governmental entity within the coverage of the Freedom of Information Law. Furthermore, I have been informed that the Registry has adopted a policy which permits all nurses registered with that office to inspect records pertaining to them. Therefore, I suggest that you request to inspect any records pertaining to you in possession of the Registry. If you are denied access, I have been advised that you should contact:

The Department of Labor
Office of Counsel
2 World Trade Center - Rm. 7330
New York, New York 10047

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

Sincerely,

Robert J. Freeman
Executive Director

Enclosure

RJF:lbb

A.O. - 425

August 16, 1976

Mr. Norman W. Clark
[redacted]

Dear Mr. Clark:

At the request of Ms. Gertrude Wilbur of the Citizens Public Expenditure Survey, I have enclosed copies of the Freedom of Information Law and regulations promulgated thereunder by the Committee, which have the force and effect of law.

Your question pertains to access to payroll information in possession of the Candor Central School District. The Freedom of Information Law [§88(1)(g)] requires that the individual charged with the duty of preparing the payroll compile a record consisting of the name, address, title and salary of every officer or employee of the school district. While §88(1)(g) appears to provide access only to bona fide members of the news media, case law decided prior to the enactment of the Law provided access to this information to any person [see Winston v. Mangan, 338 NYS 2d 654, 662 (1972)]. Since §88(10) of the Law preserves rights of access granted by the courts, the payroll record remains available to any person.

Moreover, the regulations adopted by the Committee, with which the School District must comply, specifically state that the payroll items noted in §88(1)(g) must be made available "to any person, including bona fide members of the news media..." [see regulations, §1401.3(b)].

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

Sincerely,

Robert J. Freeman
Executive Director

cc: Office of the Principal
Candor Central School District
Candor, New York 13743

Ms. Gertrude Wilbur
Citizens Public Expenditure Survey
100 State Street
Albany, New York 12207

Enclosures

RJF:lbb

A.O.- 426

August 18, 1976

Mr. Michael D. Prisaznuk
[redacted]

Dear Mr. Prisaznuk:

Your letter addressed to Attorney General Lefkowitz has been transmitted to the Committee on Public Access to Records, which is responsible for advising with respect to the Freedom of Information Law.

The question raised involves access to a transcript of your hearing before the License Division of the New York City Police Department concerning issuance of a pistol purchase permit. Based upon a review of your correspondence with the License Division, it appears that the response to your request has been unduly delayed. In this regard, the procedural aspects of the Freedom of Information Law are governed by regulations adopted by the Committee, which have the force and effect of law (see enclosed). The regulations state that a unit of government must respond to a request for records within five business days of receipt of the request, unless "extraordinary circumstances" can be shown [regulations, §1401.6(b)].

With respect to fees, the statute provides that records must be made available on request "upon payment of, or offer to pay, the fees allowed by law or rule..." [see enclosed Freedom of Information Law, §88(6)]. In this case, the record sought involves compilation of a stenographic transcript of the hearing. Therefore, the Division may charge a fee not exceeding the actual cost of compiling the record. According to an official of the License Division, the actual cost, which is set by contract, is $2.25 per page, as you have been recently informed. Since the Division is unable to know the length

of the transcript until it is completed, only an estimate of the cost to you can be given. Under the circumstances, the deposit sought by the Division is, in my opinion, reasonable.

A copy of my response to you will be sent to the License Division and will include copies of both the Freedom of Information Law and regulations. Perhaps a review of these documents will enable you to better assert your rights and will also inform the Division of its responsibilities and duties under the statute.

I hope that I have been of some assistance.

Sincerely,

Robert J. Freeman
Executive Director

Attachments

cc: Mr. Peter J. Maloney
Commanding Officer
License Division
New York City Police Department
1 Police Plaza
New York, New York 10038

RJF:lbb

A.O. - 427

August 18, 1976

Mr. Mickey Mayes
[redacted]

Dear Mr. Mayes:

I can only reiterate statements made to you in letters written during the past year. A copy of this letter will be sent to both Ms. Myrtle Hull, the Town Clerk of the Town of Warrensburg, and Mr. Charles Hastings, the Town Supervisor. I will also enclose for them a copy of regulations promulgated by the Committee, which have the force and effectcof law.

With regard to particular issues raised in your letter of July 20, the request for warrants prepared by the Town Clerk for specific months in 1975, in my opinion, met the standard that a request reflect identifiable records [see regulations, §1401.6(d),(e)]. In this regard, it was recently held that:

> "[I]t is not necessary that the party requesting the information identify it down to the last detail. The language of the Law places part of such responsibility upon the public agency from whom the information is sought. The responsibility of the person requesting the records is that he provide sufficient information to permit the agency to accomplish this duty. The Budget examiner's files on the Cable Television Commission, even though it might

> consist of forty individuals
> folders as alleged by respondents,
> is sufficiently identifiable as
> to meet the requirements of the
> Law" [Dunlea v. Goldmark, 380
> NYS 2d 496, 499 (1976)].

As described in your letter, the request for the warrants was sufficiently specific for the Clerk to act upon it.

With respect to custody of town records, the Town Law, §30, clearly states that:

> "[T]he town clerk of each town:
>
> 1. Shall have custody of all
> the records, books and papers
> of the town."

As such, the Clerk should have possession of the records, rather than the Supervisor. Moreover, the records must be made available for public inspection and copying during all regular business hours [see regulations, §1401.5(a) and General Municipal Law, §51].

I hope that I have been of some assistance.

Sincerely,

Robert J. Freeman
Executive Director

cc: Mr. Charles E. Hastings (with attachment)
Town Supervisor

Ms. Myrtle Hull (with attachment)
Town Clerk

RJF:lbb

A.O. 428

August 18, 1976

Mr. Myron H. Blumenfeld
[redacted]

Dear Mr. Blumenfeld:

Thank you for your continued interest in the Freedom of Information Law (hereafter "the Law").

Your letter pertains to procedures adopted by the Town of North Hempstead which require that requests for records under the Law be made in person and prohibit providing copies of records by mail.

Although neither the Law nor the regulations promulgated thereunder specifically deal with the issues raised, the procedures in question, in my view, violate the spirit of the Law. While a unit of government may require that a request be made in writing, unless the records sought have in the past been customarily made available without a written request [regulations, §1401.6(a)], there is no requirement that requests be personally submitted, Therefore, a written request that is sufficiently specific that it reflects identifiable records [see the Law, §88(6); regulations, §1401.6(d)], should suffice, whether the request is transmitted in person or otherwise.

Similarly, if an individual asks that materials be mailed to him after having paid the appropriate fees pursuant to §88(6) of the Law and §1401.8 of the regulations, the agency should, in my opinion, mail the records as requested. If, for example, a state agency with its only office in Albany were to require that all residents of the state personally apply for records, a court, in my view, would likely decide that such a requirement would constitute a constructive denial of access. While the issues raised in your letter deal with a nearby unit of government, I believe that the principle offered in the example provided above would be equally applicable.

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

Sincerely,

Robert J. Freeman
Executive Director

cc: Mr. Joseph A. Guarino
Senior Deputy Town Attorney
Town of North Hempstead
Town Hall
Manhasset, New York 11030

RJF:lbb

A.O.-429

August 18, 1976

Ms. Anne M. Srebro
Latona, Worthington, Srebro & Nitterauer
Attorneys and Counselors at Law
120 Delaware Avenue
Suite 200
Buffalo, New York 14202

Dear Ms. Srebro:

Your letter addressed to the State Department of Taxation and Finance has been transmitted to the Committee on Public Access to Records, which is responsible for advising with respect to the Freedom of Information Law.

The question raised pertains to correspondence dealing with an application for a real property tax exemption by the Crittenden Volunteer Fire Department, Inc. I have contacted officials of both the Department of Taxation and Finance and the Board of Equalization and Assessment and have been informed that neither of those agencies, nor any other state agencies, have possession of the records in question.

The requirements regarding exemptions for associations of volunteer firemen are provided in the Real Property Tax Law, §464. It appears that such associations need not submit a formal application for a real property tax exemption and that any information concerning an exemption would be in possession of the local assessor.

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:lbb

August 18, 1976

Ms. Barbara J. Gilman
President
Chemung County Taxpayers Association
228 Sunset Circle
Horseheads, New York 14845

Dear Ms. Gilman:

Thank you for your continued interest in the Freedom of Information Law (hereafter "the Law").

The question raised pertains to access to records reflective of the names of officials of the City of Elmira who made decisions concerning a flood control plan implemented by the Elmira Urban Renewal Agency.

It is important to note that the Law provides access to certain existing records. Therefore, an agency need not create a new record in order to respond to a request for information. Consequently, if there are no records containing the names of the individuals concerned, there is no right of access.

Assuming, however, that such records do exist, they are, in my opinion, available. First, the orders to implement the plan in effect constitute final opinions [§88(1)(a)] or final determinations [§88(1)(h)] of the agency. As such, they are accessible. Second, the Law provides access to

> "any other files, records, papers or documents required by any other provision of law to be made available for inspection and copying" [§88(1)(i)].

One such provision of law is General Municipal Law, §51, which provides access to:

> "[A]ll books of minutes, entry or accounts, and the books, bills, vouchers, checks, contracts or other papers connected with or used 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" in possession of a municipal corporation, such as the City of Elmira, are available, unless they contain information deemed deniable pursuant to §88(7) of the Law. In view of the nature of the records sought, it appears that the exemptions contained in §88(7) are inapplicable. As such, if the records exist, they are accessible.

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

Sincerely,

Robert J. Freeman
Executive Director

cc: Mr. Joseph Sartori
City Manager
City Hall
Elmira, New York 14901

RJF:lbb

A.O.- 431

August 19, 1976

Joseph R. McCoy III
Counselor at Law
3784 Mill Road
Seaford, New York 11783

Dear Mr. McCoy:

As I informed you yesterday, your letter addressed to Commissioner Ewald Nyquist was sent to Attorney General Lefkowitz, who in turn transmitted it to the Committee on Public Access to Records, which is responsible for advising with respect to the Freedom of Information Law.

The issue raised pertains to a denial of access by the Seaford School District to the budget that was defeated by the voters earlier this summer. In my opinion, the denial was violative of both the Freedom of Information Law (Public Officers Law, §§ 85-89) and the Education Law.

The Freedom of Information Law provides access to specified categories of records [§88(1)], including statistical or factual tabulations made by or for a governmental entity [§88(1)(d)]. As described in your letter, "a line by line budget," consists of factual tabulations and is, therefore, accessible. In addition, the Freedom 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" [§88(1)(i)].

One such provision of law is §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."

Read in conjunction with the Freedom of Information Law, virtually all school district records are accessible unless they contain information deemed deniable pursuant to §88(7) of the Freedom of Information Law. Since none of the exemptions contained in §88(7) is applicable to the information sought, the denial of access was improper.

I have enclosed copies of the Freedom of Information Law and regulations promulgated by the Committee, which govern the procedural aspects of the statute and have the force and effect of law. Copies of this letter as well as the documents enclosed will be sent to the School Board of the District.

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

Sincerely,

Robert J. Freeman
Executive Director

cc: The School Board
Union Free School District No. 6
Jackson Avenue
Seaford, New York 11783

A.O.- 432

August 19, 1976

Mr. Alan S. Hoffman
Assistant Superintendent
Poughkeepsie City School District
11 College Avenue
Poughkeepsie, New York 12603

Dear Mr. Hoffman:

Thank you for your interest in complying with the Freedom of Information Law.

Your question pertains to the subject matter list to which reference is made in §88(4) of the Freedom of Information Law and §1401.6(c) of the regulations promulgated by the Committee. The statute requires that every entity within the coverage of the Freedom of Information Law maintain "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," which is September 1, 1974.

In essence, §88(4) requires that the School District maintain a list broken down into categories of records in its possession that have been created since the effective date of the statute. This provision does not require that every kind of record be included in the list; rather, the list should merely be sufficiently detailed to permit a person asking for a record to identify the file category of the record sought.

The Committee has not created a sample subject matter list because each agency possesses different kinds of records. However, I have enclosed a copy of the Committee's list, which may be helpful as a guide. Also, I suggest that you review the schedules for retention and disposal of records issued by the State Education Department. While the schedules are more

specific than the subject matter list must be, perhaps a study of the schedules will assist you in formulating a subject matter list. If you need additional information concerning the retention and disposal schedules, it can be obtained from the state archivist, who is located in the Office of Cultural Education of the Education Department.

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

Sincerely,

Robert J. Freeman
Executive Director

Enclosure

RJF:lbb

A.O.-433

August 26, 1976

Ms. Dorothy E. Pearsall
Village Clerk Treasurer
Village of Bayville
Nassau County
Bayville, New York 11709

Dear Ms. Pearsall:

Thank you for your interest in the Freedom of Information Law (hereafter "the Law").

The question is whether the Law is applicable to a "free library system." I have contacted the Education Department on your behalf and have been informed that there is no precise definition of "free library system" and that a determination as to whether a particular system is covered by the Law must be based upon a finding of the characteristics of each system individually.

It is important to point out that the Law applies to all governmental entities in the state [see enclosed, §87(1)]. If, for example, a system is run as part of a school district and is funded by school taxes, it would be a governmental entity within the scope of the Law. However, based upon a discussion of the system in question with Ms. Barbara Lintz, Deputy Village Clerk Treasurer, on August 25, it appears that the system in question is not a governmental entity and, therefore, is not subject to the Law.

Although the system may have many of the characteristics of a governmental entity (i.e., funding from government; participation in state health and retirement plans), it is a private separate legal

entity which has the power to hire and fire its employees without governmental infringement. According to Ms. Lintz, neither the system nor its trustees possess governmental powers; they merely provide a service.

Further, the Appellate Division has held that the New York City Public Library is not a governmental or public employer within the coverage of the Taylor Law, which pertains to government employees [New York Public Library v. New York State, 357 NYS 2d, 522, 533 (1974)]. In addition, 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 Ed. Dept. Rep. 102).

Consequently, as the facts have been described to me, the system in question does not, in my view, appear to be subject to the 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
Executive Director

Enclosure

RJF:lbb

A.O. - 434

August 31, 1976

Ms. Nell Heath
[redacted]

Dear Ms. Heath:

Your question pertains to your right of access as a former employee to forms returned to the Manpower Services Division of the New York State Department of Labor by your former employers.

Generally, the records in question are deniable. Section 537 of the Labor Law provides in relevant part as follows:

> "1. Use of information. Information 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 available to the party affected and, in the commissioner's discretion, may be made available to the parties affected in connection with effecting placement."

The provision quoted above provides for confidentiality of the records in question, but contains exceptions which may permit you to inspect the records. Since the issue relates to your efforts to secure placement, the

forms submitted by your former employers may, in the discretion of the Industrial Commissioner, be made available to you.

I suggest that you write to the State Department of Labor and explain fully what you believe are inaccuracies contained in records pertaining to you. Your statement should be addressed to:

Frederick J. Hmiel, Esq.
Office of Counsel
New York State - Department of Labor
State Office Building Campus
Albany, New York 12249

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

Sincerely,

Robert J. Freeman
Executive Director

cc: Frederick J. Hmiel

Ms. Dorothy Knorr
Senior Employment Counselor
Manpower Services Division
New York State
Division of Labor
13 South Street
Glens Falls, New York 12801

RJF:lbb

A.O. 435

September 7, 1976

Mr. Frank Delle Cese, Jr.
Ms. Florence Delle Cese
[redacted]

Dear Mr. and Ms. Delle Cese:

The Committee on Public Access to Records has the responsibility of advising with respect to the Freedom of Information Law. As such, the Committee does not have in its possession records pertaining to you or forms concerning confidentiality of records.

Nevertheless, I have enclosed a copy of the Freedom of Information Law, which provides that government may deny access to records when disclosure would result in "an unwarranted invasion of personal privacy" [see Section 88(3)].

With regard to safekeeping of wills, Section 2507 of the Surrogate's Court Procedure Act provides that a will deppsited with the clerk of the court is kept confidential, except under specified circumstances. It states that:

> "1. The court of any county upon being paid the fees allowed therefore by law shall receive and deposit in the court any will of a domiciliary of the county which any person shall deliver to it for that purpose and shall give a written receipt therefor to the person depositing it. An attesting witness to any will may make and sign an affidavit before any officer authorized to administer oaths setting forth such facts as he would be required to testify to in order to prove the will. The affidavit

may be written upon the will or on some paper securely attached thereto and may be filed for safekeeping with the will to which it relates. There may also be filed with the will affidavits of certified medical examiners, under the provisions of the mental hygiene law, certifying that the maker of the will was of sound mind at the time of its execution, together with any facts supporting such opinion.

2. The will shall be enclosed in a sealed wrapper so that the contents thereof cannot be read and shall have endorsed thereon the name of the testator, his domicile, and the day, month and year when delivered and shall not on any pretext whatever be opened, read or examined until delivered to a person entitled to it as hereinafter directed.

3. The will shall be delivered only
(a) to the testator in person or
(b) upon his written order duly proved by the oath of a subscribing witness or
(c) after his death to the persons named in the endorsement on the wrapper of the will, if such endorsement be made thereon or
(d) if there be no such endorsement or if it has been deposited with any other officer than a surrogate, then to the surrogate's court of the county.

> 4. If the will shall have been deposited with a surrogate's court or shall have been delivered to it as above prescribed the court after the death of the testator shall publicly open and examine the will and make known the contents thereof and shall file it in the court, there to remain until it shall have been duly proved, if capable of proof, and then to be delivered to the person entitled to the custody thereof or until required by the authority of some competent court to produce the same in such 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
Executive Director

Enclosure

RJF:lbb

A.O. -436

September 22, 1976

Mr. Thomas G. Conway
Counsel
Department of Agriculture
and Markets
State Office Building Campus
Building 8 - Room 312
Albany, New York 12235

Dear Mr. Conway:

I want to thank you and Commissioner Barber on behalf of the Committee on Public Access to Records at the outset for the cooperation, patience and assistance given to the Committee and to me. The Committee is aware that its opinion may have far-reaching implications.

In presenting the issues to the Committee, I attempted to provide as many alternatives and potential effects of disclosure as possible. In addition, access to all records pertaining to the controversy, including the investigative records, was considered in my memorandum to the Committee, a copy of which is enclosed.

It is the Committee's opinion that all records relative to conditions 2 through 6 in the administrative determination dated April 19, 1974, should be made available.

The key question concerns rights of access to testing results of milk products submitted to the Department of Agriculture and Markets by the Dairylea Cooperative, Inc. In essence, a narrow interpretation of §33(7)(b) of the Freedom of Information Law results in a finding that the records are available; a more expansive interpretation permits a denial of access.

The Freedom of Information Law provides access to several categories of records, including

> "any other files, records, papers or documents required by any other provision of law to be made available for public inspection and copying" [§38(1)(1)].

One such provision of law is §23 of the Agriculture and Markets Law, which states:

> "[A]ll proceedings, documents, papers and records filed or deposited with the department relating to matters within its jurisdiction and powers shall be public records; except such portions thereof as are received and accepted by the Commissioner, as being of a confidential nature which when so received and accepted shall not be subject to subpoena. Copies of all official documents and orders so filed or deposited, certified by the commissioner, a deputy commissioner, or the secretary under the seal of the department to be true copies of the originals, shall be evidence in like manner as the originals."

Reading the Freedom of Information Law in conjunction with §23 of the Agriculture and Markets Law, all Department records are accessible, except to the extent that they contain information deemed deniable pursuant to §38(7) of the Freedom of Information Law or are of a confidential nature as determined by the Commissioner pursuant to §23. Since neither Commissioner Barber nor his predecessors have yet determined that any of the records at issue are confidential under §23, the question is whether the records contain information under §38(7) of the Freedom of Information Law that is:

> "a. specifically exempted by statute;

> b. 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, but this exemption shall not apply to records the disclosure or publication of which is directed by other statute;
>
> c. if disclosed, an unwarranted invasion of personal privacy, pursuant to the standards of subdivision three of this section; or
>
> d. part of investigatory files compiled for law enforcement purposes."

Paragraph (a), which deals with information that is "specifically exempted" by statute, is inapplicable. Although §23 of the Agriculture and Markets Law provides a means of withholding information, that section does not pertain to specific records that are exempted from disclosure. Therefore, §88(7)(a) is of no relevance regarding the records in question.

Paragraph (b) provides that information may be denied when three conditions precedent are met. First, information must be confidentially disclosed to an agency. Second, it must be compiled and maintained for the regulation of commercial enterprise, for the grant or review of a license to do business, or it must contain trade secrets. And third, disclosure must result in an unfair advantage to competitors.

The information is clearly maintained for the regulation of commercial enterprise, but was it confidentially disclosed and would disclosure provide an unfair advantage to Dairylea's competitors?

Although the information clearly constitutes statistical or factual tabulations which are accessible under the Freedom of Information Law [§88(1)(d)], it appears that public disclosure of these figures might result in a competitive disadvantage to Dairylea. If the test results are disclosed, a competitor might advertise that Dairylea's products do not meet the state standard, thereby injuring Dairylea's competitive position in the dairy industry. In addition, the test results could be used by competing milk cooperatives or dealers when bidding for contracts with supermarket chains or attracting farmer membership into a cooperative.

Nevertheless, in the opinion of the Committee, records indicating a failure to comply with state standards are precisely the kind of records that the Freedom of Information Law seeks to make publicly available. The courts have posited the principle that the public has a right to know whether a regulatory agency is performing its duties effectively [see e.g., Alberghini v. Tizes, 68 Misc. 2d 587 (1972); C. Van Deusen v. New York State Liquor Authority, 253 NYS 2d 984 (1965)]. Without access to the test results, the public is unable to know whether the Department is carrying out its duties pursuant to law (i.e. whether state standards are being met) or whether Dairylea is complying with the administrative determination. Although the decisions cited above do not deal with the effects of disclosure with respect to competitors within a particular area of commerce, the principle may be applicable to the situation under consideration.

In addition, paragraph (b) was not, in the opinion of the Committee, intended to be asserted as a means of withholding facts which show that a regulated commercial enterprise is producing substandard goods. On the contrary, it appears that the intent of the Legislature [see §85] was to provide access to such information, while enabling an agency to withhold trade secrets or information reflective of the financial condition or responsibility of a commercial enterprise.

It could also be argued that such information should be disclosed only after a pattern of violations on the part of a particular milk dealer has been found, since a single sample below standard may not reflect a continual failure to meet the standard. Moreover, statistics quoted out of context may result in unfair and misleading inferences.

Nevertheless, disclosure always involves the danger that information will be disseminated in a misleading manner. In the Committee's view, that factor alone should not be used to deny the flow of information. Second, if test results of milk producers are made publicly available, there may be a levelling effect. As such, a producer may be reluctant to criticize the findings contained in a monthly report regarding his competitor if he may be similarly criticized the following month.

Finally, were the records in question "confidentially disclosed"?

There is some indication that the test results are not confidential. First, as stated earlier, neither Commissioner Barber nor his predecessors have determined that the records in question are confidential under §23 of the Agriculture and Markets Law. Second, the Commissioner's determination in the administrative proceeding includes eight orders. Order number one (see p. 5 of administrative determination) specifically states that certain records would upon receipt by the Commissioner be considered confidential pursuant to §23. However, order number six (see p. 6 of the administrative determination), which pertains to the test results, contains no such proviso. Consequently, by implication, it appears that the Commissioner did not intend to make the test results confidential when the order was issued. Third, if it can be assumed that the test results were accessible pursuant to §23 when the determination was rendered, paragraph (b) of the exemption provision of the Freedom of Information Law cannot be used as a means of denying access. Section 88(10) of the Freedom of Information 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 public records kept by any agency or municipality."

Stated in another way, if rights of access existed prior to the enactment of the Freedom of Information Law, nothing in the Law can be asserted to limit those rights. Therefore, if the records were accessible under the Agriculture and Markets Law when the determination was rendered, they remain accessible notwithstanding paragraph (b).

Paragraph (c) permits denial of access to information which if disclosed would result in an unwarranted invasion of personal privacy. Although names of employees and their positions are mentioned in many of the records, the personal details of their lives are nowhere apparent. Consequently, paragraph (c) cannot be relied upon as a means of denial.

Paragraph (d), the final category of deniable information, pertains to investigatory files compiled for law enforcement purposes. Since the records are not investigatory in nature, this provision cannot be asserted to deny access.

Once again, on behalf of the Committee, I thank you for your interest in complying with the Freedom of Information Law. Should any questions arise, please feel free to contact me.

Sincerely,

Robert J. Freeman
Executive Director

cc: Mr. Gerald Wegman
Limeledge Road
Marcellus, New York 13108

John M. Freyer, Esq.
Bond, Schoeneck & King
1 Lincoln Center
Syracuse, New York 13202

STATE OF NEW YORK
COMMITTEE ON PUBLIC ACCESS TO RECORDS FOIL-AO-437

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

COMMITTEE MEMBERS
[redacted]LIE ABEL - Chairman
. ELMER BOGARDUS
MARIO M. CUOMO
PETER C. GOLDMARK, JR.
JAMES C. O'SHEA
GILBERT P. SMITH
ROBERT W. SWEET
EXECUTIVE DIRECTOR
ROBERT J. FREEMAN

September 28, 1976

Ms. Sheila Newman
[redacted]

Dear Ms. Newman:

Thank you for your interest in complying with the Freedom of Information Law.

The issue raised in your letter pertains to rights of access to personnel information generally and to records of an employee's qualifications in particular. In my opinion, much of the information in question should be made available.

The Freedom of Information Law provides access to several categories of records [§88(1)], including

> "any other files, records, papers or documents required by any other provision of law to be made available for public inspection and copying" [§88(1)(i)].

One such provision of law is §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."

Reading the Freedom of Information Law in conjunction with §2116, all records in possession of a school district are accessible, unless they contain information deemed deniable pursuant to §88(7) of the Freedom of Information Law. Relevant to your inquiry, §88(7)(c) provides that a unit of government need not provide access to information that would if disclosed result in "an unwarranted invasion of personal privacy, pursuant to the standards of subdivision three of this section..."

Subdivision three provides a list of five examples of unwarranted invasions of personal privacy. A review of these examples is useful in discerning the intent of the Legislature. The examples of unwarranted invasions of privacy [§88(3)(a) to (e)] include:

> "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."

Paragraphs (c) and (d) have no relevance concerning your question. However, paragraphs (a) and (e) both state that records reflective of personal matters may be withheld unless the records are relevant or essential to the ordinary work of the agency or municipality. As such, although the records in question may deal to some extent with personal matters, if those matters are relevant to the work of the school district or pertain to the duties of school district personnel, they should in my opinion be made available. Moreover, in the only judicial opinion rendered to date related to disclosure of personnel information, it was held that disclosure of written reprimands of police officers would not constitute an unwarranted invasion of personal privacy, since these records were "relevant...to the ordinary work of the...municipality" [Farrell v. Village Bd. of Trustees, Etc., 372 NYS 2d 905, 908 (1975)].

It is noted, however, that paragraphs (b) of §88(3) provides that personal references of applicants for employment need not be provided unless the applicant has signed a release permitting disclosure.

In sum, records containing an employee's qualifications are relevant to the work of the school district and therefore, in my opinion, are available under the Freedom of Information Law. As in all instances in which access is denied, I suggest that the denial be appealed to the person or body designated to hear appeals pursuant to §88(8) of the Freedom of Information Law and §1401.7 of the 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.

Sincerely,

Robert J. Freeman
Executive Director

RJF:lbb

cc: Mr. Donald Saltmarsh

STATE OF NEW YORK
COMMITTEE ON PUBLIC ACCESS TO RECORDS FOIL-AO-438

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

September 28, 1976

Mr. David G. Retchless
Ontario County Attorney
County Court House
Canandaigua, New York 14424

Dear Mr. Retchless:

Thank you for your continued interest in complying with the Freedom of Information Law.

The question pertains to a request for information consisting of a department by department breakdown of names, titles, anniversary dates and salaries of all county employees who occupy positions covered by the contract entered into by Ontario County and a public employee union.

It is important to point out that the Freedom of Information Law provides access to certain existing records. Therefore, if the information sought does not exist in the form of a record or records, there is no obligation that the agency in receipt of the request create a new record in response to the request.

If the information sought does exist in the form of a record, it is likely that the record would consist of "factual tabulations" and, as such, would be accessible pursuant to §88(1)(d) 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
Executive Director

RJF:lbb

STATE OF NEW YORK
COMMITTEE ON PUBLIC ACCESS TO RECORDS FOIL-AO-439

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

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EXECUTIVE DIRECTOR
ROBERT J. FREEMAN

September 28, 1976

Ms. Carol Greitzer
Councilwoman
3rd District
51 Chambers Street
Room 429
New York, New York 10007

Dear Councilwoman Greitzer:

I regret that the Committee on Public Access to Records can do little to assist you in your efforts to obtain information from the New York City Transit Authority.

The Committee, which was created by enactment of the Freedom of Information Law, is an advisory body and has no authority to force compliance with the Law. As such, enforcement of the Law rests on the public.

You may be aware that a denial of access may be appealed to the head or heads of an agency [see enclosed, Freedom of Information Law, §88(8)]. The procedures concerning appeal are found in regulations promulgated by the Committee [see enclosed, §1401.7], which deal with the procedural aspects of the Freedom of Information Law and have the force and effect of law. Further, each entity covered by the Law must adopt regulations no more restrictive than those adopted by the Committee. It is important to complete the appeal process, because administrative remedies must be exhausted before a judicial challenge to a denial of access can be initiated. If you decide to seek judicial review of the denial, a special proceeding may be instituted under Article 78 of the Civil Practice Law and Rules.

As noted in my letter to you, the status of the Transit Authority is unclear with regard to certain existing provisions of law (i.e., Public Officers Law, §66-a). Perhaps an effort can be made through the State

Legislature to clarify or otherwise amend existing statutes. If remedial changes in the Law can be accomplished, controversies analogous to that in which you are presently involved could be avoided.

Once again, I regret that the Committee cannot offer you substantial additional assistance. If you would like to discuss the matter further, please feel free to contact me.

Sincerely,

Robert J. Freeman
Executive Director

RJF:lbb
Enc.

STATE OF NEW YORK
COMMITTEE ON PUBLIC ACCESS TO RECORDS FOIL-AO-440

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

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EXECUTIVE DIRECTOR
ROBERT J. FREEMAN

October 1, 1976

Mr. Frederick M. Reuss, Jr.
Village Attorney
Incorporated Village of Bellerose
County of Nassau
Bellerose, New York 11426

Dear Mr. Reuss:

Thank you for your interest in complying with the Freedom of Information Law.

The question raised in your letter is whether a municipality must furnish a list of pensioned former employees of the municipality or a department thereof under the Freedom of Information Law.

It is important to note at the outset that the Freedom of Information Law provides access to certain existing records. Therefore, if there is no list reflective of the information sought in existence, there is no obligation to create a new record in order to respond to a request. If, however, such a list does exist in the form of a record, the record would likely consist of a factual tabulation, which is accessible pursuant to Section 88(1)(d) of the Law.

Although the list would appear to be accessible, there may be situations in which access could be denied. Section 88(3) of the Law provides that agency officials may delete identifying details or otherwise withhold information the disclosure of which would constitute "an unwarranted invasion of personal privacy." While there is no requirement that such information must be withheld, an agency official has discretion to withhold the information when in his judgment disclosure would result in an unwarranted invasion of personal privacy.

In addition, the Law lists five examples of unwarranted invasions of personal privacy. Relevant to your inquiry, Section 88(3)(d) states that an unwarranted invasion includes

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

Consequently, if a list of pensioned former employees would be used for the purposes envisioned in the provision quoted above, the list need not be provided.

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:lbb

STATE OF NEW YORK
COMMITTEE ON PUBLIC ACCESS TO RECORDS FOIL-AO-441

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

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EXECUTIVE DIRECTOR
ROBERT J. FREEMAN

October 6, 1976

Mr. Jordan Shifriss
Children's Learning Center
Big Indian
New York, New York 12410

Dear Mr. Shifriss:

Thank you for your interest in the Freedom of Information Law.

Your question pertains to rights of access to census information in possession of a school district. The information is sought in order to form a pre-school program. It is noted that school districts must take a census of all children between birth and eighteen years of age pursuant to §3242 of the Education Law.

The Freedom of Information Law provides a right of access to "statistical or factual tabulations" [§88(1)(d)]. As such, it would appear that the information requested is accessible. Nevertheless, the Freedom of Information Law provides that information may be withheld when disclosure would result in "an unwarranted invasion of personal privacy" [§88(3)]. While the Law does not impose an obligation upon government to protect against such an invasion, government officials have the authority to delete identifying details when making records available or otherwise withhold information the disclosure of which would result in an unwarranted invasion of personal privacy.

In addition, the Law lists five examples of unwarranted invasions of personal privacy [see §88(3)(a) to (e)]. Relevant to your inquiry, one example of such an invasion pertains to:

> "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..." [§88(3)(d)].

Consequently, a list of names and addresses of pre-school children residing in a particular school district may be withheld, since, according to your letter, the list would be used for a private or commercial purpose.

As stated earlier, a school district may withhold information the disclosure of which would result in an unwarranted invasion of personal privacy, although there is no obligation to do so. It is likely that this permissive aspect of the Freedom of Information Law is the reason for being granted access to a list in some districts, while being denied access in others.

Attached are copies of the advisory opinions requested, as well as a copy of the Freedom of Information Law and the regulations promulgated thereunder, 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
Executive Director

RJF:lbb
Att.

STATE OF NEW YORK
COMMITTEE ON PUBLIC ACCESS TO RECORDS FOIL-AO-442

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

October 7, 1976

Mr. Alfred B. Lowy
Managing Editor
The Daily Item
Port Chester, New York 10573

Dear Mr. Lowy:

Thank you for your interest in the Freedom of Information Law.

Your question pertains to rights of access to financial records of a volunteer fire department regarding the expenditure of monies received from the State of New York as a rebate on out-of-state insurance policies. According to the Chief of the Port Chester Fire Department, since the office is a volunteer fire department, it is not within the coverage of the Freedom of Information Law.

In my opinion, a volunteer fire company is within the scope of the Law. First, the definition of "municipality" in the Freedom of Information Law [§87(2)] specifically includes fire districts and any other special districts established by law for any public purpose. Second, a federal court has held that a volunteer fireman is "in the public service" and is therefore a public servant, even though he receives no salary [Everett v. Riverside Hose Co., 261 F. Supp. 463 (1966)]. Consequently, although a volunteer fire company may be a not-for-profit corporation, it performs a governmental function, is a governmental entity and is subject to rights of access granted by the Freedom of Information Law.

With respect to the information sought, it is likely that it consists of statistical or factual tabulations, which are accessible under the Law

[§88(1)(d)]. In addition, the financial condition of volunteer fire companies is audited periodically by the New York State Department of Audit and Control. These audits are also accessible under the 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
Executive Director

RJF:lbb

cc: Chief William Carlson
Port Chester Fire Department
Headquarters Building
Westchester Avenue
Port Chester, New York 10573

STATE OF NEW YORK
COMMITTEE ON PUBLIC ACCESS TO RECORDS FOIL-AO-443

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

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EXECUTIVE DIRECTOR
ROBERT J. FREEMAN

October 7, 1976

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

Dear Ms. Zeller:

Thank you for your continued interest in complying with the Freedom of Information Law.

Your questions deal with the procedural aspects of the Freedom of Information Law and what your duties are as records access officer for the Town of Deerpark. These responsibilities are described in the regulations promulgated by the Committee (see attached), which have the force and effect of law.

Specifically, the duties of the records access officer are set out in §1401.2. According to the regulations, the records access officer is initially responsible for granting or denying access. It is noted that records must be produced promptly, but if research must be performed to appropriately determine whether records are accessible or deniable, up to five days may transpire before a decision to grant or deny access is made (see §1401.6).

Further, both the Freedom of Information Law [see attached, §88(8)] and the regulations (§1401.7) require that an appeals procedure be established. In brief, when a denial is made, the reasons for the denial must be stated in writing and the person denied access must be apprised of his or her right to appeal to the head or heads of an agency or whomever that person or body has designated to hear appeals.

I would also like to point out that the Freedom of Information Law specifically provides access to police blotters and booking records [§88(1)(f)]. Although the term "booking record" is undefined, in my opinion, it is intended to mean the record of arrest created by the arresting agency. The original bill passed by the Legislature included the term "arrest record" instead of "booking record." It is likely that the latter replaced the former by amendment to make clear that criminal history records in the possession of the Division of Criminal Justice Services need not be made available. However, it is clear that a booking record, the record of an arrest, is available.

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:lbb
Att.

STATE OF NEW YORK
COMMITTEE ON PUBLIC ACCESS TO RECORDS FOIL-AO-444

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

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EXECUTIVE DIRECTOR
ROBERT J. FREEMAN

October 7, 1976

Mr. David E. Langdon
Assistant Director
Office of Legislative Oversight
and Analysis
Room 542
State Capitol
Albany, New York 12224

Dear Mr. Langdon:

The issue raised in your letter pertains to fees that may be charged for reproduction of transcripts created pursuant to a contract for an agency of government by private stenographic services. In some cases, I believe that a contract may specify that the cost of reproduction is $2.50 per page, that additional copies can be made only by the stenographic service, and that the agency is prohibited from reproducing a transcript by means of photocopying.

In my opinion, a fee of $2.50 per page under most circumstances would constitute a violation of law. The Freedom of Information Law provides that the Committee on Public Access to Records promulgate regulations governing the procedural aspects of the Law [§88(9)(a)(ii)], including fees [§88(2)(c)]. The regulations (see attached) have the force and effect of law and provide that unless a fee had been established by law prior to September 1, 1974, an agency can charge no more than twenty-five cents for photocopies up to eight and one half by fourteen inches (see attached, Regulations, §1401.8). Therefore, unless a higher fee had been set by law prior to the effective date of the Freedom of Information Law, no more than twenty-five cents per copy may be charged.

I recognize that by charging a fee in accordance with the regulations, an agency may in effect be breaking a contractual agreement. However, I do not believe that a contractual agreement can supersede a provision of law, such as §1401.8 of the regulations or be used to constructively abridge rights of access granted by the Freedom of Information Law by means of charging a higher fee than that prescribed by the regulations.

When a record is produced or received by a governmental entity in New York, the record is subject to the Freedom of Information Law. If it is an accessible record and copies are requested, the fee for copies must be assessed in accordance with regulations adopted by the governmental entity, which can be no more restrictive than those promulgated by the Committee.

I hope that I have been of some assistance. If you would like to discuss the matter further, please feel free to contact me.

Sincerely,

Robert J. Freeman
Executive Director

RJF:lbb
Att.

STATE OF NEW YORK
COMMITTEE ON PUBLIC ACCESS TO RECORDS FOIL-AO-445

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

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EXECUTIVE DIRECTOR
ROBERT J. FREEMAN

October 8, 1976

Ms. Camille Coulborn
[redacted]

Dear Ms. Coulborn:

Based upon the correspondence attached to your letter, it appears that some confusion continues to exist regarding access to the minutes of meetings of the Carle Place Board of Education. To reiterate the opinion stated in my letter to you dated May 3, 1976, minutes must be made available as soon as they are compiled. Stated another way, as soon as a document exists in a form recognizable as minutes, the document is accessible, whether or not the Board of Education has approved it.

This, I believe, conflicts with Mr. O'Brien's interpretation of my opinion. According to Mr. O'Brien, my opinion is that "the stenographer's 'work product' do (sic) not become the minutes of the District until they have been adopted by the Board and made a part of the minute book of the District" (letter to you from Edward J. O'Brien, Esq., September 13, 1976). As I interpret the phrase "stenographer's work product," such materials consist of writings used as an aid in transcribing the minutes, such as handwritten notes or a stenographic tape. While rights of access to those materials remain unclear for reasons discussed in my earlier letter, once minutes have been prepared, they must be made available. For example, if a clerk has prepared minutes of a meeting but the Board does not meet until a month following their preparation, in my view, those minutes are available notwithstanding the fact that they have neither been approved by the School Board nor entered into a minute book. As such, I believe that "stenographer's work product" as I interpret the phrase can be distinguished from minutes prepared but yet to be approved by the School Board.

I suggest that you appeal the denial of access to the person or body designated by the Board to hear appeals pursuant to §88(8) of the Freedom of Information Law and §1401.7 of the 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.

Sincerely,

Robert J. Freeman
Executive Director

RJF:lbb

cc: Mr. Edward T. O'Brien
Attorney at Law
370 East Old Country Road
P.O. Box 668
Mineola, New York 11501

STATE OF NEW YORK
COMMITTEE ON PUBLIC ACCESS TO RECORDS FOIL-AO-446

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(518) 474-2518, 2791

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EXECUTIVE DIRECTOR
ROBERT J. FREEMAN

October 12, 1976

Mr. Robert A. Mauborgne
[redacted]

Dear Mr. Mauborgne:

Thank you for your interest in the Freedom of Information Law, a copy of which is enclosed. Your questions deal with both the amount of time within which a unit of government must respond to a request for records, as well as access to municipal government records.

The time for responding to a request is governed by regulations promulgated by the Committee (see enclosure) which have the force and effect of law. Section 1401.6(b) of the regulations states:

> "(1) An 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.
>
> (2) If for any reason more than five days is required to produce records, an agency or municipal official shall acknowledge receipt of the request within five working days after the request is received. The acknowledgment should include a brief explanation of the reason for delay and an estimate of the date production or denial will be forthcoming."

Since more than five days have transpired without an acknowledgment of the request, you may appeal to the head of the unit of government or whomever that person has designated to hear appeals [see regulations, §1401.7(c)].

With respect to access to municipal government records, the Freedom of Information Law and other statutes provide broad rights of access. The Freedom of Information Law grants access to several categories of records, including

> "any other files, records, papers, or documents required by any other provision of law to be made available for public inspection and copying" [§88(1)(i)].

One such provision of law is §51, 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..."

Reading the Freedom of Information Law in conjunction with the provision quoted above, virtually all records in possession of a municipality are accessible, unless they contain information deemed deniable under §88(7) of the Freedom of Information Law. As I interpret your letter, the records sought are available.

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:lbb
Enc.

STATE OF NEW YORK
COMMITTEE ON PUBLIC ACCESS TO RECORDS FOIL-AO-447

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EXECUTIVE DIRECTOR
ROBERT J. FREEMAN

October 12, 1976

Mr. John J. Sheehan
Adjusters, Inc.
P.O. Box 604
Binghamton, New York 13902

Dear Jack:

Before going into legalities, I want to thank you for your kind comments regarding my talk in your letter to Secretary Cuomo. I think that the meeting in Binghamton was unique. Usually the people addressed are from a single group with united interests. At your meeting, I had the opportunity to hear from both the public that uses the Law as well as the government officials that must implement it. The discussion and meeting of the minds was quite gratifying to me and showed once again that dialogue is the best method of avoiding disputes and establishing an atmosphere of cooperation.

Your first inquiry deals with a request for a copy of a complaint reflective of the theft of a citizens band radio from an automobile. The request was denied on the ground that the complaint is "part of investigatory files." The Freedom of Information Law states that government may deny access to information that is "part of investigatory files compiled for law enforcement purposes." Although the complaint may now be "part of investigatory files," the question is whether it was compiled for "law enforcement purposes" or in the ordinary course of business. If it was created in the ordinary course of business, it is, in my opinion, accessible. The Freedom of Information Law specifically provides access to police blotters [§88(1)(f)]. As we discussed during our meeting in September, there is no clear definition of "police blotter" and practices concerning police blotter entries vary from one police department to another. However, the Committee has consistently advised that a blotter is in the nature of a log or diary in which any event reported by or to a

police department is recorded. It contains no investigative information, but merely summarizes an occurrence. It appears that a complaint might consist of the kind of information that has customarily been logged in a police blotter. Therefore, in my view, a complaint is available, except to the extent that it contains information the disclosure of which would hamper police officials in attempting to carry out a law enforcement investigation.

The second inquiry pertains to rights of access to blood test information. This information was properly denied pursuant to two sections of the County Law, §674(b) and §677. In brief, §674(b) provides that the results of blood tests "shall be used only for the purpose of compiling statistical data and shall not be admitted into evidence or otherwise disclosed in any legal action or other proceeding." Similarly, §677 states that reports made by the coroner, coroner's physician or medical examiner are open to inspection only by the district attorney. As such, the blood tests are deniable.

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:lbb

STATE OF NEW YORK
COMMITTEE ON PUBLIC ACCESS TO RECORDS FOIL-AO-448

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

October 12, 1976

Mr. Walter F. Noiseux
[redacted]

Dear Mr. Noiseux:

As requested, enclosed is a copy of the Freedom of Information Law.

Your question is whether rights of access granted by the Law apply to inspection of your personnel files. In this regard, the Law provides no specific right to personnel information and is silent on the subject. However, the Law provides access to several categories of records [see §88(1)(a) to (i)]. To the extent that your files contain records reflective of those categories, they are available to you. For example, if you were involved in a grievance, the opinion rendered would be accessible as a final opinion made in the adjudication of a case [§88(1)(a)]; if the files contain time sheets or similar records, it is likely that such records would consist of statistical or factual tabulations, which are also accessible [§88(1)(d)].

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:lbb
Enc.

STATE OF NEW YORK
COMMITTEE ON PUBLIC ACCESS TO RECORDS FOIL-AO-449

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

October 22, 1976

Mr. James O. Moore
Chairman
Smithtown Citizens Organization
for Responsible Education
58 Brooksite Drive
Smithtown, New York 11781

Dear Mr. Moore:

Your letter sent to the Department of Education has been transmitted to the Committee on Public Access to Records, which is responsible for advising with respect to the Freedom of Information Law.

The question concerns whether a school district may refuse to respond to a request by an organization and require that a request be made by an individual. In my opinion, there should be no distinction made between individuals and organizations. The sole question that should be asked by a unit of government when a request is made is whether or not the records sought are accessible. As the Committee has resolved, "information accessible under the Freedom of Information Law shall be equally accessible to any person, without regard to status or interest" (see enclosed resolution). In general, an official has no right to ask the name of the individual requesting records, who the person is representing or his purpose for making the request.

The one exception to this rule involves requests for lists of names and addresses. The Law provides that when used for "private, commercial or fund-raising purposes," disclosure of these lists would constitute an unwarranted invasion of personal privacy [see enclosed, Freedom of Information Law, §88(3)(d)]. Therefore, if a list of names and addresses is sought for any of the purposes described, it may be withheld.

Also enclosed is a copy of the regulations promulgated by the Committee. The regulations govern the procedural aspects of the Freedom of Information Law and 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
Executive Director

RJF:lbb
Enc.

cc: Frederick W. Burgess
Staff Attorney
Department of Education

STATE OF NEW YORK
COMMITTEE ON PUBLIC ACCESS TO RECORDS FOIL-AO-450

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

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EXECUTIVE DIRECTOR
ROBERT J. FREEMAN

October 25, 1976

Mr. Edward T. O'Brien
Attorney at Law
370 East Old Country Road
P.O. Box 668
Mineola, New York 11501

Dear Mr. O'Brien:

Thank you for your letter of October 13.

In my opinion, the issue with which we are dealing, access to unapproved minutes, remains unresolved. Although I am aware of the Rosenbaum decision cited in your letter, the Comptroller of the State has rendered advisory opinions implying that unapproved minutes are available as soon as they have been prepared and are in the possession of a town clerk (see 64 Op. St. Compt. 664; 68 Op. St. Compt. 1002). Moreover, I have attended meetings of statewide associations, such as the Conference of Mayors, during which counsel to the Comptroller has advised that unapproved minutes are accessible. While the Comptroller's opinions have dealt with towns and villages, I believe that the language and breadth of applicable statutes governing access to records is similar (see §51, General Municipal Law; §2116, Education Law). Due to the apparent conflict of authority and the lack of judicial decision on the matter, I do not believe that there is a definitive answer to the problem.

In many instances, unapproved documents or portions of clearly accessible documents have been made publicly available. Since there is always a danger that publication of excerpts of records will be misinterpreted or quoted out of context, usage of a stamp or other device noting that a document is not in final form or that portions of records may not be reflective of entire documents has been a successful method of protecting government officials from being embarrassed unnecessarily. Should the school board decide to provide access to unapproved minutes, a notation stating that the minutes have not yet been approved may serve to protect the members of the board and at the same time permit interested members of the public to be aware of action taken by the board.

Until the courts determine the issue at hand, we will continue to face conflicting interpretations by high government officials as well as conflicting personal opinions.

I hope that I have been of some assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:lbb

STATE OF NEW YORK
COMMITTEE ON PUBLIC ACCESS TO RECORDS FOIL-AO-451

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

COMMITTEE MEMBERS
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PETER C. GOLDMARK, JR.
JAMES C. O'SHEA
GILBERT P. SMITH
ROBERT W. SWEET
EXECUTIVE DIRECTOR
ROBERT J. FREEMAN

October 25, 1976

Mr. Martin Maier
Chenango County Planning Director
99 North Broad Street
Norwick, New York 13815

Dear Mr. Maier:

Thank you for your interest in the Freedom of Information Law. The question raised in your letter pertains to access to real estate tax assessment cards.

In my opinion, the right of access to the information sought is well established in both statutory and case law. The Freedom of Information Law provides rights of access to several categories of information, including

> "any other files, records, papers or documents required by any other provision of law to be made available for public inspection and copying" [see enclosed, Freedom of Information Law, §88(1)(i)].

In addition, the Law preserves rights of access to records previously granted by either the courts or by statutory law [§88(10)]. In this regard, there are two cases which deal with access to assessment information. In Sears, Roebuck and Company v. Hoyt, 107 NYS 2d 756 (1951), it was held that cards and records contained in a "Kardex System" as well as applications made by taxpayers for revisions of real estate assessments are available to the public for inspection and copying. Similarly, in Sanchez v. Papontas, 303 NYS 2d 711 (1969), the court found that pencil-marked data cards in possession of a board of supervisors used by county assessors to reappraise real property are publicly accessible, even though the cards were prepared by a third party, a private company.

In addition, to rights of access granted by case law, there are two statutes which also provide access to the assessment cards. First §51 of the General Municipal Law provides a right of access to

> "[A]ll books of minutes, entry or accounts, and the books, bills, vouchers, checks, contracts or other papers connected with or used 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..."

Second, §208(4) of the County Law provides that

> "Except as otherwise provided by law...all records, books, maps or other papers recorded or filed in any county office, shall be open to public inspection, and upon request, copies shall be prepared and certified..."

As such, virtually all papers connected with or used or filed by an officer of municipal government are publicly accessible, unless otherwise provided by law. Since there is no provision of law permitting municipal government to deny access to the records in question, they are, in my view, accessible to 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
Executive Director

RJF:lbb

cc: Mr. Robert J. Michael
Director of Real Property
County Office Building
Norwich, NY 13815

Chairman
Board of Supervisors
County Office Building
Norwich, NY 13815

STATE OF NEW YORK
COMMITTEE ON PUBLIC ACCESS TO RECORDS FOIL-AO-452

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

October 28, 1976

Ms. Kitty Cohen
[redacted]

Dear Ms. Cohen:

The questions raised in your letter pertain to rights of access to certain payroll information under the Freedom of Information Law.

It is important to note at the outset that any person charged with the duty of preparing the payroll for any governmental entity in the state must compile and make available a payroll record consisting of the name, address, title and salary of all officers or employees, except law enforcement officers, whose names and addresses need not be provided [see enclosed Freedom of Information Law, §88(1)(g)]. Although the applicable provision of the Law appears to provide access only to "bona fide members of the news media," both judicial decisions and the regulations adopted by the Committee, which have the force of law, provide access to the payroll record to any person [see enclosed Regulations, §1401.3].

Moreover, in a decision rendered prior to enactment of the Freedom of Information Law, it was held 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 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.

> "The employee's 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" [Winston v. Mangan, 338 NYS 2d 654, 662 (1972)].

Since the Freedom of Information Law preserves rights of access previously granted by the courts [§88(10)], rights granted by the decision quoted above continue to be applicable. As such, any person has a right of access to the payroll record required to be compiled under the Freedom of Information Law. With respect to disclosure of employees' home addresses, since the Law does not specify which address, home or business, must be provided, the Committee has consistently advised that a unit of government has discretion to provide either address. In some instances, disclosure of home addresses might result in an "unwarranted invasion of personal privacy" [see §88(3)]. In such cases, home addresses may be withheld.

If the district has created records reflective of the number of hours worked by part-time employees, that information is available under §88(1)(d) of the Freedom of Information Law, which grants access to "statistical or factual tabulations." However, if the district has not created a record reflective of the information sought, it is not obligated to create a new record in response to your request.

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:js
Enc.

STATE OF NEW YORK
COMMITTEE ON PUBLIC ACCESS TO RECORDS FOIL-AO- 453

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

COMMITTEE MEMBERS
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ROBERT W. SWEET
EXECUTIVE DIRECTOR
ROBERT J. FREEMAN

October 15, 1976

Mrs. Mildred Littell
Town Clerk
Town Hall
Warwick, New York 10990

Dear Mrs. Littell:

I have been requested by Mrs. Louis Lofrese to write an advisory opinion concerning access to vital records compiled between 1847 and 1851 that are in your possession.

While the Public Health Law provides that vital records are accessible only under certain circumstances [§4173, 4174], that body of law is applicable only with respect to vital records created after 1880. The foregoing interpretation of the Public Health Law has been confirmed by Mr. Joseph Sterzinger, Director of the Bureau of Vital Records of the State Health Department, which is responsible for implementing the Public Health Law. Consequently, the records sought by Mrs. Lofrese are accessible under both the Freedom of Information Law and §51 of the General Municipal Law.

I would like to add that if photocopies of the records are sought, the Freedom of Information Law requires that copies be made [§88(6)]. The fees that may be charged are set out in regulations promulgated by the Committee, which have the force and effect of law [see enclosed regulations, §1401.8].

To reiterate, the records sought by Mrs. Lofrese are available and photocopies must be made on request.

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:js
Enc.

cc: Mrs. Louis Lofrese
Mr. Joseph Sterzinger

STATE OF NEW YORK
COMMITTEE ON PUBLIC ACCESS TO RECORDS FOIL-AO-454

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

November 5, 1976

Mrs. R. Bessie Gilbert
[redacted]

Dear Mrs. Gilbert:

Thank you for your interest in the Freedom of Information Law.

Your questions pertain to the procedural aspects of the Law. As such, I have enclosed a copy of the regulations adopted by the Committee These regulations have the force of law and every unit of government in the state must adopt regulations no more restrictive than those issued by the Committee.

With respect to your specific questions, first, minutes of village board of trustees are available regardless of the date of their compilation. Second, so long as a request is reflective of identifiable records, any request in writing should be sufficient, whether the request is made in person or by mail.

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:lbb
Enc.

STATE OF NEW YORK
COMMITTEE ON PUBLIC ACCESS TO RECORDS FOIL-AO-455

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

December 9, 1976

Mr. Raymond Copeland 76A-2209
Box B F-9/45
Dannemora, New York 12929

Dear Mr. Copeland:

The Freedom of Information Law provides rights of access to several categories of records, one of which includes any other records made available by any other provision of law [see enclosed Freedom of Information Law, §88(1)(i)]. In this regard, one such provision of law is §255 of the Judiciary Law which provides access to virtually all records in possession of a court clerk. I suggest that you contact the clerk of the court in which your case was tried and identify the records that you are seeking to the best of your ability. Since the clerk can charge a fee for copies, you should attempt to gain information concerning waiver of a fee.

Also enclosed are copies of regulations adopted by the Committee. The regulations have the force and effect of law and should be helpful to you in determining the responsibilities of government in responding to your request.

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:lbb
Enc.

STATE OF NEW YORK
COMMITTEE ON PUBLIC ACCESS TO RECORDS FOIL-AO-456

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

December 9, 1976

Mr. David Weinstein
Visiting Associate Professor of Law
Temple University
School of Law
Philadelphia, Pennsylvania 19122

Dear Professor Weinstein:

I apologize for the delay in responding to your inquiry. To the best of my knowledge, there have been few judicial interpretations concerning rights of access to criminal justice information systems. The New York State Freedom of Information Law provides that information that is part of investigatory files compiled for law enforcement purposes need not be disclosed [§88(7)(d)]. In addition, while the original freedom of information bill provided access to police blotters and "arrest records," the criminal justice community felt that the term "arrest record" would have provided access to records such as criminal history information. In order to avoid providing a right of access to such information, the Legislature changed the term "arrest record" to "booking record" in order to insure that the records intended to be released should consist of the records of arrest compiled by an arresting agency, rather than criminal history information.

For additional information, I suggest you contact Ms. Norma Sue Wolfe, Public Information Officer, Division of Criminal Justice Services, Executive Park Tower, Stuyvesant Plaza, Albany, New York, 12203. I am sure that Ms. Wolfe can provide you with current and specific information concerning access to criminal justice systems information.

Enclosed is a copy of the New York State Freedom of Information Law. I hope that I have been of some assistance.

Sincerely,

Robert J. Freeman
Executive Director

Enclosure

cc: Ms. Norma Sue Wolfe

STATE OF NEW YORK
COMMITTEE ON PUBLIC ACCESS TO RECORDS FOIL-AO-457

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

December 9, 1976

Mr. David Thorstad
[redacted]

Dear Mr. Thorstad:

Attached for your perusal is a copy of the New York State Freedom of Information Law. It is noted that rights of access granted by the New York State statute are not as extensive as those granted by the Federal Freedom of Information Act. Also, the state legislature has not enacted the equivalent of the Federal Privacy Act as yet. As such, the ability of individuals to gain access to information identifiable to them in possession of a government agency in New York has not been established.

While the New York statute enables government to deny access to "part of investigatory files for law enforcement purposes" [§88(7)(d)], the breadth of the scope of this exemption has not yet been tested in the courts. However, the Freedom of Information Law does provide some tools that may be useful to you in requesting records concerning yourself. For example, pursuant to §88(4) of the Law, each agency must compile a subject matter list, which consists of a categorization of all records in possession of an agency since the effective date of the Freedom of Information Law, which is September 1, 1974. Secondly, the Committee has promulgated regulations governing the procedural aspects of the Law (see enclosed). Each agency must adopt regulations no more restrictive than those promulgated by the Committee. I suggest that you request copies of subject matter lists from the agencies in possession of records pertaining to you and review the regulations to determine how they may be most helpful to 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
Executive Director

RJF:lbb
Enc.

STATE OF NEW YORK
COMMITTEE ON PUBLIC ACCESS TO RECORDS FOIL-AO-458

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

December 15, 1976

Mr. Eugene T. Dooley
Town Clerk
Town of Brookhaven
Town Clerk's Office
Town Hall
Patchogue, New York 11772

Dear Mr. Dooley:

I apologize for the delay in responding to your letter.

With respect to access to records pertaining to the Town Animal Shelter, the Freedom of Information Law provides access to several categories of records [Section 88(1)] including any other records made available by any other provision of law [Section 88(1)(i)]. In this regard, Section 51 of the General Municipal Law 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 the state..."

As such, virtually all records in possession of a municipality, such as the Town of Brookhaven, are accessible unless the records contain information that is deniable pursuant to Section 88(7) of the Freedom of Information Law. Section 88(7) provides that an agency may deny access to information that is exempt from disclosure by another statute, that is in the nature of trade secrets or is compiled and maintained for the regulation of commercial enterprise and disclosure would adversely affect competitive position of the subject enterprise, information the disclosure of which would result in an unwarranted invasion of personal privacy and investigatory files compiled for law enforcement purposes.

With respect to custody of the records, Section 30 of the Town Law clearly provides that

> "the town clerk of each town shall have the custody of all the records, books, and papers of the town."

Consequently, you as town clerk rather than an assistant town attorney should have custody of all town records. Moreover, in an interpretation of the provision quoted above, the Attorney General has advised that neither a town supervisor nor anyone else should be permitted access to the official town records in the absence of the town clerk or one of his or her deputies in light of the clerk's responsibility for the custody of town records [1970 Atty. Gen., (Inf.), 104]. Therefore, custody of the records should never have been in anyone but yourself as the clerk of the Town of Brookhaven.

In addition, in my opinion, only the designated records access officer (see attached Regulations, Section 1401.2) should have the authority to review requests for records and the records themselves to determine whether or not they should be made available under the Freedom of Information Law.

Once again, I apologize for the delay in responding to your letter. I hope that I have been of some assistance. Should any further questions arise, please feel free to contact me.

Sincerely,

Robert J. Freeman
Executive Director

RJF:js
Att.

cc: Mr. Frank Breselor
Department of Law

STATE OF NEW YORK
COMMITTEE ON PUBLIC ACCESS TO RECORDS

OML-AO-37
FOIL-AO-459

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

December 16, 1976

Mrs. Paul Berard
[redacted]

Dear Mrs. Berard:

Your inquiry regarding the application of the Open Meetings Law to public employee negotiations has been transmitted by Assemblyman Cook to the Committee on Public Access to Records, which is responsible for advising with respect to the Freedom of Information Law and the Open Meetings Law. The Open Meetings Law, a copy of which is enclosed, provides that all meetings of public bodies shall be open to the general public except that a public body may enter into executive session to discuss subjects specified in the Open Meetings Law [see §95]. One of the subjects that may be discussed in executive session is "collective negotiations pursuant to Article 14 of the Civil Service Law." Therefore, a public body may enter into executive session for the purpose of public employee negotiations.

With respect to materials presented at collective bargaining negotiations, rights of access granted by the Freedom of Information Law are unclear. While the Freedom of Information Law provides broad rights of access and specifically grants access to statistical or factual tabulations [see enclosed Freedom of Information Law, §88(1)(d)], the status of records pertaining to collective bargaining negotiations has not yet been dealt with judicially. In a related area, it has been held that when disclosure of records related to an incomplete transaction would hamper the possibility of completing the transaction, the records need not be made available until the transaction has been consummated [Sorley v. Village of Rockville Center, 30 AD 2nd 822]. Similarly, it is possible that a court might find that premature disclosure of records related to collective bargaining negotiations could hamper the negotiations and therefore should remain undisclosed until the negotiations have been completed. On the other hand, it is also possible that a court might determine that statistical or factual tabulations used in collective bargaining should be made available pursuant to 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
Executive Director

RJF:lbb
Enc.

cc: Assemblyman Charles D. Cook
19 Prospect Street
Delhi, New York 13753

STATE OF NEW YORK
COMMITTEE ON PUBLIC ACCESS TO RECORDS FOIL-AO-460

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

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ROBERT W. SWEET
EXECUTIVE DIRECTOR
ROBERT J. FREEMAN

December 17, 1976

Mr. William H. Englander
Cooper and Englander
Attorney at Law
114 Old Country Road
Mineola, New York 11501

Dear Mr. Englander:

Thank you for your thoughtful letter.

The question raised deals with the Committee's policy concerning search fees. Shortly after the Freedom of Information Law became effective, the Committee was faced with several problems regarding fees generally. After a substantial survey, we found that the average cost of copying is slightly more than six cents per page. In some departments, the cost is less than a half cent per copy due to the availability of modern and sophisticated machinery; in smaller units of government which have older copying equipment, the cost of reproduction is as high as approximately fifteen cents per page. In order to meet the needs of units of government throughout the state, the Committee opted to set a maximum limit of twenty-five cents per copy [see Regulations, §1401.8].

The feasibility of permitting a fee for searching records was discussed in some detail. The Committee and its staff raised several points. First, it was felt that access to records should not be based upon the ability to pay. Second, the opportunity to charge for a search would in many instances discourage the public from asking to inspect records. Third, establishment of search fees might have the effect of encouraging governmental inefficiency. Fourth, the imposition of search fees could result in constructive denials of access. And fifth, the courts have long held that "mere inconvenience" is not a sufficient ground for denying access to records [see e.g., Sorley v. Lister, 33 Misc. 2d 471, 218 NYS 2d 215 (1961)].

In my view, the fact that the Law establishes a right was crucial to the standard adopted by the Committee. Based upon personal experience and discussions with numerous municipal officials, I have had difficulty convincing these officials that searching for records is as much a part of their official duties as any of the other tasks that they must perform. As such, although expense and inconvenience might result due to searching for records, those factors are, in the opinion of the Committee, outweighted by the considerations discussed in the preceding paragraph.

Once again, your interest in the Freedom of Information Law is appreciated and I hope that I have been of some assistance. If you would like to discuss the matter further, please feel free to contact me.

Sincerely,

Robert J. Freeman
Executive Director

RJF:lbb

STATE OF NEW YORK
COMMITTEE ON PUBLIC ACCESS TO RECORDS FOIL-AO-461

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

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ROBERT W. SWEET
EXECUTIVE DIRECTOR
ROBERT J. FREEMAN

December 21, 1976

Officer Donald Ryan
Tewksbury Police Department
935 Main Street
Tewksbury, Massachusetts 01876

Dear Officer Ryan:

Your letter addressed to the Attorney General has been transmitted to the New York State Committee on Public Access to Records, which is responsible for advising with respect to the New York Freedom of Information Law.

The Freedom of Information Law provides access to certain records in possession of units of government at both the state and local levels in New York. Consequently, the Law does not provide access to records in possession of commercial detective agencies in the state. To the best of my knowledge, New York has not yet enacted any provision of law which would enable you to gain access to records in possession of a commercial entity. However, there are instances in which an employment contract contains provisions whereby individuals can gain access to records pertaining to them. I suggest that you contact the detective agency in question and determine whether such provisions were included in your contract of employment.

For the purpose of clarification, it should be noted that the Federal Freedom of Information Act provides access to records in possession of federal agencies. Like the New York Freedom of Information Law, the federal statute is not applicable to private or commercial entities.

I regret that I cannot be of greater assistance. Should any further questions arise, please feel free to contact me.

Sincerely,

Robert J. Freeman
Executive Director

cc: Solicitor General

OML-AO-18
FOIL-AO-462

STATE OF NEW YORK
COMMITTEE ON PUBLIC ACCESS TO RECORDS

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

December 21, 1976

Mr. Paul Feiner
[redacted]

Dear Mr. Feiner:

I apologize for the delay in responding to your letter.

The questions raised in your letter deal with application of both the Freedom of Information Law and the Open Meetings Law. I will attempt to deal with each question in order.

First, informal, regular meetings between a Mayor and a village manager, for example, or other employees, is not subject to the Open Meetings Law. The Law pertains only to public bodies as defined in §92(2). As such, a meeting between an executive official, such as the Mayor, and his employees would not constitute a meeting as defined by the Law.

Second, when the Open Meetings Law becomes effective in January, will village boards, for example, have to release minutes of executive sessions that were compiled before January 1, 1977? Section 88(1)(c) of the Freedom of Information Law provides access to minutes of governing bodies. Consequently, if minutes of executive sessions compiled prior to January 1 are in existence, they are available under the Freedom of Information Law since its enactment in 1974.

Third, can you, as the resident of one village, gain access to records of another village and attend its meetings? With respect to the Freedom of Information Law, as the Committee resolved shortly after the Law became effective, information made available under the Freedom of Information Law shall be made equally available to any person, without regard to status or interest. As such, your status as a

resident of one village has no relevance with respect to your rights of access to the records of another village. With regard to the Open Meetings Law, §93 of that statute states that every meeting of a public body shall be open to the general public. Therefore, you have the right to attend meetings of another village as well as those of your own village.

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:js

STATE OF NEW YORK
COMMITTEE ON PUBLIC ACCESS TO RECORDS FOIL-AO-463

COMMITTEE MEMBERS
[redacted]IE ABEL - Chairman
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GILBERT P. SMITH
ROBERT W. SWEET
EXECUTIVE DIRECTOR
ROBERT J. FREEMAN

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

December 29, 1976

Leo B. Harford, P.E.
[redacted]

Dear Mr. Harford:

Thank you for your interest in the Freedom of Information Law and for sending me a copy of the determination in Harford v. County of Onondaga.

The Freedom of Information Law grants access to several categories of records [§88(1)] including any other records made available by any other provision of law [§88(1)(i)]. One such provision of law is §51 of the General Municipal Law, which has long provided access to virtually all records in possession of or used by officials of municipal government. In addition, judicial determinations have stated that county community colleges are subject to §51 (see Cline v. Schenectady Community College, 351 NYS 2d 81). Consequently, all records in possession of municipality are accessible unless they contain information that is deemed deniable pursuant to §88(7) of the Freedom of Information Law. Therefore, the information that you have requested pertaining to sabbatical leaves is available, but identifying details may be deleted to protect against unwarranted invasion of personal privacy. Moreover, as stated in the Harford decision referred to above, the Supreme Court in Onondaga County has ruled that the information in question should be made available after having deleted identifying details.

With respect to the letter addressed to you by Mr. J. Paul Graham, Dean of Business Affairs of the Mohawk Valley Community College, I agree with your contention that a member of the public who has been denied access to records need not identify the specific provision of law upon which

the appeal is based. The procedures governing the right to appeal denial of access are found in both the Freedom of Information Law, §88(8) and regulations promulgated by the Committee, §1401.7. Enclosed for your perusal is a copy of the regulations. An additional copy will be sent to Mr. Graham.

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:js

cc: Mr. J. Paul Graham

STATE OF NEW YORK
COMMITTEE ON PUBLIC ACCESS TO RECORDS FOIL-AO-464

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

December 30, 1976

Howard E. Pachman, Esq.
County Attorney
County of Suffolk
Veterans Memorial Highway
Hauppauge, New York 11787

Dear Mr. Pachman:

Thank you for your interest in complying with the Freedom of Information Law.

The question raised in your letter pertains to disclosure of information concerning the shipment of atomic waste. As stated in your letter, "such information, in the wrong hands, could represent a serious danger to the public health."

The Freedom of Information Law when read in conjunction with other statutes, such as §51 of the General Municipal Law, provides broad rights of access to government records. Although there is no specific provision which permits a denial of access to the information in question, the courts have found that, notwithstanding rights of access granted by the Freedom of Information Law, information need not be provided when on balance disclosure would be detrimental to the public interest [see e.g., Cirale v. 80 Pine Street Corp., 35 NY 2d 113, 117 (1974)].

However, the courts have also stated that the propriety of an assertion that disclosure would be detrimental to the public interest can be made only judicially and that the public officer asserting the privilege must prove that the public interest would indeed be jeopardized by disclosure. Consequently, it would be inappropriate for me to advise that disclosure of the information in

question would in the opinion of a court be privileged, since my judgment cannot be substituted for that of a court.

I regret that I cannot be of greater assistance. Should any questions arise, please feel free to contact me.

Sincerely,

Robert J. Freeman
Executive Director

RJF:js

STATE OF NEW YORK
COMMITTEE ON PUBLIC ACCESS TO RECORDS FOIL-AO-465

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

COMMITTEE MEMBERS
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[redacted]ELMER BOGARDUS
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JAMES C. O'SHEA
GILBERT P. SMITH
ROBERT W. SWEET
EXECUTIVE DIRECTOR
ROBERT J. FREEMAN

December 30, 1976

Carrol M. Martin, L.H.D.
Executive Secretary
Maine Chiropractic Association, Inc.
40 Broad Turn Road
Scarborough, Maine 04074

Dear Mr. Martin:

Your letter addressed to the Secretary of State has been transmitted to the Committee on Public Access to Records, which is responsible for advising with respect to the New York State Freedom of Information Law.

In response to your question, there is no provision of law in New York that requires that "tax supported hospitals shall make patient records available to chiropractors upon request of the patient." There is a statute, §17 of the Public Health Law, which states that patient records under certain circumstances be disclosed to physicians. However, "physician" under New York State Law includes only doctors of medicine or osteopathy. As such, chiropractors do not have a right of access to patient records.

I hope that I have been of some assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:js

STATE OF NEW YORK
COMMITTEE ON PUBLIC ACCESS TO RECORDS FOIL-AO-466

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

January 5, 1977

Leon W. Katz, Esq.
Katz & Katz
141 Central Park Avenue, South
Hartsdale, New York 10530

Dear Mr. Katz:

Thank you for your interest in the Freedom of Information Law.

The question raised in your letter deals essentially with rights of access to an "opinion" prepared by the Division of State Police. Having discussed the controversy with both yourself and Mr. Charles Labelle, Assistant Counsel to the Division, it appears that there is some conflict regarding the facts surrounding the controversy. According to the correspondence attached to your letter, the Division of State Police issued an opinion that was disseminated to state police barracks advising enforcement officers that possession of a radar detection device is a violation of Section 397 of the Vehicle and Traffic Law. Based upon conversations with Mr. Labelle, the "opinion" was intended to be an "in-house" memorandum which should not have been forwarded to police barracks. It is his contention that if the memorandum was disseminated, that it was disseminated mistakenly.

It is impossible to determine rights of access until the factual controversy is settled. However, if it is true that the opinion in question has been disseminated to state police officers and is being relied upon as a basis for carrying out their duties, the opinion is, in effect, a "statement of policy," which is accessible under Section 88 (1)(b) of the Freedom of Information Law. On the other hand, if in fact the opinion has not been disseminated and has not been used as a basis for taking action, its status would be advisory and, as such, there would be no right 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
Executive Director

RJF:js

cc: Mr. Charles Labelle