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

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EXECUTIVE DIRECTOR
ROBERT J. FREEMAN

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

STATE OF NEW YORK
COMMITTEE ON PUBLIC ACCESS TO RECORDS FOIL-AO-467

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

January 5, 1977

Mr. Alfred B. Lowy
Managing Editor
The Daily Item
Westchester Rockland Newspapers, Inc.
33 New Broad Street
Port Chester, New York 10573

Dear Mr. Lowy:

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

Your letter pertains to access to records reflective of charges brought against a teacher in the Blind Brook-Rye Union Free School District. In my opinion, the records are accessible. The Freedom of Information Law provides rights of 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 §2116 of the Education Law which provides access to virtually all records in possession of a school district. Consequently, reading the Freedom of Information Law in conjunction with §2116 of the Education Law, all records of a school district are accessible unless such records contain information deemed deniable under §88(7) of the Freedom of Information Law. Subdivision (c) of that section states that information may be withheld if disclosure would result in an unwarranted invasion of personal privacy.

With respect to the issue raised in your letter, as I understand the Education Law, a charge may be brought initially against a school teacher which is then brought to the attention of the school board to determine whether probable cause for the charge can be found and a hearing on the charge should ensue. If the request for the charges had been made prior to a finding of probable cause, the charges would at that point be deniable as an unwarranted invasion of personal privacy. However, once a board has found that there is probable cause, disclosure of the charges should be made available, regardless of whether the hearing on

the charges is open or closed. With regard to protection of privacy, §88(3) provides five examples of unwarranted invasions of personal privacy. Several of the examples state that an unwarranted invasion of privacy would occur if the records are not relevant to the ordinary work of the agency. Since in this case probable cause has been found which in effect signifies that the charges are indeed relevant to the performance of the teacher's duties, disclosure would not result in an unwarranted invasion of personal privacy but rather a permissible invasion of personal privacy. As such, at the stage when a board is about to hold a hearing to deal with charges against a teacher, the charges should be made 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

cc: Mr. James F. Blendell
State Education Department

STATE OF NEW YORK
COMMITTEE ON PUBLIC ACCESS TO RECORDS FOIL-AO-468

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January 11, 1977

Mr. Herman I. Osten
Publisher
Wappingers Falls Shoppers, Inc.
84 East Main Street
Wappingers Falls, New York 12590

Dear Mr. Osten:

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

The question raised in your letter pertains to rights of access to contracts entered into between the Wappingers Central School District and its central office administrators. In my opinion, the records sought are available.

The Freedom of Information Law provides 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 §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."

As such, all records in possession of the school district are accessible unless the records contain information deemed deniable pursuant to §88(7) of the Freedom of Information Law. The only ground for denial in §88(7) having any relation to the information sought deals with information the disclosure of which would result in an unwarranted invasion of personal privacy. However, §88(3) of the Freedom of Information Law provides five examples of unwarranted invasions of personal privacy. A review of

these examples indicates that the Legislature intended that information could be denied if it is not relevant to the performance of official duties. Since the contracts are indeed relevant to the performance of the duties of the central office administrators, in my opinion, disclosure would not result in an unwarranted invasion but rather a permissible invasion of privacy. Consequently, the contracts 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

STATE OF NEW YORK
COMMITTEE ON PUBLIC ACCESS TO RECORDS FOIL-AO-469

DEPARTMENT OF STATE, 162 WASHINGTON AVENUE, ALBANY, NEW YORK 12231
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EXECUTIVE DIRECTOR
ROBERT J. FREEMAN

January 11, 1977

Mr. Lawrence C. R. Lopez
Capital News Service
State Capitol
Albany, New York 12224

Dear Larry:

I apologize for the delay in responding to your inquiry.

Your letter pertains to rights of access to legislative records under the Freedom of Information Law. In brief, your request involves the production of financial records in possession of the maintenance and operation fund and the photographic unit of the Assembly.

The Freedom of Information Law provides access to several categories of records [Section 88(1)], one of which includes

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

One such provision of law is Section 22 of the Legislative Law entitled "Custody of Legislative Papers and Documents." In describing the duties of the secretary or clerk of each house, Section 22 states:

> "Any person may obtain a certified copy of any paper or document on such files by applying to the secretary or clerk in charge thereof and paying to such secretary or clerk the same fees as are charged by law by the secretary of state for engrossing and certifying exemplifications of records deposited in his office."

Therefore, if the records sought are in possession of the clerk of the Assembly, they are accessible.

Whether the clerk must maintain custody of the records sought is open to question, and several of the additional issues raised in your letter and the attached correspondence are contingent upon the interpretation of the Legislative Law. Due to the lack of clarity regarding the internal procedure of the Assembly, it would be inappropriate to conjecture as to the duties of the clerk as custodian of Assembly records.

With respect to "constructive denial of access," the phrase envisions a situation in which a request is made that is not followed by a response within the time limit set forth in regulations promulgated by the Committee. If that situation occurred, there was a constructive denial of access.

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

RJF:js

cc: Ms. Catherine Carey
William J. Alexander
Edwin Margolies
Joseph Martorana
bcc: Carl M. Davidson
Raymond Kennedy
David Shaffer

STATE OF NEW YORK
COMMITTEE ON PUBLIC ACCESS TO RECORDS FOIL-AO-470

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

January 12, 1977

Edward S. Nelson, Esq.
The Manley House
42 South Broad Street
Norwich, New York 13815

Dear Mr. Nelson:

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

The question raised in your letter pertains to rights of access to contracts entered into by an independent self-supporting student organization. As described in your letter, the student organization is an entity separate and distinct from the school district. As such, in my opinion, the records in question need not be made available. It should be noted, however, that the audit of the student association performed by the school district is accessible pursuant to Section 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:js

STATE OF NEW YORK
COMMITTEE ON PUBLIC ACCESS TO RECORDS FOIL-AO-471

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

January 12, 1977

Sister Margaret Quinn
Saint Joseph Convent
Brentwood
Long Island, New York 11717

Dear Sister Quinn:

Thank you for your interest in the Freedom of Information Law. Attached for your perusal are copies of the Law and regulations promulgated by the Committee on Public Access to Records. The regulations deal with the procedural aspects of the Freedom of Information Law and have the force and effect of law.

It should be noted that the statute provides rights of access to records in possession of governmental entities in the State of New York. As such, the Law would have no application with respect to archival records in possession of the Saint Joseph Convent.

With regard to the State Archives, which are situated in the State Education Department, Section 144 of the Education Law defines "public record" for archival purposes as

> "any book, paper, map, photograph, microphotograph or other information storage device regardless of physical form or characteristic which is the property of the state or any state agency, department, division, board, bureau, commission, county, city, town, village, district or any subdivision thereof by whatever name designated in or on which any entry has been made or is required to be made by law, or which any officer or employee of any of said bodies has received or is required to receive for filing."

If you would like additional information on the subject concerning policies adopted by the State Archives, I suggest that you direct your inquiry to Mr. Edward Weldon, State Archivist, Office of Cultural Education, Department of Education, Washington Avenue, Albany, New York 12230.

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-472

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

January 12, 1977

Oakley Gentry, Jr., Esq.
Village of Freeport
Municipal Building
46 North Ocean Avenue
Long Island, New York 11520

Dear Mr. Gentry:

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

The question raised in your letter pertains to requests by members of the news media to inspect the police blotter generally, as opposed to requests to inspect specific entries in the blotter. In my opinion, the police blotter must be made available for inspection by members of the news media, as well as any member of the public, whether the blotter as a whole is sought or whether specific entries are sought. The only restrictions on rights of access to the police blotter are found in Section 88(7) of the Freedom of Information Law. If any of the information contained in the police blotter is deniable pursuant to Section 88(7), those portions may be withheld from public view. Otherwise, the police blotter in its entirety must be made available to any person.

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-473

DEPARTMENT OF STATE, 162 WASHINGTON AVENUE, ALBANY, NEW YORK 12231
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EXECUTIVE DIRECTOR
ROBERT J. FREEMAN

January 12, 1977

Mr. Andrew James Jackson
c/o Box 367 - 75A3866
Dannemora, New York 12929

Dear Mr. Jackson:

I apologize for the delay in responding to your letter. Attached as requested is a pocket brochure outlining the provisions of the Freedom of Information Law.

I am not entirely sure as to what records you are attempting to obtain. However, it appears that the records sought are not accessible as of right under the Freedom of Information Law. Generally, records identifying the personal details of an individual's life are deniable as an unwarranted invasion of personal privacy pursuant to Sections 88(3) and (7)(c) of the statute. Nevertheless, the regulations promulgated by the Department of Correctional Services provide a right of access to medical records to inmates in facilities of the Department of Correctional Services under certain circumstances. Specifically Section 5.20(a)(7) states that medical records may be provided to:

> "attorneys representing inmates in proceedings in which the inmates's committment pursuant to Section 408 of the Correctional Law is in issue, and attorneys representing inmates in other matters only upon written request when accompanied by an authorization signed by the person whose record is desired, or by someone authorized to act on his behalf..."

Therefore, if I understand your inquiry, you may obtain your medical records through an attorney after having authorized the attorney to make such a 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-474

DEPARTMENT OF STATE, 162 WASHINGTON AVENUE, ALBANY, NEW YORK 12231
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EXECUTIVE DIRECTOR
ROBERT J. FREEMAN

January 13, 1977

Hon. Thomas Bartosiewicz
State Senator
The Senate
State of New York
Albany, New York 12247

Dear Senator Bartosiewicz:

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

Your inquiry involves a denial of access to names, addresses, titles and salaries of individuals employed within a C.E.T.A. program, which is administered by Mr. Canio DeVito. During our conversations, you informed me that Mr. DeVito serves a dual role on behalf of the City of New York and the School Settlement Association, Inc. According to your statements, Mr. DeVito is a public official whose office performs a governmental function. As such, it appears that the entity he serves is subject to the Freedom of Information Law.

With respect to the issue, in my opinion, the information that you are seeking is accessible. The Freedom of Information Law provides access to several categories of records. First, if the information sought is contained in an existing list, it is accessible as a factual tabulation pursuant to §88(1)(d) of the Law. If no list is in existence, a payroll record must be compiled. In general, the Law provides access to existing records. However, §88(1)(g) represents one of the few instances in the Law in which a record must be created. That provision states that each entity within the scope of the Law must compile a payroll record consisting of the name, address, title and salary of each officer and employee of the entity. Although the statute appears to provide access to the payroll record only to members of the news media, regulations promulgated by the Committee (see enclosed Regulations, §1401.3) state that the payroll record is accessible to any person. This

conclusion was reached due to the language of §88(10) of the Law, which provides that nothing in the Law shall be construed to limit or abridge rights of access previously granted by other provisions of law or by the courts. In this regard, case law decided prior to the enactment of the Freedom of Information Law held that payroll information must be made available to any person [Winston v. Mangan, 338 NYS 2d 654, 662 (1974)].

With regard to privacy as a basis for denial of access, in my opinion, the fact that the Legislature specifically stated that public employees' names, addresses, titles and salaries be disclosed represents a finding that disclosure of such information would constitute a permissible rather than an unwarranted invasion of personal privacy. As such, a denial based upon protection of personal privacy is contrary to the clear intent of the Law.

According to the correspondence attached to your letter, you have requested that Mr. DeVito inform you of the person or body to whom an appeal should be directed. After having received that information, if your appeal and the records in question are once again denied, you may challenge the denial by means of an Article 78 proceeding. With regard to procedures regarding implementation of the Law generally, the regulations promulgated by the Committee 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

RJF:js
Enc.

cc: Mr. Canio DeVito
Director, Ceta VI Program
School Settlement Association, Inc.
120 Jackson Street
Brooklyn, New York 11211

STATE OF NEW YORK
COMMITTEE ON PUBLIC ACCESS TO RECORDS FOIL-AO-475

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

January 13, 1977

Mr. Philip Holgado
[redacted]

Dear Mr. Holgado:

The question raised in your letter pertains to rights of access to a list of substitute teachers of the Newark School District. According to your letter, you have been denied access to the names, addresses, and telephone numbers of substitute teachers.

In my opinion, some of the information sought is accessible. The Freedom of Information Law provides access to several categories of records, including statistical or factual tabulations [§88(1)(d)]. If the school district has compiled a list of substitute teachers, it must be made available. If there is no such list in existence, the school district need not create a record in response to your request.

It is noted that the Law states that information the disclosure of which would result in "an unwarranted invasion of personal privacy" [§88(3)] may be withheld. In this regard, some of the information that you are seeking may properly be denied. While the law states that a payroll record consisting of the name, address, title and salary of each employee of a governmental entity must be compiled and made available, the Law does not specify whether the home or business address must be provided. As a consequence, the Committee has consistently advised that if, for example, the custodian of the payroll record feels that disclosure of home addresses would result in an unwarranted invasion of the employees' privacy, the business address may be provided. Second, telephone numbers of employees may be denied as an unwarranted invasion of privacy. Employees' home telephone numbers have no relevance to the performance of their duties. As such, if the listings of substitute teachers contains home telephone numbers, those numbers may in my view be deleted.

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: Solicitor General

STATE OF NEW YORK
COMMITTEE ON PUBLIC ACCESS TO RECORDS FOIL-AO-476

DEPARTMENT OF STATE, 162 WASHINGTON AVENUE, ALBANY, NEW YORK 12231
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EXECUTIVE DIRECTOR
ROBERT J. FREEMAN

January 13, 1977

Mr. Joseph J. Volker
[redacted]

Dear Mr. Volker:

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 Freedom of Information Law.

Your inquiry deals essentially with the status of volunteer fire companies under the Freedom of Information Law. Case law holds that fire companies, corporations and departments, including independent volunteer fire companies chartered under the Not-For-Profit Corporation Law, are governmental entities. Therefore, volunteer fire companies are subject to the Freedom of Information Law.

With regard to the information in question, records reflective of the use of insurance monies, are likely accessible. Without more specific information concerning the information sought, it would be inappropriate to conjecture as to the rights of access to it. If you would like to provide more substantial information concerning the records sought, I will be happy to provide a more explicit advisory opinion.

I hope that I have been of some assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:js

cc: Solicitor General

STATE OF NEW YORK
COMMITTEE ON PUBLIC ACCESS TO RECORDS FOIL-AO-477

DEPARTMENT OF STATE, 162 WASHINGTON AVENUE, ALBANY, NEW YORK 12231
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EXECUTIVE DIRECTOR
ROBERT J. FREEMAN

January 14, 1977

Dr. Sally Evans
[redacted]

Dear Dr. Evans:

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

Your inquiry concerns the hours during which a school district must provide access to records under the Freedom of Information Law. According to your letter, the Copiague Public Schools have refused to permit you to inspect and copy records during regular business hours.

In this regard, the enclosed Regulations which were promulgated by the Committee and have the force and effect of law, provide that

> "[E]ach agency and municipality shall accept requests for public access to records and produce records during all hours they are regularly open for business" [§1401.5(a)].

As such, the action of the school district in question is in violation 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:js
Enc.

cc: Mr. Evelyn Buchheim
Records Access Officer

STATE OF NEW YORK
COMMITTEE ON PUBLIC ACCESS TO RECORDS FOIL-AO-478

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EXECUTIVE DIRECTOR
ROBERT J. FREEMAN

January 14, 1977

Mr. Larry A. Swartzbaugh
Beauty - Barber Discount Supply, Inc.
10711 Mockingbird Drive
Omaha, Nebraska 68127

Dear Mr. Swartzbaugh:

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

Your request for a list of licensed cosmetology and barbering establishments may be denied under the Freedom of Information Law. The Law states that records the disclosure of which would result in an unwarranted invasion of personal privacy may be withheld (see attached Freedom of Information Law, Section 88(3) and (7)(c)). In addition, the Law lists five examples of unwarranted invasions of personal privacy, one of which 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..." [§88(3)(d)].

Since the list is intended to be used for a commercial purpose, access may be denied.

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:js
Enc.

STATE OF NEW YORK
COMMITTEE ON PUBLIC ACCESS TO RECORDS FOIL-AO-479

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

January 14, 1977

Mr. Louis Providence
[redacted]

Dear Mr. Providence:

Thank you for your interest in the Freedom of Information Law. The question raised in your letter pertains to the right of access to the legal address of the Mayor of the Village of East Rochester.

The Freedom of Information Law provides that each entity subject to it compile a payroll record consisting of the name, address, title and salary of each officer or employee of the entity. However, the Law does not specify which address, home or business, must be provided. As such, the Committee has consistently advised that if the custodian of the records feels that disclosure of employees' home addresses would result in an unwarranted invasion of personal privacy pursuant to Sections 88(3) and (7)(c) of the Law, business addresses may be given.

Nevertheless, case law indicates that there may be circumstances in which the home address of a public employee must be provided. Specifically, in Winston v. Mangan it was held that:

> "The names and pay scales of the park district employees, both temporary and permanent, are matters of public record and represent important fiscal as well as operational information. The identity of the employees and their salaries are vital statistics kept in the proper recordation of departmental functioning and are the primary sources of protecting against employee favoritism. They are subject therefore to inspection.

> The employees' home addresses, however, do not carry the same prima facie public importance and unless a specific 'private' need is shown for them, they need not be disclosed. In such instances, the strength of the competing consideration of employee privacy must be balanced against the benefit in the public's knowledge of this specific information, such as protection against 'cronyism' or violation of local residence laws, and some cause should be shown to warrant their disclosure" [338 NYS 2d 654, 662 (1972)].

In view of the language quoted above in relation to the situation described in your letter, it would be likely in my opinion that a court would hold that a record indicating the legal residence of the Mayor is available under the Freedom of Information Law. Under the circumstances, disclosure of the home address would constitute a permissible rather than an unwarranted invasion of personal privacy. Consequently, it should be made available.

It is unclear in your letter whether village officers have possession of a record indicating the Mayor's legal residence. If the village records access officer states that there is no record of the Mayor's address, I suggest that you ask that the records access officer to certify in writing that the record does not exist. You may seek certification pursuant to Section 1401.2 of regulations promulgated by the Committee which have the force and effect of law (see attached).

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-480

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

COMMITTEE MEMBERS
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[illegible]. ELMER BOGARDUS
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JAMES C. O'SHEA
GILBERT P. SMITH
ROBERT W. SWEET
EXECUTIVE DIRECTOR
ROBERT J. FREEMAN

January 17, 1977

Mr. John J. Sheehan
J. J. Sheehan Adjusters, Inc.
P.O. Box 604
Binghamton, New York 13902

Dear Mr. Sheehan:

I apologize for the delay in responding to your letter. For some reason unknown to me, I only recently received your communication.

The question raised in your letter concerns rights of access to background information relative to a complaint summary of an investigation. Without additional information relative to the records sought, it is impossible to provide specific advice. However, if the records consist of "investigatory files compiled for law enforcement purposes" [§88(7)(d)], they are deniable. If, on the other hand, they were not compiled for investigatory purposes but rather in the ordinary course of business, they should, in my view, be made available.

I regret that I cannot be of further assistance. Should any further questions arise, please feel free to contact me.

Sincerely,

Robert J. Freeman
Executive Director

RJF:lbb
cc: Hon. Alfred J. Libous
Mayor
City of Binghamton

STATE OF NEW YORK
COMMITTEE ON PUBLIC ACCESS TO RECORDS FOIL-AO-481

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

January 27, 1977

Mr. Thomas Testa
[redacted]

Dear Mr. Testa:

Your inquiry pertains to rights of access to individual sewer bills in the possession of the Village of Clyde.

In this regard, the Freedom of Information Law provides right of access to several categories of records, including any other records made available by any other provision of law (Section 88(1)(i)). One such provision of law is Section 51 of the General Municipal Law which provides access to

> "[A]ll books of minutes, entry or account, and the books, bills, vouchers, checks, contracts or other papers connected with or used or filed in the office of, or with any officer, board, commission acting for or on behalf of any county, town, village or municipal corporation in this state..."

As such, denial of access to sewer bills in the possession of the Village Clerk was improper and the records sought should be made available.

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:js

STATE OF NEW YORK
COMMITTEE ON PUBLIC ACCESS TO RECORDS FOIL-AO-481

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EXECUTIVE DIRECTOR
ROBERT J. FREEMAN

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

January 27, 1977

Mr. Thomas Testa
[redacted]

Dear Mr. Testa:

Your inquiry pertains to rights of access to individual sewer bills in the possession of the Village of Clyde.

In this regard, the Freedom of Information Law provides right of access to several categories of records, including any other records made available by any other provision of law (Section 88(1)(i)). One such provision of law is Section 51 of the General Municipal Law which provides access to

> "[A]ll books of minutes, entry or account, and the books, bills, vouchers, checks, contracts or other papers connected with or used or filed in the office of, or with any officer, board, commission acting for or on behalf of any county, town, village or municipal corporation in this state..."

As such, denial of access to sewer bills in the possession of the Village Clerk was improper and the records sought should be made available.

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:js

STATE OF NEW YORK
COMMITTEE ON PUBLIC ACCESS TO RECORDS FOIL-AO-482

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

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EXECUTIVE DIRECTOR
ROBERT J. FREEMAN

January 26, 1977

Mr. Edward A. Morrison
Chairman
Crime Victims Compensation Board
875 Central Avenue
Albany, New York 12206

Dear Mr. Morrison:

Your letter addressed to the Solicitor 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 question raised in your letter pertains to the extent to which materials contained in a claimant's file, particularly medical or other personal information, can be withheld pursuant to the Freedom of Information Law. In this regard, the rights of access granted by the Freedom of Information Law are limited and are applicable only to categories of accessible records listed in Section 88(1)(a) through (i). Therefore, unless records requested are analogous to any of the categories, there is no right of access. It should be noted, however, that Section 88(1)(i) provides access to records made available under other provisions of law, including Section 633 of the Executive Law, which provides that "[T]he record of a proceeding before the board or a board member shall be a public record." Therefore, in addition to the categories of records accessible under Section 88(1) of the Freedom of Information Law, records of proceedings of the Crime Victims Compensation Board are also accessible.

Perhaps most relevant to your inquiry, Section 88(7)(c) provides that, notwithstanding rights of access granted by Section 88(1), an agency may deny access to records the disclosure of which would result in an "unwarranted invasion of personal privacy" pursuant to the standards set forth in Section 88(3). Section 88(3)(a) through (e) lists five instances in which disclosure would result in an unwarranted invasion of personal privacy, including "disclosure of items involving the medical or personal records of a client or

patient in a hospital or medical facility" (Section 88(3)(c)). Moreover, the instances of unwarranted invasions of privacy listed in Section 88(3) are merely five examples among conceivable dozens of such invasions of privacy. Therefore, unless records are otherwise accessible under Section 633 of the Executive Law, the Board has discretionary authority to withhold information the disclosure of which would in its judgment result in an unwarranted invasion of personal privacy.

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

Very truly yours,

Robert J. Freeman
Executive Director

RJF:js
bcc: Franklin Breselor, Assistant Attorney General
Department of Law
The Capitol

STATE OF NEW YORK
COMMITTEE ON PUBLIC ACCESS TO RECORDS FOIL-AO-483

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

February 2, 1977

Dr. Arthur J. Brewster
[redacted]

Dear Dr. Brewster:

Your inquiry pertains to a denial of access to records by the Board of Education of the City of Little Falls. Specifically, the denial concerns access to "warrants and supporting vouchers and/or claims" that were denied due to your involvement in litigation with the school district and the relevance of the records to the litigation.

In my opinion, the denial of access was improper. First, the Freedom of Information Law provides access to several categories of records (Section 88(1)), inclusing any other records made available by any other provision of law (Section 88(1)(i)). In this regard, one such provision of law is Section 2116 of the Education Law which provides access to virtually any records in possession of a school district. As such, the warrants, supporting vouchers and claims are accessible.

Second, as the Committee resolved shortly after the effective date of the Freedom of Information Law,

> "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 of Committee on Public Access to Records, October 31, 1974).

Therefore, if records are available under the Freedom of Information Law, they must be available to you notwithstanding your status as a litigant.

Third, the contention reflected in the resolution cited in the preceding paragraph has been affirmed judicially. In Burke v. Yudelson (368 NYS 2d 779, affirmed 378 NYS 2d 165, 51 A.D. 2d 673), it was held that information available under the Freedom of Information Law cannot be withheld on the ground that the person seeking access to the records is a litigant. Moreover, in affirming the decision of the Supreme Court, Monroe County, the Appellate Division, 4th Department stated that

> "[C]ontrary to respondent's assertion, however, 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. 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" (id. at 166).

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: Dr. William Bradt

STATE OF NEW YORK
COMMITTEE ON PUBLIC ACCESS TO RECORDS FOIL-AO-484

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

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EXECUTIVE DIRECTOR
ROBERT J. FREEMAN

February 7, 1977

Mr. James E. Kelly
General Counsel
Niagara Frontier
Transportation Authority
1600 Statler Hilton Hotel
Buffalo, New York 14202

Dear Mr. Kelly:

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

Your inquiry pertains to rights of access to monthly financial reports given to the Niagara Frontier Transportation Authority by automobile rental companies that are tenants of the Authority at its facilities.

In responsing to your question, I believe that the intent of the Freedom of Information Law should be given substantial consideration. As noted in our telephone conversation of February 4, the information is not being sought for the purpose of determining the accountability of a governmental entity, but rather is sought by a commercial enterprise in competition with a similar enterprise.

On one hand, portions of the report may constitute statistical or factual tabulations, which are accessible pursuant to Section 88(1)(d) of the Freedom of Information Law. On the other hand, it is possible that a court might look to the intent of the statute generally and to that of Section 88(7)(b) specifically. That provision states that notwithstanding rights of access granted by Section 88(1), the Freedom of Information Law does 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 the competitors of the subject enterprise..."

The quoted provision contains three prerequisites for denial. First, the information must be confidentially disclosed. Second, it must be compiled and maintained for the regulation of a commercial enterprise or for the grant or review of a license to do business, or consist of trade secrets. And third, disclosure must result in an unfair advantage to competitors of the subject enterprise.

Although it appears that each of the three requirements noted above are present, in our conversation it was indicated that disclosure could permit an unfair advantage among competitors.

In my opinion, should this controversy be heard judicially, a court might view the evil sought to be avoided by Section 88(7)(b), i.e., prevention of unfair advantages by competitors by means of disclosure of information, and therefore deny access. Additionally, as mentioned earlier, the request does not relate to the remedial purpose of the Freedom of Information Law, which is to insure that government is accountable by means of providing access to records. Although it would be inappropriate to conjecture as to the determination that would be rendered by a court, I do not believe that the Freedom of Information Law was enacted to permit commercial enterprises to gain advantage of their competitors.

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-485

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

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EXECUTIVE DIRECTOR
ROBERT J. FREEMAN

February 9, 1977

Mr. Thomas 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.

Your inquiry pertains to a denial of access to records of the Code Enforcement Bureau of the City of Troy. As described in your letter, the denial relates to information consisting of addresses at which housing code inspections are made, addresses of all structures cited in violation of the building code, including the name and address of the person named in the citation and the nature of the violation, and similar information concerning cases referred to the Office of Corporation Counsel for possible prosecution. According to the letter of denial attached to your letter, the denial was based upon several contentions of the Deputy Corporation Counsel, none of which is in my opinion an appropriate ground for withholding the records sought.

The Freedom of Information Law provides 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 provides access to:

> "[A]ll books of minutes, entry or account, and the books, bills, vouchers, checks, contracts or other papers connected with or used or filed in the office of, or with any officer, board or commission acting for or on behalf of any county, town, village or municipal corporation in this state..."

Since the City of Troy is subject to the General Municipal Law, virtually all records in its possession are accessible except to the extent that information may be denied pursuant to §88(7) of the Freedom of Information Law.

Another provision of law which grants access to records of the Code Enforcement Bureau is §307 of the Multiple Residence Law. That section states:

> "[A]ll records of the department shall be public. Upon request the department shall be required to make a search and issue a certificate of any of its records, including violations, and shall have the power to charge and collect reasonable fees for searches or certificates."

It is noted that the Multiple Residence Law is applicable to all cities of less than five hundred thousand inhabitants [Multiple Residence Law, §4(10)]. Therefore, to the extent that the Multiple Residence Law is applicable to the City of Troy, all of the records of the Enforcement Bureau are accessible.

Moreover, denial of access based upon §88(7)(d) of the Freedom of Information Law, which permits the withholding of investigatory files compiled for law enforcement purposes, is in my opinion inappropriate. Further, under similar circumstances, it was held that records of a town building department cannot be denied on the grounds that they are investigatory files compiled for law enforcement purposes. In Young v. Town of Huntington, the town denied access to records of its building department compiled pursuant to an investigation. In granting access to the records, the court stated that:

> "[A] broad interpretation of 88-7d would cloak so many governmental activities with secrecy as to result in an impermissible perversion of the basic statutory intent. Therefore, the sole

> beneficiaries of the exemption are criminal law enforcement authorities, and the Town of Huntington cannot predicate its refusal to permit petitioner to examine its records on 88-7d" [338 NYS 2d 978, 984 (1976); see also Matter of Maloff, N.Y.L.J., October 20, 1976].

Furthermore, according to the Senate sponsor of the Freedom of Information Law, the investigatory files exception was included to enable the criminal law enforcement community to carry out its duties without undue hindrance [Marino, The New York Freedom of Information Law, 43 Ford. L. Rev. 83, 92 (1974)].

In conclusion, none of the reasons for denial of access posited by the Deputy Corporation Counsel is, in my opinion, proper. In view of the foregoing, I believe that the records 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

RJF:js

cc: George H. Dush, Esq.
Deputy Corporation Counsel
City of Troy
Department of Law
City Hall
Monument Square
Troy, New York 12180

STATE OF NEW YORK
COMMITTEE ON PUBLIC ACCESS TO RECORDS FOIL-AO-486

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

February 9, 1977

Dr. Sally Evans
[redacted]

Dear Dr. Evans:

The Freedom of Information Law does not provide the Committee with the power to enforce its provisions. Rather the power to enforce the Law rests on the shoulders of the public.

Consequently, it appears that I can only reiterate the statement made in the opinion rendered on January 14 and send a copy to the Records Access Officer and to the Board of Education of the Copiague School District.

Stated simply, the regulations promulgated by the Committee state that:

> "[E]ach agency and municipality shall accept requests for public access to records and produce records during all hours they are regularly open for business" [§1401.5(a)].

Having reviewed the correspondence attached to your letter of January 7, it appears that Ms. Buchheim, the Records Access Officer for the School District, has misinterpreted the regulations. As I interpret §1401.5 of the regulations, subdivision (a) provides that no appointment to inspect or request records is required when an agency has regular business hours. An appointment procedure is necessary under subdivision (b) only in cases in which an agency has no regular business hours. Since the Copiague Public Schools have regular business hours, you need not make an appointment to request records.

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

RJF:js

cc: Ms. Evelyn Buchheim, Records Access Officer
Board of Education
Copiague Union Free School District
Copiague, New York 11726

STATE OF NEW YORK
COMMITTEE ON PUBLIC ACCESS TO RECORDS FOIL-AO-487

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

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EXECUTIVE DIRECTOR
ROBERT J. FREEMAN

February 9, 1977

Mr. John G. Lernihan
Deputy Village Clerk
Village of Floral Park
One Floral Boulevard
P.O. Box 27
Floral Park, New York 11002

Dear Mr. Lernihan:

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

Your question pertains to rights of access to recordings of telephone calls that would be received by the Floral Park Police Department if it installs a "multi-recording device." Although rights of access to such recordings are unclear, they may in my opinion be denied.

The Freedom of Information Law specifically provides access to police blotters [§88(1)(f)]. Defining exactly what constitutes a police blotter has been a continuing problem, since there is no provision of law that states specifically what a police blotter is or must be. However, the Committee has consistently advised that, according to customary usage, a police blotter is a record in the nature of a log or diary in which any event reported by or to a police department is recorded. Nevertheless, practices differ among police departments and the information contained in the blotters of police departments varies from one department to another.

Although it appears that the "multi-recording device" that may be employed by the Floral Park Police Department would contain virtually the same information as a police blotter, as stated in your letter access to the recordings could result in disclosure of attitudes, inflection of voices and the like which could result in

an unwarranted invasion of personal privacy. The Freedom of Information Law enables an agency to withhold information the disclosure of which would result in an unwarranted invasion of personal privacy [§88(3)] and the Law lists five instances of such invasions [§88(3)(a) to (e)]. However, in my opinion, the list is merely reflective of five examples of unwarranted invasions of personal privacy among conceivable dozens. While I believe that the same information would be made available if recorded in print on a police blotter, disclosure of the voice of an individual who has telephoned the police department would provide access to something quite different than the printed word.

As stated at the outset, rights of access to the recordings described in your letter are unclear. Nevertheless, in my view, it is likely that such recordings could be denied on the ground that disclosure would result in an unwarranted invasion of personal privacy.

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:js

STATE OF NEW YORK
COMMITTEE ON PUBLIC ACCESS TO RECORDS FOIL-AO-488

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

February 14, 1977

Mr. Merrill E. Trefzer
[redacted]

Dear Mr. Trefzer:

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

Your question is whether a non-resident of a school district is permitted access to records of the district. As the Committee resolved shortly after the Freedom of Information Law became effective, "information accessible under the Freedom of Information Law shall be made equally accessible to any person, without regard to status or interest" (see enclosed resolution). Therefore, if a record is otherwise available, it must be made available to you even though you may not be a resident of the school district to which a request is directed.

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-489

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

February 14, 1977

Ms. Susan Stetson
President
League of Women Voters
of Yorktown
P.O. Box 391
Yorktown Heights, New York 10598

Dear Ms. Stetson:

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

Your inquiry pertains to rights of access to records in possession of the Town of Yorktown Building Department and Zoning Board. As described in your letter, the records in question have been denied on several grounds, none of which may be appropriate.

Among the reasons for denial cited by the Town Attorney are statements made in advisory opinions that dealt with access to records compiled by building inspectors. I would like to point out that the three opinions cited by the Town Attorney were prepared by me in my capacity as Counsel to the Committee on Public Access to Records. The Attorney General's Office had nothing to do with their preparation. The statements made in those opinions were based upon one judicial opinion which was rendered some twelve years prior to the enactment of the Freedom of Information Law [Willets v. Quinto, 225 NYS 2d 301 (1962)]. In that decision, it was held that a town building inspector may be invested by the town board with authority to enforce the town's building code and zoning ordinances. The decision did not reach the issue of whether the records compiled by a building inspector must be made available. My reasoning at the time, which was based upon one judicial determination, was that a building inspector compiles investigatory files for law enforcement purposes which could be denied pursuant to §88(7)(d) of the Freedom of Information Law.

Since the issuance of those advisory opinions, I have reviewed comments concerning the legislative intent of the Freedom of Information Law, which has resulted in an alteration in my interpretation of the Law. First, a law review article written by Senator Ralph Marino, the Senate sponsor of the Freedom of Information Law, stated that the exception concerning investigatory files compiled for law enforcement purposes was written to enable criminal law enforcement agencies to perform their investigatory duties without undue hindrance [Marino, The New York Freedom of Information Law, 43 Ford. L. Rev. 83, 90 (1974)]. As such, in the opinion of one of the authors of the Law, §88(7)(d) can be asserted as a means of denial of access only by a criminal law enforcement agency. Second, having reviewed the legislative history of the Law, I have advised the §88(7)(d) is applicable only with respect to a criminal law enforcement agency. It is noted that this position was adopted after the issuance of the advisory opinions cited by the Town Attorney but prior to recent judicial interpretations of the Freedom of Information Law which uphold the reasoning suggested above. For example, in an advisory opinion dated May 11, 1976, I cited the article written by Senator Marino and advised that §88(7)(d) can be used appropriately only by a criminal law enforcement agency. That advisory opinion was used as the basis for a determination rendered in Matter of Maloff (New York Law Journal, October 20, 1976). Shortly after publication of the Maloff decision, the Supreme Court, Suffolk County, rendered a decision in Young v. Town of Huntington (388 NYS 2d 978; New York Law Journal, November 3, 1976). It is noted that the Young decision dealt basically with the same issues that you have raised in your letter. In granting access to the records, Young stated that "[A] broad interpretation of 88-7d would cloak so many governmental activities with secrecy as to result in an impermissible perversion of the basic statutory intent. Therefore, the sole beneficiaries of the exemption are criminal law enforcement authorities, and the Huntington Building Department cannot predicate its refusal to permit petitioner to examine its records on 88-7d" (id. at 984). Since the Young case dealt with records compiled by a town building department during an investigation and since it was alleged that the investigation was conducted pursuant to the law enforcement responsibility of the town inspector, it appears that the controversy

described in your letter is quite similar to that in the Young case. Based upon the language in both Young and Maloff, it appears that the records that you have sought are accessible under the Freedom of Information Law.

The other grounds for denial offered may be insufficient as well. First, although records may be relevant to judicial proceedings that may ensue, if records are otherwise available under the Freedom of Information Law, they continue to be available even if they relate to potential or ongoing litigation [see Burke v. Yudelson, 368 NYS 2d 779, 51 AD 2d 673 (1976)]. In addition, the provisions dealing with protection of personal privacy in the Freedom of Information Law [§88(3)] are inapplicable with respect to records that are relevant to the performance of the official duties of a town employee [see Farrell v. Board of Trustees, 372 NYS 905 (1975)].

It should be noted, however, that notwithstanding rights of access granted by the Freedom of Information Law and other statutes, there exists a "governmental privilege." In the case of Cirale v. 80 Pine Street Corp., 35 NY 2d 113 (1974), the State's highest court held that the governmental privilege is properly asserted when on balance disclosure would result in detriment to the public interest. In the Young decision, supra, the court held that the Town of Huntington failed to meet its burden of proving that disclosure would in fact result in detriment to the public interest. Nevertheless, it is possible that on a case by case basis, the Town of Yorktown may successfully argue that disclosure of certain records in possession of its building department or zoning board may be detrimental to the public interest.

In addition, it is possible that disclosure of records identifiable to members of the public might result in an unwarranted invasion of personal privacy pursuant to §88(3) of the Freedom of Information Law. If, for example, a court decided that disclosure would result in such an invasion, identifying details could be deleted.

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

STATE OF NEW YORK
COMMITTEE ON PUBLIC ACCESS TO RECORDS FOIL-AO-490

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

February 15, 1977

Mr. Michael A. Fiala
Director
Pre-School Playhouse
109 South Route 303
Blauvelt, New York 10913

Dear Mr. Fiala:

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 may result in access to a list in some districts and a denial of access in others.

Enclosed, as requested, is 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
Enc.

STATE OF NEW YORK
COMMITTEE ON PUBLIC ACCESS TO RECORDS

OML-AO- 58
FOIL-AO-491

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

February 16, 1977

George J. Schaefer, Esq.
Counselor at Law
101 Park Avenue
New York, New York 10017

Dear Mr. Schaefer:

Thank you for your interest in the Freedom of Information and Open Meetings Laws.

Your inquiry pertains generally to rights of access to records of meetings of the New York Hospital Review and Planning Council. It is important to note at the outset that your letter makes reference to two kinds of documents, minutes and transcripts. In my opinion, the term "transcript" denotes a verbatim account of all conversations that transpired at a meeting or a hearing. Minutes, on the other hand, consist of a summary of activities in which a public body engages during a meeting. In this regard, the Open Meetings Law requires that minutes be kept of both open meetings and executive sessions (§96). Subdivision 1 provides that minutes of an open meeting "shall consist of a record or summary of all motions, proposals, resolutions and any other matter formally voted upon and the vote thereon." Subdivision 2 provides that minutes of executive sessions must consist of a record of any action that is taken by formal vote and that such record "shall consist of a record or summary of the final determination of such action, and the date and vote thereon..."

While the Open Meetings Law requires that minutes of executive sessions be compiled and made available within one week of the executive session [§96(3)], the Law does not prescribe a specific time limit regarding compilation of minutes of an open meeting. In my view, minutes must be compiled within a reasonable time after a meeting. However, what constitutes a reasonable time is unclear. Nevertheless,

once minutes have been compiled, they are accessible whether or not they have been approved by a public body. In the past, it has been suggested that unapproved minutes when disclosed be marked as such. Therefore, minutes consisting of the information described in subdivisions 1 and 2 of §96 of the Open Meetings Law are available when they are compiled.

With respect to transcripts which, as discussed earlier, may be distinguished from minutes, rights of access and the duties of public bodies are not so clearly defined as in the case of minutes. For example, although the Council has adopted a policy of transcribing its proceedings, it appears that there is no obligation that such a record be created. Moreover, the Freedom of Information Law provides access to specific categories of records [§88(1)]. As I interpret the Law, there is neither an obligation to create a transcript nor is there a right of access to a transcript if it is created. Since the Law is permissive, an agency may disclose a transcript of its proceedings, but it need not. Therefore, in my opinion, the action taken by the Council and the Department of Health with regard to the transcripts sought is not contrary to law.

I regret that I cannot be of greater assistance. Should any further questions arise, please feel free to contact me.

Sincerely,

Robert J. Freeman
Executive Director

STATE OF NEW YORK
COMMITTEE ON PUBLIC ACCESS TO RECORDS FOIL-AO-492

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

February 23, 1977

Mr. Jean M. Shields
[redacted]

Dear Mr. Shields:

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

Your letter raises questions generally concerning the procedural aspects of the implementation of the Freedom of Information Law. In this regard, I have enclosed a copy of the regulations promulgated by the Committee, which deal with the procedural aspects of the Law and have the force and effect of law. Also enclosed are model regulations that were prepared for use by entities subject to the Law. Copies of both the regulations and the model regulations have been forwarded to individuals designated in your letter.

In response to your questions, first, Section 1401.6 of the regulations states that a request must be answered within five days of its receipt, unless "extraordinary circumstances" are present. Second, the Town Law, Section 30, provides that "the town clerk of each town shall have the custody of all records, books, and papers of the town." Moreover, in an interpretation of Section 30 of the Town Law, the Attorney General has advised that neither a town supervisor nor anyone else should be permitted access to official town records in the absence of the town clerk or one of the clerk's deputies in light of the responsibility of the clerk to maintain custody of town records [1970 Atty. Gen. (Inf.) 104]. Therefore, custody of town records should remain in the clerk rather than the town supervisor.

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: Town Board
Town of Randolph
Randolph, New York 14722

Mayor Samuel Abbott
Village of Randolph
Randolph, New York 14722

Randolph Register
Randolph, New York 14722

OML-AO- 61
FOIL-AO- 493

STATE OF NEW YORK
COMMITTEE ON PUBLIC ACCESS TO RECORDS

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

February 23, 1977

Mrs. Betty Glasnovic
[redacted]

Dear Mrs. Glasnovic:

Thank you for your letter of February 9. I regret that I have not yet responded to your earlier inquiry. It will be answered shortly.

In your letter of February 9, two questions are raised, one of which pertains to the Freedom of Information Law and the other to the Open Meetings Law. With respect to records sought from the school board, 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 or copying" [§88(1)(i)]. One such provision of law is Section 2116 of the Education Law, which in brief provides access to virtually any records in possession of a school district. Reading Section 2116 in conjunction with the Freedom of Information Law, any records in possession of a school district are available except to the extent that they contain deniable information pursuant to Section 88(7) of the Freedom of Information Law. Although I agree with some of the statements made in the communication attached to your letter concerning the attorney-client privilege, I doubt that the record that you are seeking, an invoice, would fall within that privilege. Nevertheless, without additional information regarding the controversy, it would be inappropriate to conjecture as to the propriety of assertion that the information is privileged.

With respect to your second question concerning the status of work sessions under the Open Meetings Law, the Committee dealt with the issue in its first annual report to the Legislature as follows:

> "The Law defines 'meeting' as 'the formal convening of a public body for the purpose of officially transacting public business.' Numerous questions have arisen regarding this definition, particularly with respect to the phrases 'formal

> convening' and 'officially transacting public business.' Many reports indicate that the two phrases have been used by public bodies as a means of circumventing the Law. Several public bodies have adopted practices whereby they meet as a body in closed 'work sessions,' 'agenda sessions,' 'organizational meetings' and the like, during which they discuss public business but take no action. It is during these 'work sessions' that the true deliberative process which is at the heart of the Open Meetings Law occurs. Stated simply, if work sessions and the like are closed to the public, the Open Meetings Law may in many cases be all but meaningless.
>
> "It is the opinion of the Committee that 'meeting' should currently be construed to include any situation wherein each member of a public body will meet at a specific time and place and that, following notification, at least a quorum of the body convenes for the purpose of discussing public business. As such, the Committee believes that 'work sessions' and similar gatherings are meetings within the scope of the Law."

Therefore, if each of the ingredients described in the second paragraph quoted above are present with respect to work sessions of a school board, such sessions are meetings under the Open Meetings Law that must be open to the public.

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-494

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

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EXECUTIVE DIRECTOR
ROBERT J. FREEMAN

February 23, 1977

Ms. Dina M. Viscarde
[redacted]

Dear Ms. Viscarde:

Thank you for your interest in the Freedom of Information Law. The question raised in your letter pertains to the right of access to the home addresses of Town employees of the Town of Greenburgh.

The Freedom of Information Law provides that each entity subject to it compile a payroll record consisting of the name, address, title and salary of each officer or employee of the entity. However, the Law does not specify which address, home or business, must be provided. As such, the Committee has consistently advised that if the custodian of the records feels that disclosure of employees' home addresses would result in an unwarranted invasion of personal privacy pursuant to §§88(3) and (7)(c) of the Law, business addresses may be given.

Nevertheless, case law indicates that there may be circumstances in which home addresses of public employees must be provided. Specifically, in Winston v. Mangan it was held that:

> "The names and pay scales of the park district employees, both temporary and permanent, are matters of public record and represent important fiscal as well as operational information. The identity of the employees and their salaries are vital statistics kept in the proper recordation of departmental functioning and are the primary sources of protection against employee favoritism. They are subject therefore to inspection.

> "The employees' home addresses, however, do not carry the same prima facie public importance and unless a specific 'private' need is shown for them, they need not be disclosed. In such instances, the strength of the competing consideration of employee privacy must be balanced against the benefit in the public's knowledge of this specific information, such as protection against 'cronyism' or violation of local residence laws, and some cause should be shown to warrant their disclosure" [338 NYS 2d 654, 662 (1972)].

In view of the language quoted above in relation to the situation described in your letter, it would be likely, in my opinion, that a court would hold that a record indicating the home address of Town employees is available under the Freedom of Information Law. Under the circumstances, disclosure of the home address would constitute a permissible rather than an unwarranted invasion of personal privacy. Consequently, the addresses should be made available.

It is unclear in your letter whether Town officials have possession of a record indicating the Town employees home addresses. If the Town records access officer states that there is no record of the home addresses, I suggest that you ask that the records access officer to certify in writing that the record does not exist. You may seek certification pursuant to Section 1401.2 of regulations promulgated by the Committee which have the force and effect of law (see enclosed).

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:llb

STATE OF NEW YORK
COMMITTEE ON PUBLIC ACCESS TO RECORDS FOIL-AO-495

DEPARTMENT OF STATE, 162 WASHINGTON AVENUE, ALBANY, NEW YORK 12231
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EXECUTIVE DIRECTOR
ROBERT J. FREEMAN

February 24, 1977

Ms. Chris Torrey
Office Manager
Greenburgh District Office
7 South Broadway
Tarrytown, New York 10591

Dear Ms. Torrey:

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

Your inquiry pertains to the interpretation of §88(1)(g) of the Law, which provides rights of access to a payroll record consisting of the name, address, title and salary of each employee of a governmental entity in New York State, except law enforcement officers whose names and addresses need not be made available. The provision in question is lengthy, confusing and appears to provide access only to members of the news media. Nevertheless, it is the opinion of the Committee that the payroll record required to be compiled by §88(1)(g) shall be made available to any person, including bona fide members of the news media, and this opinion is reflected in regulations promulgated by the Committee, which have the force and effect of law (see attached regulations, Committee on Public Access to Records, §1401.3(b)). This interpretation was reached due to two facets of the Freedom of Information Law. First, unlike earlier access statutes which provided access to individuals meeting a particular status, the Freedom of Information Law provides equal rights of access to any person, regardless of status or interest (see enclosed resolution). Second, §88(10) of the Freedom of Information Law states that rights of access previously granted by the courts or by any other provision of law are preserved, notwithstanding the provisions of the Freedom of Information Law. In this regard, two years prior to the enactment of the Freedom of Information Law, the courts held that payroll information is accessible

to any person. Specifically, in Winston v. Mangan it was held that:

> "The names and pay scales of the park district employees, both temporary and permanent, are matters of public record and represent important fiscal as well as operational information. The identity of the employees and their salaries are vital statistics kept in the proper recordation of departmental functioning and are the primary sources of protection against employee favoritism. They are subject therefore to inspection.
>
> "The employees' home addresses, however, do not carry the same prima facie public importance and unless a specific 'private' need is shown for them, they need not be disclosed. In such instances, the strength of the competing consideration of employee privacy must be balanced against the benefit in the public's knowledge of this specific information, such as protection against 'cronyism' or violation of local residence laws, and some cause should be shown to warrant their disclosure [338 NYS 2d 654, 662 (1972)].

Due to the language quoted above and the lack of direction in the Freedom of Information Law concerning which address, home or business, must be provided, the Committee has consistently advised that if the custodian of the records feels that disclosure of employees' home addresses would result in unwarranted invasions of personal privacy pursuant to §§88(3) and (7)(c) of the Law, business addresses may be provided. However, as stated in Winston, if a specific need is shown for home addresses of public employees, it is possible that a court would find that a disclosure of home addresses would constitute a permissible rather than an unwarranted invasion of personal privacy.

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:js
Enc.

STATE OF NEW YORK
COMMITTEE ON PUBLIC ACCESS TO RECORDS FOIL-AO-496

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

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EXECUTIVE DIRECTOR
ROBERT J. FREEMAN

March 2, 1977

Mr. Eugene F. DeClue
Village Clerk-Treasurer
Village of Bayville
Bayville, New York 11709

Dear Mr. DeClue:

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

Your inquiry pertains to a situation during which immediate access to a record was denied, but during which it was stated that the record would be made available within one hour of the request. Since §1401.6 of the regulations promulgated by the Committee (see attached) states that a response to a request must be given promptly and within no longer than five days of receipt of the request, it appears that a one hour delay in providing access to records would not be unreasonable. Therefore, in my view, the action taken by the Village of Bayville was in compliance with 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:js

STATE OF NEW YORK
COMMITTEE ON PUBLIC ACCESS TO RECORDS FOIL-AO-497

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

March 2, 1977

Mr. Merrill E. Trefzer
[redacted]

Dear Mr. Trefzer:

Your inquiry pertains to the right of access to a collective bargaining agreement entered into by a school district and a teacher's association.

In my opinion, a collective bargaining agreement is a contract which must be made available under both the Freedom of Information Law and §2116 of the Education Law. Section 2116 has long stated that virtually any records in possession of a school district are publicly accessible. Therefore, the agreement in question must be made available 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

STATE OF NEW YORK
COMMITTEE ON PUBLIC ACCESS TO RECORDS FOIL-AO-498

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

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EXECUTIVE DIRECTOR
ROBERT J. FREEMAN

March 2, 1977

Bertram B. Daiker, Esq.
Daiker, D'Elia, Turtletaub & Cantino
Attorney at Law
Colonial Office Building
14 Vanderverter Avenue
Port Washington, New York 11050

Dear Mr. Daiker:

Thank you for your thoughtful letter concerning the interpretation of the Freedom of Information Law.

Your inquiry deals with rights of access to an appraisal of real property in possession of the Board of Education of the Roslyn School District. In general, it has consistently been held that appraisal records and similar documents are publicly available. Nevertheless, there may be situations in which an entity subject to the Freedom of Information Law need not disclose such information. Specifically, it has been held that if disclosure of information would on balance result in detriment to the public interest, it need not be publicly disclosed [see Cirale v. 80 Pine Street Corp., 35 NY 2d 113 (1974); Sorley v. Clerk, Village of Rockville Centre, 30 App. Div. 2d 822 (1968)]. In Sorley, supra, it was held that "data and valuations" related to a proposed urban renewal project might properly be denied "at least so long as the transactions to which they relate remain inchoate and uncompleted" (id.). The court stated further that records related to an inchoate transaction might, if disclosed, result in detriment to the public interest and that therefore, they need not be disclosed until the transaction has been consummated.

It should be noted, however, that a mere assertion that disclosure would result in detriment to the public interest is insufficient. Under the Freedom of Information Law, a person denied access has the burden of proving that the denial was unreasonable. However, when a unit of government asserts that disclosure would be detrimental to the

public interest, it has the burden of proving that disclosure would indeed result in such detriment. Moreover, as stated in Cirale, supra, only a court can determine whether such an assertion is properly envoked (id. at 119).

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-499

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

March 3, 1977

Mr. William J. Kelly
[redacted]

Dear Mr. Kelly:

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

Your inquiry pertains to rights of access to names and titles of individuals holding Civil Service titles by means of provisional appointments. In this regard, the Freedom of Information Law specifically provides that each entity subject to the Law must compile a payroll record consisting of the names, addresses, titles and salaries of every employee of the entity, except law enforcement officers whose names and addresses need not be provided [§88(1)(g)]. In addition, the procedures followed by units of government can be no more restrictive than those promulgated by the Committee in its regulations. With respect to the payroll record, I direct your attention to §1401.3 of the regulations. Enclosed are copies of both the Freedom of Information Law and the regulations referred to above.

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
Enclosures

STATE OF NEW YORK
COMMITTEE ON PUBLIC ACCESS TO RECORDS FOIL-AO-500

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

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EXECUTIVE DIRECTOR
ROBERT J. FREEMAN

March 3, 1977

Mr. Jean M. Shields
[redacted]

Dear Mr. Shields:

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

Your inquiry involves an assertion by the Town of Randolph that all police records are confidential, as well as refusals by the Town to adopt regulations consistent with those promulgated by the Committee and to comply with §30 of the Town Law, which requires that the town clerk maintain custody of all town records.

Under the Freedom of Information Law, rights of access are specifically granted with respect to police blotters and booking records [§88(1)(f)]. Although neither "police blotter" nor "booking records" is defined by law, the sense of the two terms may be arrived at by means of custom and usage. "Police blotter" has customarily been defined as a log or diary in which any event reported by or to a police department is recorded. "Booking record" has customarily been defined as the record of an arrest compiled by an arresting agency; for example, a local police department. Therefore, records in possession of a police department consistent with those described above are accessible under the Freedom of Information Law.

The two remaining issues raised in your letter do not deal directly with the Freedom of Information Law, but rather with the legal responsibilities of particular public officials. Specifically, §88(2) of the Freedom of Information Law requires each unit of government subject to the Law to establish rules and regulations no more restrictive than those promulgated

by the Committee. In my opinion, an action in the nature of mandamus could be brought pursuant to Article 78 of the Civil Practice Law and Rules to compel the Town to perform a duty that is required to be performed. A similar action could be initiated regarding the duties of the town clerk.

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

OML-AO-73
FOIL-AO-501

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

March 3, 1977

Mr. Isaac Tress
[redacted]

Dear Mr. Tress:

Thank you for your thoughtful letter.

The basic issues raised in your inquiry pertain to information relative to collective bargaining negotiations of a school board. Your letter describes a situation reflective of a general lack of availability of information concerning collective bargaining agreements entered into by the Valley Stream School District.

First, the Open Meetings Law provides that all meetings of public bodies, including school boards, shall be open to the public, except that a public body may enter into an executive session to discuss subjects specified in §95 of the Open Meetings Law (see enclosed). However, one of the subjects that may be discussed in executive session is collective bargaining negotiations under the Taylor Law. As such, the collective bargaining negotiations discussed in your letter may be held by the school board behind closed doors so long as the requirements stated in §95 are met. It should be noted that a public body cannot enter into an executive session without complying with a specified procedure. As stated in §95 of the Open Meetings Law, a public body may conduct an executive session

> "upon a majority vote of its total membership, taken in an open meeting pursuant to a motion identifying the general area or areas of the subject or subjects to be considered..."

Second, the Freedom of Information Law (see enclosed) and the Education Law, §2116, provide substantial rights of access to records. Pursuant to those statutes, a collective bargaining agreement as well as documents and statistics that lead to an agreement and were used in its formulation are publicly accessible. As such, I believe that you have the ability to gain access to a great deal of information relative to collective bargaining negotiations.

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
Enclosure

STATE OF NEW YORK
COMMITTEE ON PUBLIC ACCESS TO RECORDS

OML-AO-75
FOIL-AO-502

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

March 7, 1977

John E. Roe, Esq.
Corporation Counsel
City of Albany
Department of Law
100 State Street
Albany, New York 12207

Dear Mr. Roe:

Thank you for your thoughtful letter of March 1 concerning the interpretation of the Open Meetings Law.

I have reviewed your communication of February 8, which discussed gatherings of the City Council held prior to a public meeting. According to statements made in that letter, I believe that the situation described would constitute meetings under the Open Meetings Law. However, the gatherings described in your letter of March 1 are, in my view, quite different from those detailed in your earlier communication. First, according to the more recent information provided, there is generally no quorum present prior to the public meeting of the Council. Since a group of public officials cannot constitute a public body until a quorum is present, a gathering of less than a quorum of the Council would not constitute a meeting. Second, §98(3) of the Open Meetings Law provides that the Law is inapplicable to matter made confidential by federal or state law. Since the attorney-client relationship is privileged and confidential, I believe that discussions between you as Counsel to the City Council and members of the City Council would fall within the attorney-client privilege. Therefore, to the extent that the privilege is applicable, the Open Meetings Law would be inapplicable. Moreover, an analogous opinion was also reached concerning access to records under the Freedom of Information Law (see enclosed opinion regarding attorney-client relationship).

In sum, if the City Council meets as a body and if such gatherings are reflective of the ingredients described in the report to the Legislature that was sent to you, such gatherings should be considered meetings. However, under the circumstances described in your letter of March 1, it appears that most of those situations would not constitute meetings under the Law or would be exempt from the provisions of the Law.

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:js
Enc.

STATE OF NEW YORK
COMMITTEE ON PUBLIC ACCESS TO RECORDS FOIL-AO-503

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

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EXECUTIVE DIRECTOR
ROBERT J. FREEMAN

March 8, 1977

Mr. Richard G. Ryan
District Principal
Lisbon Central School
Lisbon, New York 13658

Dear Mr. Ryan:

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

Your question pertains to fees permitted to be charged with respect to providing copies of records sought pursuant to the Freedom of Information Law. It is noted that the Committee promulgated regulations shortly after the effective date of the Freedom of Information Law in 1974 regarding fees. The regulations specifically provide the no fee may be charged for inspection of records or search for records (see attached, regulations, Section 1401.8). Although secretarial time may be involved in copying records, the regulations, which have the force and effect of law, provide that the only fee that may be charged pertains to copying.

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-504

DEPARTMENT OF STATE, 162 WASHINGTON AVENUE, ALBANY, NEW YORK 12231
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EXECUTIVE DIRECTOR
ROBERT J. FREEMAN

March 8, 1977

Ms. Martha J. Hill
Records Management
Division of Labor Relations
Room 8-A City Hall
City of Buffalo
Buffalo, New York 14202

Dear Ms. Hill:

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

Enclosed are several documents pertaining to the Freedom of Information Law, which became effective September 1, 1974. With respect to the Records Management Program that is being formulated by the City of Buffalo, it is suggested that the regulations promulgated by the Committee, which govern the procedural aspects of the Freedom of Information Law and have the force and effect of law, be thoroughly reviewed. In addition, §88(4) of the Law, which deals with the compilation of a subject matter list, may be important to your program. In brief, the subject matter list must make reference by category in reasonable detail to all records first kept or filed since the effective date of the Law.

I have contacted the Bureau of Management Services of the Department of State which will be sending you additional materials that may be relevant to your inquiry.

I hope that I have been of some assistance. Should any 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-505

DEPARTMENT OF STATE, 162 WASHINGTON AVENUE, ALBANY, NEW YORK 12231
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EXECUTIVE DIRECTOR
ROBERT J. FREEMAN

March 8, 1977

Mrs. Alex Kaufman
[redacted]

Dear Mrs. Kaufman:

Your inquiry pertains to rights of access to records in the possession of a court clerk.

In this regard, Section 255 of the Judiciary Law states that virtually all records in possession of a court clerk, including dockets, are publicly accessible. However, if there is no record in existence in the nature of the record sought, the clerk has no duty to create such a record in response to a request. In sum, if there is a record in existence reflective of the information that you are seeking, it is accessible; if it does not exist, the clerk is not obligated to create it.

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-506

DEPARTMENT OF STATE, 162 WASHINGTON AVENUE, ALBANY, NEW YORK 12231
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EXECUTIVE DIRECTOR
ROBERT J. FREEMAN

March 9, 1977

James D. Cole, Esq.
Assistant Corporate Attorney
New York State Environmental
Facilities Corporation
50 Wolf Road
Albany, New York 12205

Dear Jim:

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

Your inquiry pertains to a request for payroll records in possession of the Environmental Facilities Corporation of a contractor engaged in a public works project. Your letter specifies that the records include the salaries of various named employees.

In my opinion, the payroll records are accessible pursuant to §88(1)(d) of the Freedom of Information Law since they contain "statistical or factual tabulations." Nevertheless, I believe that the names of employees appearing in the records may be deleted. Section 88(3) of the Law states that identifying details may be deleted from records when disclosure would result in an "unwarranted invasion of personal privacy." Although the Law provides that the names, addresses, titles and salaries of public employees must be made available [§88(1)(g)], your inquiry pertains to records containing the names of individuals employed in the private sector by the state by means of a contract. Moreover, paragraphs (a) through (e) of §88(3) list five examples of unwarranted invasions of personal privacy. Several of those examples speak in terms of relevance to the ordinary work of an agency. Under the circumstances described in your letter, the salaries of individuals,

which represent an expenditure of public monies, are relevant to the ordinary work of the agency, but in my view the names of the individuals employed are not. In sum, it is suggested that the factual information reflective of the expenditure of public monies be made available after having deleted the names of the employees.

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-507

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

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EXECUTIVE DIRECTOR
ROBERT J. FREEMAN

March 10, 1977

Mr. Richard K. Wager
Poughkeepsie Journal
P.O. Box 1231
Poughkeepsie, New York 12602

Dear Mr. Wager:

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

Your inquiry raises two questions, one of which pertains to the appeal procedure under the Freedom of Information Law [Section 88(8); regulations, 1401.7] and the other to rights of access to "the charges against Sheriff Quinlan" transmitted to the Governor by the State Investigation Commission.

With respect to an appeal, since your initial request was directed to the person designated to hear appeals, it appears that an appeal to the same person would be all but meaningless. Nevertheless, to ensure that all administrative remedies are exhausted, it is suggested that an appeal be directed to Mr. Brown, citing Section 88(8) of the Freedom of Information Law, and stating that a final opinion explaining the reasons for denial fully in writing must be provided within seven business days of his receipt of the appeal. By so doing, you will ensure that the letter of the Law will have been met.

With regard to rights of access to the "charges," I believe that denial of access was proper. My opinion is based upon Section 7502(2) of the Unconsolidated Laws, which provides that

> "[A]t the direction of the governor the commission shall conduct investigations and otherwise assist the governor in connection with...(b) [T]he making of recommendations by the governor to any other person or body, with respect to the removal of public officers..."

Since the Commission has the authority merely to make recommendations to the Governor, it would appear under the circumstances that the Commission could not issue a "final opinion" made in the adjudication of a case [Section 88(1)(a)] or a final determination made by a governing body [Section 88(1)(h)], either of which would be accessible under the Freedom of Information Law. In my view, a recommendation is not reflective of a final opinion made in the adjudication of a case. Similarly, the State Investigation Commission in this situation cannot make a final determination, since that authority rests solely in the Governor. As such, the status of the Commission appears to be that of an advisory body rather than a governing body. Consequently, it cannot finally resolve the controversy at issue. For the foregoing reasons, I believe that the record that you are seeking is not accessible as of right under the Freedom of Information Law.

I regret that I cannot be of further 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-508

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

March 14, 1977

Ms. Jean Robbins
[redacted]

Dear Ms. Robbins:

Based upon statements made in your letter of March 3, it appears that access to the records that you are seeking, as well as responsibility of a Surrogate's Court clerk, are contained in §2501 of the Surrogate's Court Procedure Act, a copy of which is enclosed. It is noted that subdivision 8 of §2501 states that all books and records other than those sealed are publicly available. Moreover, subdivision 3 provides that the clerk must develop a system in order to locate records efficiently.

In view of the foregoing, I believe that a failure on the part of a clerk to perform his statutory duties under §2501 could be challenged by means of a proceeding in the nature of mandamus brought pursuant to Article 78 of the Civil Practice Law and Rules.

I hope that I have been of some assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:lbb
Enc.

STATE OF NEW YORK
COMMITTEE ON PUBLIC ACCESS TO RECORDS

OML-AO-83
FOIL-AO-509

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

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EXECUTIVE DIRECTOR
ROBERT J. FREEMAN

March 15, 1977

Mr. Mickey Mayes
[redacted]

Dear Mr. Mayes:

Your letter of March 4 raises questions concerning the recently enacted Open Meetings Law.

In response to your questions, first, meetings of the New York State Hospital Review and Planning Council must be open to the public. The Council is a public body pursuant to §92(2) and is therefore subject to the Open Meetings Law. Second, although the Open Meetings Law provides the public with the ability to "attend and listen to the deliberations" of public bodies (§90), the Law does not provide a right on the part of the public to participate at meetings. While an agency may permit public participation by means of the adoption of reasonable procedures, it need not. And third, although the State Health Department has its main offices in Albany, the Open Meetings Law does not preclude the Council from holding its meetings elsewhere. In my view, so long as a meeting is held in a location that can accommodate public attendance, and the meeting follows the requisite notice as reflected in §94 of the Open Meetings Law, a public body headquartered in Albany may meet in locations within New York State outside of Albany.

Your final question deals with the means by which records may be requested under the Freedom of Information Law. According to your letter, the records access officer of the Health Department informed you that an appointment must be made in order to inspect records. However, §1401.5(a) of the regulations promulgated by the Committee, which have the force and effect of law, state that requests for records must be accepted during all regular business hours.

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: Chairman Arcy Degni
Hospital Review and Planning Council
State of New York
Department of Health
Tower Building
Empire State Plaza
Albany, New York 12237

Mr. Steven Krill
Records Access Officer
State of New York
Department of Health
Tower Building
Empire State Plaza
Albany, New York 12237

STATE OF NEW YORK
COMMITTEE ON PUBLIC ACCESS TO RECORDS

OML-AO-85
FOIL-AO-510

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

March 17, 1977

Mr. Tim C. Engelmann
Staff Reporter
The Viking
Westchester Community College
75 Grasslands Road
Valhalla, New York 10595

Dear Mr. Engelmann:

Thank you for your interest in the Open Meetings Law (see attached).

Your inquiry pertains to the application of the Open Meetings Law with respect to action taken by the Westchester Community College Budget Committee. In my opinion, the Budget Committee is subject to the Law and therefore should have conducted its business in full view of the public.

First, it has been established judicially that community colleges are subject to the General Municipal Law [see Cline v. Board of Trustees of Schenectady County Community College, 76 misc. 2d 536, 351 NYS 2d 81 (1973)]. Second, the definition of "public body" under the Open Meetings Law [§92(2)] includes any entity consisting of two or more members that performs a governmental function for a public corporation, such as the County of Westchester. In addition, in the debate in the Assembly on the bill that became law, clear statements were made to the effect that committees, subcommittees and other subgroups were intended to fall within the definition of "public body" (see Assembly debate, May 20, 1976, pages 6268 to 6270). As such, the Budget Committee of the Westchester Community College is a public body subject to the Law.

Moreover, Section 93 of the Law states that every meeting of a public body shall be open to the general public, except that an executive session, which is defined as a portion of an open meeting [§92(3)] may be called to

discuss matters specified in Section 95(1) of the Law, As described in your letter, the business transacted by the Budget Committee likely did not deal with any of the subjects that may be discussed in executive session. Consequently, the meeting should have been open to the public. In addition, the Law provides that when a public body appropriates public monies, the vote to appropriate must be conducted publicly.

It is suggested that you request that the Committee furnish minutes that are required to be compiled pursuant to Section 96 of the Law. Further, you might also request that the Budget Committee compile a record of votes identifiable to each member of the Committee as required by Section 88(5) of the Freedom of Information Law (see attached).

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
Encs.

STATE OF NEW YORK
COMMITTEE ON PUBLIC ACCESS TO RECORDS FOIL-AO-511

DEPARTMENT OF STATE, 162 WASHINGTON AVENUE, ALBANY, NEW YORK 12231
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EXECUTIVE DIRECTOR
ROBERT J. FREEMAN

March 18, 1977

Ms. Evelyn L. Sweet
Town Clerk
Town of German Flatts
14 West Main Street
Mohawk, New York 13407

Dear Ms. Sweet:

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

Enclosed is a copy of regulations promulgated by the Committee. The regulations pertain to the procedural aspects of the Freedom of Information Law and have the force and effect of law.

The Committee has never issued public access forms and has consistently advised that any written request reflective of identifiable records should suffice. Nevertheless, the Town may create its own form so long as failure to use such a form by the public is not used as a ground for denying 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:lbb
Enc.

STATE OF NEW YORK
COMMITTEE ON PUBLIC ACCESS TO RECORDS FOIL-AD-512

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ROBERT J. FREEMAN

March 22, 1977

Mr. Frank Sayers
UniServ Representative
New York Educators Association
Suffolk Service Center
1727 Veterans Memorial Highway
Room 212
Central Islip, New York 11722

Dear Mr. Sayers:

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

Your inquiry pertains to a "policy" adopted by the Wyandanch School District which requires a fee of fifty cents per copy for records sought pursuant to the Freedom of Information Law. In this regard, the regulations promulgated by the Committee, which have the force and effect of law, provide that no more than twenty-five cents per photocopy may be assessed unless a higher fee had been set prior to the effective date of the Freedom of Information Law by law or rule. The attachment to your letter entitled "Regulations Concerning Inspection and Copying of District Records" was adopted on November 8, 1974. Since those regulations were issued after September 1, 1974, the effective date of the Freedom of Information Law, the fifty cents fee is in violation of the Committee's 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

RJF:js

cc: Dr. Joseph Kuhn
Records Access Officer
Wyandanch Union Free School District
Central Administration Building
Straight Path Road
Wyandanch, New York 11798

STATE OF NEW YORK
COMMITTEE ON PUBLIC ACCESS TO RECORDS FOIL-AO-513

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

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EXECUTIVE DIRECTOR
ROBERT J. FREEMAN

March 23, 1977

Mrs. Helen P. Keyes
[redacted]

Dear Mrs. Keyes:

Your letter pertains to disclosure of medical records concerning your son that are in possession of the Children's Hospital in Buffalo.

It is noted that the Freedom of Information Law is applicable only to governmental entities in New York State. It does not apply to entities outside of government, such as private hospitals. Therefore, the only method by which you can currently gain access to medical records of a private hospital is by means of a court order.

I would like to add that the subject of medical records generally is being considered by the State Consumer Protection Board and the Assembly Committee on Governmental Operations, which is headed by Assemblyman Vincent Nicolosi. For information concerning proposed legislation, I suggest that you write to Ms. Rosemary Pooler, Executive Director, State Consumer Protection Board, 99 Washington Avenue, Albany, and to Assemblyman Vincent Nicolosi, Legislative Office Building, Albany.

I regret that I cannot be of greater assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:lbb

STATE OF NEW YORK
COMMITTEE ON PUBLIC ACCESS TO RECORDS FOIL-AO-514

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EXECUTIVE DIRECTOR
ROBERT J. FREEMAN

March 23, 1977

Mr. Clinton Cox
Sunday Magazine
New York Daily News
220 East 42nd Street
New York, New York 10017

Dear Mr. Cox:

Your letter addressed to Mr. Bohan of the Division of State Records has been transmitted to the Committee on Public Access to Records, which is responsible for advising with respect to the Freedom of Information Law.

Your question pertains to rights of access to the tax returns of a wholly-owned subsidiary of a not-for-profit corporation. In this regard, §202(1) of the Tax Law states that corporate tax information is confidential. Moreover, subdivision (2) of the same section provides that any official who discloses such information may be fined or imprisoned or both and also shall be dismissed from office and shall be barred from holding any public office for a period of five years. As such, the information that you are seeking is clearly deniable.

With respect to tax returns of private citizens such information is similarly deemed confidential by §384 of the Tax 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-515

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EXECUTIVE DIRECTOR
ROBERT J. FREEMAN

March 23, 1977

Mr. Edward G. Laraby
Box 149 - 74-C-392
Attica, New York 14011

Dear Mr. Laraby:

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.

Your inquiry pertains to a failure by the Sheriff of Monroe County to respond to your requests. In this regard, enclosed is a copy of regulations issued by the Committee, which govern the procedural aspects of the Freedom of Information Law and have the force and effect of law. It is noted that §1401.6 of the regulations states that an official must respond promptly to a request and unless "extraordinary circumstances" are cited, a response must be given within five business days from receipt of a request.

It is also noted that the Freedom of Information Law states that rights of access do not apply to information that is "part of investigatory files compiled for law enforcement purposes" [see enclosed Freedom of Information Law, §88(7)(d)]. Therefore, to the extent that your request is reflective of investigatory files compiled for law enforcement purposes, the information sought need not be made available.

It is suggested, however, that you renew your request to the Sheriff and cite the appropriate provisions of the enclosed 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: Sheriff William Lombard

Enclosures

STATE OF NEW YORK
COMMITTEE ON PUBLIC ACCESS TO RECORDS FOIL-AO-516

DEPARTMENT OF STATE, 162 WASHINGTON AVENUE, ALBANY, NEW YORK 12231
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EXECUTIVE DIRECTOR
ROBERT J. FREEMAN

March 24, 1977

Mr. Leonard B. Wachsman
Research Director
Civil Service Merit Council
3535 DeKalb Avenue
New York, New York 10467

Dear Mr. Wachsman:

Your letter addressed to Dean Abel has been transmitted to this office for response. Your letter pertains to rights of access under the Freedom of Information Law to payroll records consisting of the name, home address, title and salary of employees of the Lottery Commission.

The Freedom of Information Law provides that each entity subject to it compile a payroll record consisting of the name, address, title and salary of each officer or employee of the entity. However, the Law does not specify which address, home or business, must be provided. As such, the Committee has consistently advised that if the custodian of the records feels that disclosure of employees' home addresses would result in an unwarranted invasion of personal privacy pursuant to §§88(3) and (7)(c) of the Law, business addresses may be given.

Nevertheless, case law indicates that there may be circumstances in which home addresses of public employees must be provided. Specifically, in Winston v. Mangan it was held that:

> "The names and pay scales of the park district employees, both temporary and permanent, are matters of public record and represent important fiscal as well as operational information. The identity

> of the employees and their salaries are vital statistics kept in the proper recordation of departmental functioning and are the primary sources of protection against employee favoritism. They are subject therefore to inspection.
>
> "The employees' home addresses, however, do not carry the same prima facie public importance and unless a specific 'private' need is shown for them, they need not be disclosed. In such instances, the strength of the competing consideration of employee privacy must be balanced against the benefit in the public's knowledge of this specific information, such as protection against 'cronyism' or violation of local residence laws, and some cause should be shown to warrant their disclosure" [338 NYS 2d 654, 662 (1972)].

Therefore, in my opinion, the home addresses should be made available if you can show that they are relevant to the performance of the duties of the public employees in question or if, for example, home addresses are needed to prove that hiring practices of the Commission are contrary to law.

I suggest that you request the information by means of the procedures outlined in the regulations promulgated by the Committee (see enclosed). If you exhaust your administrative remedies without success you may then seek judicial review of a denial of access.

I hope that I have been of some assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:js
Enc.

STATE OF NEW YORK
COMMITTEE ON PUBLIC ACCESS TO RECORDS FOIL-AO-517

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EXECUTIVE DIRECTOR
ROBERT J. FREEMAN

March 24, 1977

Mrs. Edgar Fowler
[redacted]

Dear Mrs. Fowler:

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

Your letter deals with the nature of records that are accessible under the Freedom of Information Law. I have enclosed copies of the Freedom of Information Law and a pocket brochure outlining the statute. Please note that §88(1) lists categories of records that must be made available. In addition to the specific categories listed, the Law preserves rights of access to records made available by any other provision of law.

The Freedom of Information Law, however, is not applicable to vital records, since access to those records is dealt with in other provisions of law. In brief, §4173 of the Public Health Law pertains to birth records, §4174 to death records and §20 of the Domestic Relations Law to marriage records. Birth records are generally made available only to the individuals to whom they pertain. Marriage and death records are made available to persons who can show that a request is reflective of a "proper purpose." In addition, the original marriage, birth and death records are in the possession of the State Department of Health.

With regard to records of a Surrogate's court, §2501(8) of the Surrogate's Court Procedure Act provides that all books and records in possession of the clerk of the court are publicly accessible unless sealed.

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

STATE OF NEW YORK
COMMITTEE ON PUBLIC ACCESS TO RECORDS

FOIL-AO-518

DEPARTMENT OF STATE, 162 WASHINGTON AVENUE, ALBANY, NEW YORK 12231
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EXECUTIVE DIRECTOR
ROBERT J. FREEMAN

March 24, 1977

Mr. Paul Feiner
[redacted]

Dear Mr. Feiner:

Your inquiry pertains to the nature of the subject matter list that is required to be compiled and made available by governmental entities pursuant to §88(4) of the Freedom of Information Law.

With respect to the degree of specificity required in a subject matter list, the Law states that the list must be "reasonably detailed, by subject matter." Therefore, a subject matter list need not make reference to every record, letter or staff memorandum in possession of a unit of government. However, a unit of government must create a list which categorizes by subject matter in reasonable detail the records in its possession.

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: Scarsdale Village Board of Trustees
Village Hall
Scarsdale, New York 10583

STATE OF NEW YORK
COMMITTEE ON PUBLIC ACCESS TO RECORDS

FOIL-AO-519

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

March 24, 1977

Mr. Thomas Goggin
[redacted]

Dear Mr. Goggin:

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

Your inquiry pertains to requests for information directed to the Department of Transportation concerning financial and stockholder information relative to corporations engaged in contractual relationships with the Department. I have been in contact with the Office of Counsel of the Department of Transportation and have been informed that in most instances the Department does not have possession of the information sought. As you stated in your letter, I was told that experience data concerning corporations often is not obtained by the Department, since many awards are based on past experience with a particular firm. In addition, the Department does not have information concerning major stockholders of the firms in question. On your behalf, I also contacted the Corporations and State Records Division of the Department of State and was informed that it does not have in its possession the names of major stockholders of corporations.

I regret that I cannot be of further assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:js

STATE OF NEW YORK
COMMITTEE ON PUBLIC ACCESS TO RECORDS

FOIL-AO-520

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

March 28, 1977

Mr. Richard J. Hayko
[redacted]

Dear Mr. Hayko:

Thank you for your interest in the Freedom of Information Law. Your inquiry raises four issues, three of which pertain to the Freedom of Information Law.

The first question deals with codes of ethics written by units of local government. In this regard, Section 806 of the General Municipal Law requires each county, city, town, village and school district to adopt a code of ethics "for the guidance of its officers and employees the standards of conduct reasonably expected of them." The statute, however, contains no specific requirements regarding the contents of a code of ethics. In addition, although the clerk of each municipality must file with the Comptroller a copy of the code of ethics adopted by the municipality, and the Comptroller must submit to the Legislature annually a report listing the name of each city, county, town, village or school district that has failed to file, there is no penalty for failure either to write a code of ethics or file it with the Comptroller.

Second, Section 88(2) of the Freedom of Information Law requires each entity subject to the Law to adopt rules and regulations no more restrictive than those promulgated by the Committee on Public Access to Records. The Committee promulgated regulations which became effective November 29, 1974. As such, municipalities were obliged to adopt rules and regulations governing the procedural aspects of the Freedom of Information Law within a reasonable time after issuance of regulations by the Committee.

Third, Section 1401.6 of the Committee's regulations states that a response to a request must be given promptly and within five business days of its receipt, unless an official can demonstrate that "extraordinary circumstances" require a longer period of time to respond.

And fourth, Section 88(1) of the Freedom of Information Law lists categories of records that are accessible under the statute. It is noted that paragraph (i) of Section 88(1) preserves rights of access to records granted by other provisions of law. Section 88(7) lists four categories of information that are deniable.

Enclosed are copies of the Freedom of Information Law, regulations promulgated by the Committee and a pocket brochure outlining 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

RJF:js
Encs.

STATE OF NEW YORK
COMMITTEE ON PUBLIC ACCESS TO RECORDS

OML-AO-90
FOIL-AO-521

DEPARTMENT OF STATE, 162 WASHINGTON AVENUE, ALBANY, NEW YORK 12231
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EXECUTIVE DIRECTOR
ROBERT J. FREEMAN

March 28, 1977

Mr. Kenneth Conklin, Jr.
Chief of Huguenot Fire Company
Box 156
Huguenot, New York 12746

Dear Mr. Conklin:

Thank you for your interest in complying with the Freedom of Information Law and the Open Meetings Law. Your inquiry pertains to the application of those statutes to a fire company, which is a not-for-profit corporation performing fire protection services pursuant to contract for a fire protection district in the Town of Deerpark.

First, in my opinion, a fire company is subject to the Freedom of Information Law. The definition of "municipality" in the Freedom of Information Law [§87(2)] specifically includes fire districts and any other special districts, such as fire protection districts, established by law for any public purpose. In addition, a federal court held that a volunteer fireman is "in the public service" and is therefore a public servant, even though no salary is paid [Everett v. Riverside Hose Company, 261 F Supp. 463 (1966)]. The decision further stated that a volunteer fire company performs a governmental function notwithstanding its status as a not-for-profit corporation. Consequently, although a volunteer fire company may be a not-for-profit corporation, it performs a governmental function and, therefore, is subject to rights of access granted by the Freedom of Information Law.

Second, I believe that a volunteer fire company is also subject to the Open Meetings Law. The Open Meetings Law defines "public body" [Section 92(2)] as

> "any entity, for which a quorum is required in order to transact public business and which consists of two or more members, performing a governmental function for the state or for an agency or department thereof or for a public corporation as defined in section sixty-six of the general construction law."

A fire company is an entity which must act by means of a quorum (see Not-For-Profit Corporation Law, Section 608), consists of more than two members and, according to case law, performs a governmental function, in this instance for a town, which is a public corporation as defined in Section 66 of the General Construction Law. Therefore, it appears that a fire company is a public body within the scope of the Open Meetings Law.

Enclosed for your perusal are copies of both the Freedom of Information Law and the Open Meetings 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:js
Encs.

STATE OF NEW YORK
COMMITTEE ON PUBLIC ACCESS TO RECORDS FOIL-AO-522

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

March 29, 1977

Mr. Joseph Frederick Gazza
[redacted]

Dear Mr. Gazza:

Thank you for your interest in the Freedom of Information Law. Your inquiry pertains to rights of access under the Law as well as the procedural requirements of its implementation.

According to your letter the office of the Assessor of the Town of Southampton has restricted your ability to inspect the records of his office to three hours per week and has prohibited you from making photocopies of the records. In addition, the Assessor has limited requests to one assessment card at a time and has denied access to certain records.

First, the regulations promulgated by the Committee (see attached), which govern the procedural aspects of the Freedom of Information Law and have the force and effect of law, provide that municipalities shall accept requests for public access to records and produce records "during all hours they are regularly open for business" (Regulations, Section 1401.5). Therefore, the Assessor cannot restrict your ability to inspect records as described in your letter.

Second, Section 88(6) of the Law states that, upon a request for identifiable records, the records shall be made available and photocopies shall be made upon request. Therefore, if the records are accessible, the municipality must make photocopies for which a fee may be charged (Regulations, Section 1401.8).

Third, although in my opinion the Assessor may restrict you from perusing the cards yourself, since he must maintain constant custody of the records, I believe that you need not request each assessment card separately. Perhaps it would be possible to provide a written request identifying several cards. It is also suggested that you obtain a copy of the subject matter list which must be compiled pursuant to Section 88(4) of the Freedom of Information Law [see Regulations, Section 1401.6 (d) through (f)].

And fourth, according to your letter, you have been denied access to maps, sketches and/or surveys attached to the assessment cards. In this regard, the Freedom of Information Law provides access to several categories of records [Section 88(1)], as well as any other records made available by any other provision of law [Section 88(1)(i)]. One such provision of law is Section 51 of the General Municipal Law which for years has provided access to virtually all records in possession of a municipality. Moreover, case law has long held that assessment cards as well as the information used in their compilation are accessible [see Sears, Roebuck & Co. v. Hoyt, 107 NYS 2d 756 (1951); Sanchez v. Papontas, 303 NYS 2d 711 (1969)]. As such, the information that has been denied should be made 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:js
Enc.

STATE OF NEW YORK
COMMITTEE ON PUBLIC ACCESS TO RECORDS

FOIL-AO-523

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

April 4, 1977

Howard E. Pachman, Esq.
Suffolk County Attorney
Department of Law
Veterans Memorial Highway
Hauppauge, New York 11787

Dear Mr. Pachman:

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

Your inquiry pertains to rights of access of an applicant for a civil service examination regarding a letter addressed to the Suffolk County Department of Civil Service which challenges the qualifications of the applicant. The Freedom of Information Law provides 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 a municipality. Therefore, reading the Freedom of Information Law in conjunction with §51 of the General Municipal Law, records in possession of a municipality are accessible except to the extent that information contained in the records is deniable pursuant to §88(7) of the Freedom of Information Law.

Relevant to the issue, §88(7)(c) states that an agency may withhold information the disclosure of which would result in an unwarranted invasion of personal privacy. In addition, §88(7)(c) refers to "standards" set forth in §88(3) of the Law. Section 88(3) provides essentially that, when making records available, an agency may delete identifying details to prevent unwarranted invasions of personal privacy. Based upon the

circumstances described in your letter, it is suggested that identifying details relative to the author of the letter addressed to the Department of Civil Service be deleted, but that the substance of the allegation concerning the applicant be made available. In so doing, the applicant would have an opportunity to rebut the allegations, but the identity of the author of the letter, which in my view is irrelevant, would remain undisclosed.

I have discussed the matter with a representative of the Office of Counsel of the State Department of Civil Service, who concurs with my suggestion.

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-524

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

April 4, 1977

[redacted]

Dear [redacted]

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 Freedom of Information Law.

According to your letter, you have requested that the Onondaga County Social Services Department furnish you with all records pertaining to you in its possession. You also cited §422(4)(d) of the Social Services Law as the statutory basis regarding access to the records in question. Nevertheless, having reviewed §422, I believe that rights of access pursuant to that statute pertain only to records regarding cases of child abuse and maltreatment. As such, rights of access under §422 are restricted to records regarding the subject noted above.

If your request concerns records other than those described in §422, there may or may not be a right of access, depending upon the nature of the records sought.

If you could provide additional information concerning the records in which you are interested, perhaps I can be of assistance to you.

Sincerely,

Robert J. Freeman
Executive Director

RJF:lbb

cc: Attorney General
Department of Law
Executive Office
Capitol
Albany, New York 12224

STATE OF NEW YORK
COMMITTEE ON PUBLIC ACCESS TO RECORDS

FOIL-AO-525

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

April 5, 1977

Ms. Susan C. Doolittle
City Editor
Adirondack Publishing Co., Inc.
Post Office Box 318
Saranac Lake, New York 12983

Dear Ms. Doolittle:

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

Your question pertains to rights of access to monthly reports prepared by town and village justices for submission to town and village boards. According to your letter, the reports detail the disposition of cases brought before each justice each month. In my opinion, the records in question are available pursuant to several provisions of law.

The Freedom of Information Law lists specified categories of records that must be made available [§88(1)], including any other records made available by any other provision of law [§88(1)(i)]. One such provision of law is §2019 of the Uniform Justice Court Act which states that

> "[T]he records and dockets of the court except as otherwise provided by law shall be at reasonable times open for inspection to the public and shall be and remain the property of the village or town of the residence of such justice..."

As such, records and dockets in possession of a justice subject to the Uniform Justice Court Act are available to the public.

A second provision of law granting substantial rights of access to judicial records is §255 of the Judiciary Law, which states:

> "A clerk or 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, can not be found."

Therefore, unless otherwise provided by law, virtually all records in possession of a court clerk must be made available upon request.

A third provision of law that also grants substantial rights of access is §51 of the General Municipal Law, which has long provided public access to:

> "[A]ll books of minutes, entry or account, and the books, bills, vouchers, checks, contracts or other papers connected with or used or filed in the office of, or with any officer, board or commission acting for or on behalf of any county, town, village or municipal corporation in this state..."

Consequently, the reports submitted by justices to town and village boards are accessible pursuant to §51 of the General Municipal Law from towns and villages, as well as from justices and their clerks.

In sum, based upon the statutory provisions quoted above, it appears that the records sought are clearly 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

RJF:js

FOIL-AO-526

STATE OF NEW YORK
COMMITTEE ON PUBLIC ACCESS TO RECORDS

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

April 6, 1977

Philip B. Fogel, Esq.
First Deputy Town Attorney
Town of Clarkstown
10 Maple Avenue
New City, New York 10956

Dear Mr. Fogel:

Thank you for your interest in complying with the Freedom of Information Law. Your letter pertains to rights of access to complaints directed to the Town Consumer Affairs Commission regarding a particular merchant.

The Freedom of Information Law provides rights of access to specified 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 rights of access to virtually all records in possession of a municipality. Reading the Freedom of Information Law in conjunction with §51 of the General Municipal Law, all records in possession of a municipality are accessible except to the extent that records contain information deemed deniable pursuant to §88(7) of the Freedom of Information Law.

Relevant to your inquiry, §88(7)(c) provides that information may be withheld when disclosure would result in an unwarranted invasion of personal privacy pursuant to the standards described in §88(3). Section 88(3) states that identifying details may be deleted to protect privacy when making records available and also lists five instances of unwarranted invasions of privacy [§88(3)(a) through (e)]. It is noted that paragraphs (a) through (e) are merely descriptive examples of five among conceivable dozens of unwarranted invasions of personal privacy. As such, in my view, an agency has discretionary authority to delete identifying details relative to the authors of the complaints. For example, if in your judgment disclosure of the name of a complainant would result in economic or personal hardship to the complainant

[see e.g., §88(3)(e)], identifying details concerning that person may be deleted prior to making the substance of the complaint available. However, identifying details concerning the merchant, the subject of the complaint, should not be deleted since both the name of the merchant as well as the substance of the complaint are relevant to the performance of the duties of the Consumer Affairs Commission.

Moreover, in an unreported decision, it was held that "liberally interpreted, a complaint is a 'case' and the action or non-action taken thereon can be considered a 'final opinion'" which would be accessible under §88(1)(a) of the Freedom of Information Law [Pooler v. Nyquist, Supreme Court, Albany County (1976)]. Therefore, the decision cited above bolsters the conclusion that the complaint is accessible 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

ROBERT J. FREEMAN
Executive Director

STATE OF NEW YORK
COMMITTEE ON PUBLIC ACCESS TO RECORDS

FOIL-AO-527

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

April 7, 1977

Mr. Thomas G. Conway
Counsel
Department of Agriculture
and Markets
State Office Building Campus
Albany, New York 12235

Dear Mr. Conway:

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

Your inquiry pertains to rights of access to a report filed by the Suffolk County Agricultural and Horticultural Association, Inc. with the Department of Agriculture and Markets, as required by law. Your letter notes that although agricultural associations may receive state reimbursement, the association in question received none.

As you are aware, the Freedom of Information Law provides rights of access to specified categories of records [§88(1)], as well as records made available by any other provision of law [§88(1)(i)]. In this regard, §23 of the Agriculture and Markets Law 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..."

Since the report in question is required to be submitted to the Department of Agriculture and Markets pursuant to §1409 of the Not-For-Profit Corporation Law, it should, in my opinion, be made available.

It is noted that the report must contain financial information concerning the Association and that in some circumstances, commercial information may be withheld if disclosure would result in a competitive disadvantage to the subject of the records [see Freedom of Information Law, §88(7)(b)]. Nevertheless, since it is a not-for-profit corporation, it would appear that, due to the nature of the Association, disclosure could not result in competitive disadvantage. Moreover, it appears that the report likely consists of statistical or factual tabulations which must be made available 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-528

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

April 7, 1977

Ms. Erma Hawkins
[redacted]

Dear Ms. Hawkins:

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

Your inquiry pertains to rights of access to records in possession of the Office of the City Engineer of the City of Corning. Although the records that you are seeking have not been described with specificity in your letter, it is likely that they are accessible.

The Freedom of Information Law provides access to several categories of records [§88(1)], including any other records made available by any other provision of law. In this regard, one such provision of law is §51 of the General Municipal Law, which has long provided rights of access to virtually all records of a municipality, such as the City of Corning. Reading the Freedom of Information Law in conjunction with §51 of the General Municipal Law, rights of access exist with respect to all records in possession of the City of Corning except to the extent that records contain information that is deniable pursuant to §88(7) of the Freedom of Information Law (see enclosed). Moreover, judicial decisions arising under the Freedom of Information Law as well as decisions that preceded the enactment of the Freedom of Information Law have held generally that records pertaining to real estate (e.g., assessor records, records of a building department) are publicly accessible.

If you would describe more fully the nature of the records that you are seeking, I could provide more specific advice. Nevertheless, you may decide to renew your request based upon the Freedom of Information Law and the regulations promulgated by the Committee (see enclosed). The regulations govern the procedural

aspects of the Freedom of Information Law and have the force and effect of law. Each governmental entity in the state must adopt rules and regulations no more restrictive than those 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:llb
Enclosures

STATE OF NEW YORK
COMMITTEE ON PUBLIC ACCESS TO RECORDS

FOIL-AO-529

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

April 11, 1977

Stanley J. Denmark, D.D.S., M.S.
The Old Country Road Medical Center
675 Old Country Road
Westbury, New York 11590

Dear Dr. Denmark:

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

According to your letter, you are attempting to gain access to records identifiable to you in possession of the Ethics Committee of the Tenth District Dental Society. In my opinion, since the Freedom of Information Law is applicable only to governmental entities (see enclosed Freedom of Information Law, §87) and the Dental Society is a private, not-for-profit organization, the Law has no effect with respect to the Society nor is the Society subject to rights of access granted by the Law. Consequently, the Society has no legal obligation to provide access to the records sought.

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:lbb
Enclosure

STATE OF NEW YORK
COMMITTEE ON PUBLIC ACCESS TO RECORDS

FOIL-AO-530

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

April 14, 1977

Mr. Robert C. Atkinson
[redacted]

Dear Mr. Atkinson:

Thank you for your interest in the Freedom of Information Law. Your inquiry deals essentially with rights of access to death records. It is noted at the outset that the Freedom of Information Law is not applicable to those records, since rights of access to death records are governed by the Public Health Law.

In brief, death records are kept by two levels of government. Original records are maintained by the New York State Department of Health in the Bureau of Vital Records. Duplicate copies are maintained by registrars of vital statistics in municipalities. The registrars of vital statistics are bound to follow regulations promulgated by the Department of Health on the subject.

With respect to statutory rights of access, §4174 of the Public Health Law provides that the Commissioner of the Department of Health or any person authorized by him, such as a registrar, shall

> "upon request, issue to any applicant either a certified copy or a certified transcript of the record of any death registered under the provisions of this chapter, unless he is satisfied that the same does not appear to be necessary or required for judicial or other proper purposes..."

As such, the criterion for gaining access to death records involves a showing by an applicant that a request is reflective of a so-called "proper purpose." However, "proper purpose" remains undefined. Consequently, both the State Department of Health as well as the local registrars have substantial latitude in determining whether or not death records should be made available.

Nevertheless, since the "proper purpose" standard has not been dealt with judicially with regard to requests made by genealogists, it is possible that the courts might find that such a request is reflective of a "proper purpose" or that it falls outside the ambit of that standard.

I regret that I cannot provide you with a clear answer. It appears that an appropriate response could be given only after a judicial challenge to denial of access has been made. In the alternative, the Public Health Law could be amended to provide specific standards.

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-531

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

April 15, 1977

Mr. Robert Ratner
America Observed
P.O. Box 697
New Paltz, New York 12561

Dear Mr. Ratner:

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

Your inquiry pertains to a denial of access by the State University regarding records of expenditure in specific areas by the University. As I explained to you orally, rights of access to the information sought are unclear.

The correspondence attached to your letter is reflective of numerous requests for information. In some instances, it appears that the information sought does not exist in the form of a record or records. In such cases, the University is not obligated to create a record in response to your request. Among the other records that have been denied are various bills and vouchers. Your requests indicate that you believe these records are accessible pursuant to §88(1)(d) of the Freedom of Information Law, which provides access to "statistical or factual tabulations." To date, there has been no judicial interpretation of what constitutes a statistical or factual tabulation. As such, it is unclear whether bills and vouchers fall within the category cited. It could be argued that the records in question should be made accessible as factual tabulations, since the records contain numerical figures reflective of the expenditure of public monies. Nevertheless, it could also be argued that they do not fall within the scope of §88(1)(d), since the records do not exist in tabular form.

I regret that a clear answer to your inquiry cannot be provided. Should any further questions arise, please feel free to contact me.

Sincerely,

Robert J. Freeman
Executive Director

RJF:js

bcc: Joyce Villa
Office of Counsel
Suny
Twin Towers
Albany

STATE OF NEW YORK
COMMITTEE ON PUBLIC ACCESS TO RECORDS

FOIL-AO-532

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

April 19, 1977

Mr. Stanley Blasof
[redacted]

Dear Mr. Blasof:

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

Your inquiry deals with requests for "harassment files" in possession of the Office of Rent Control of the City of New York. Based upon my research, it appears that the denial may have been proper.

There are several provisions of law which pertain to investigations, records and reports relative to rent control. First, §8608 of the Unconsolidated Laws of New York, which is part of the "Local Emergency Housing Rent Control Act" states that

> "[T]he city housing rent agency shall not publish or disclose any information obtained under this section that the city housing rent agency deems confidential or with reference to which a request for confidential treatment is made by the person furnishing such information, unless the city housing rent agency determines that the withholding thereof is contrary to the public interest."

Second, §Y51-7.0(h) of the New York City Administrative Code, which is reflective of the New York City Rent and Rehabilitation Law, states that

> "[T]he city rent agency shall not publish or disclose any information obtained under this title that the city rent agency deems confidential or with reference to which a request for confidential treatment is made

> by the person furnishing such information, unless the city rent agency determines that the withholding thereof is contrary to the public interest."

Moreover, case law has held that, although the city rent agency does not have absolute discretion to publish or disclose any information in its possession, the provision quoted above does authorize the agency to prohibit disclosure where there is a rational basis for such a determination in light of the nature, purpose and application of the particular matter involved [Bernkrant v. City Rent and Rehabilitation Administration, 1963, 40 Misc. 2nd 157, 242 NYS 2d 753, affirmed 20 AD 2d 682].

In addition, virtually the same language as is contained in the two provisions quoted earlier appears in the State Rent Control Law (see §8586, Unconsolidated Laws of New York).

As such, the Office of Rent Control has substantial latitude under the law to either disclose or withhold information. Consequently, it appears that it has the discretionary authority to withhold the records that you have sought.

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

RJF:lbb

cc: Mr. Harry Michelson
Chief Counsel
Office of Rent Control
110 Church Street
New York, New York 10007

STATE OF NEW YORK
COMMITTEE ON PUBLIC ACCESS TO RECORDS

FOIL-AO-533

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

April 21, 1977

Hon. Norman J. Levy
Senator
State of New York
119 North Park Avenue
Suite 402
Rockville Centre, New York 11570

Dear Senator Levy:

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

The correspondence attached to your letter is reflective of a request by a candidate, Mrs. Braun, for the Malverne School Board for records in possession of the Malverne School District. Relative to the request, a question was raised concerning whether the use of school district information during the correspondent's candidacy could be considered a private use. In my opinion, since the records are accessible as of right, they could not be considered to be used for private gain.

First, a basic tenet of the Freedom of Information Law is that it provides equal rights of access to any person. Shortly after the Law became effective, the Committee issued a series of resolutions dealing with basic questions arising under the Law. One of the resolutions stated that "information accessible under the Freedom of Information Law shall be made equally accessible to any person, without regard to status or interest" and has been cited by several courts as one of the bases for interpretation of the Law [see, e.g., Burke v. Yudelson, 51 AD 2d 673 (1975)]. Moreover, it has been held that the purpose for making a request is irrelevant and that a failure to state the purpose for a request cannot be valid ground for denial of access [Shapiro v. Town of Ramapo, Supreme Court, Rockland County, (1975)].

There is only one instance in the Law in which the purpose of a request may be relevant. Section 88(3)(d) of the Law states that an unwarranted invasion of personal privacy includes "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..." According to Mrs. Braun's letter, none of the information that she is seeking is deniable under the standard quoted above. The three areas of information that she has sought are clearly accessible under the Freedom of Information Law. For example, a pupil-teacher ratio is reflective of a statistical tabulation that is accessible pursuant to Section 88(1)(d) of the Freedom of Information Law. A description of administrative duties is accessible pursuant to Section 88(1)(e) of the Freedom of Information Law, which grants access to administrative staff manuals. Access to administrative salaries is governed by Section 88(1)(g) of the Law, which requires that every entity subject to the Law compile a payroll record consisting of the name, address, title and salary of every officer or employee of the agency, except law enforcement officers, whose names and addresses need not be disclosed. Although the Law appears to provide access to the payroll record only to bona fide members of the news media, the regulations promulgated by the Committee, which have the force and effect of law, state that the payroll record shall be made available to any person (see enclosed regulations, Section 1401.3). The cited provision of the regulations is based upon Section 88(10) of the Freedom of Information Law, which states that nothing in the Law shall be construed to limit or abridge existing rights of access granted either by other provisions of law or by the courts. In this regard, prior to the enactment of the Freedom of Information Law, it was held that the payroll information required to be compiled by Section 88(1)(g) is available to any person [see Winston v. Mangan, 338 NYS 2d 654, 661 (1972)]. Since rights of access to payroll information had been established by case law, those rights are preserved, notwithstanding the lack of clarity of the language in Section 88(1)(g).

Although the payroll record consists of a list of the names and addresses, it is my opinion that the Legislature specifically provided access to this information after having weighed the interests of privacy versus disclosure and deciding that disclosure of payroll information relative to public employees would constitute a permissible rather than unwarranted invasion of personal

privacy. As such, although a request for a different list of names and addresses might result in an appropriate denial based upon Section 88(3)(d), a denial could not be made with regard to the list of names and addresses contained in the payroll record required to be compiled and made available by Section 88(1)(g).

In conclusion, the information sought by Mrs. Braun is clearly accessible under the Freedom of Information Law and her purpose for requesting it is irrelevant.

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-534

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

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EXECUTIVE DIRECTOR
ROBERT J. FREEMAN

April 21, 1977

Mr. C. Douglas O'Malley
[redacted]

Dear Mr. O'Malley:

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

According to your letter, you have consistently been denied access to minutes of the meetings of the Rotterdam Town Board. Moreover, it appears that the Town has adopted procedures which have resulted in restrictions of access to information rather than expedition of access.

First, the Freedom of Information Law, §88(1)(c), specifically provides access to minutes of meetings. Second, the regulations promulgated by the Committee, which have the force and effect of law, and with which each governmental entity in the state must comply, govern the procedural aspects of the implementation of the Freedom of Information Law. The regulations contain several provisions which may be relevant to your inquiry. For example, §1401.5 of the regulations states that each entity subject to the Law must accept requests for public access to records and produce records "during all hours they are regularly open for business." In addition, the regulations provide that a "written request shall not be required for records that have been customarily available without written request" [§1401.6(a)]. It is likely that the Town's minute book was customarily available for public inspection without a written request prior to the enactment of the Freedom of Information Law. If that was the case, a written request for the information remains unnecessary. Moreover, this office has consistently advised that a failure to complete a form prescribed by an agency cannot be a valid ground for denial of access. So long as a request is reflective of an identifiable record, it is sufficient.

Enclosed are copies of both the Freedom of Information Law and the regulations promulgated thereunder.

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
Enclosures

cc: Mr. John Kirvin (with enclosures)
Town Supervisor
Town of Rotterdam
Vinewood Avenue
Schenectady, New York 12306

STATE OF NEW YORK
COMMITTEE ON PUBLIC ACCESS TO RECORDS

FOIL-AO-535

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

April 22, 1977

Dr. Stephen B. Dobrow
Committee for Better Transit, Inc.
Room 606
211 East 43rd Street
New York, New York 10017

Dear Dr. Dobrow:

Your inquiry, which was sent to the Committee by Louis Tomson, indicates that you have had difficulty in obtaining records from the Metropolitan Transportation Authority (hereafter "The MTA").

According to your correspondence, you unsuccessfully attempted to gain access to several areas of information relative to proposed cuts in service by the MTA. The following paragraphs deal with each area of your request in the order appearing in your letter.

It is noted at the outset that the Freedom of Information Law provides access to certain existing records [see attached, Freedom of Information Law, §88(1)(a) through (i)]. Therefore, if a request is reflective of information that does not exist in the form of a record or records, an agency need not compile a new record in response to a request. With respect to your letter to Mr. Yunich, it is possible that the MTA has the information sought, but that the information does not exist in the form of a record or records analogous to those sought.

First, present and proposed schedules should be made available under one or more provisions of the Freedom of Information Law. For example, §88(1)(d) of the Law provides access to statistical or factual tabulations; §88(1)(e) provides access to instructions to staff that affect members of the public. Consequently, the schedules sought should be made available. It is also noted that it has been held that the phrase "statistical tabulations" includes figures representing not only objective reality, but also proposals made in statistical or tabular form. In Dunlea v. Goldmark, the Appellate Division, 3rd Department held that "...there is no statutory requirement that such data be limited to 'objective' information and there is no apparent necessity for such limitation" 389 NYS 2d 423 425 (1976). The facts in the Dunlea case concern a request for budget work sheets

containing several columns of statistics, one of which represented actual expenditures by an agency during a fiscal year and the others representing recommendations by an agency and by budget examiners. In granting access, the court did not distinguish between the statistical tabulations based upon fact and those that were purely advisory in nature.

Similarly, statistical or factual tabulations relative to dollar savings to be realized by the proposed cuts as well as those pertaining to the estimated ridership loss should be made available under the same rationale.

Records of the environmental impact of the cuts may or may not be accessible depending upon their nature. Portions of the records consisting of statistical or factual materials are accessible. However, other portions consisting of deliberative or advisory remarks are not accessible as of right under the New York statute. Nevertheless, if the records have been sent to a federal agency pursuant to federal law, they would likely be available from the agency pursuant to the federal Freedom of Information Act (5 USC §552). With regard to your inquiry generally, much of the information may be available from a federal agency.

I would like to point out that the logic of the New York statute is the opposite of its federal counterpart. The former lists categories of records that are accessible to the exclusion of all others, while the latter provides access to all records unless they are classified as deniable. Consequently, rights of access granted by the federal Act are more substantial than those granted by state law.

Records relative to alternative methods for cuts that were studied and rejected may be accessible to the extent that such records consist of statistical or factual tabulations. In addition, if the MTA as a body made determinations at its meetings to adopt or reject particular proposals, records of the final determinations by the MTA are accessible pursuant to §88(1)(h) of the Freedom of Information Law.

The same rationale could be employed regarding records of the reasons and numerical data for choosing particular cuts over others. With respect to the reasons for adopting one plan as opposed to others, perhaps some of the records contain statements of policy adopted by the MTA. If so, they are accessible under §88(1)(b) of the Law. That provision grants

access to statements of policy and interpretations adopted by an agency as well as materials constituting statistical or factual tabulations leading to the formulation of policy. Additionally, the reasons for choosing particular cuts over others as well as the relationship to long term plans for transit improvement may be found in audits performed either by the MTA or by a consulting firm, for example. If such documents indeed exist, they are accessible under §88(1)(d).

The final area of information sought pertains to records citing the consistency of the plans with "maintaining mobility" and New York City's Transportation Control Plan. As stated earlier, if records have not been created that are reflective of the information sought, the MTA need not compile such records in response to a request. Nevertheless, there may be audits and statistical or factual tabulations relative to the inquiry.

It is suggested that you seek a copy of the MTA subject matter list, which is required to be compiled by §88(4) of the Law. In brief, the list must make reference by category to all records produced, filed or first kept since the effective date of the Freedom of Information Law, which is September 1, 1974. The list may be of substantial utility to you in determining the categories the MTA has in its possession. It also should help you in formulating your request.

Attached for your perusal are regulations promulgated by the Committee, which have the force and effect of law and govern the procedural aspects 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

RJF:js
Att.

cc: David Yunich
Louis Tomson

STATE OF NEW YORK
COMMITTEE ON PUBLIC ACCESS TO RECORDS

FOIL-AO-536

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

MMITTEE MEMBERS
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EXECUTIVE DIRECTOR
ROBERT J. FREEMAN

April 25, 1977

Mr. Paul J. Browne
Correspondent
Watertown Daily Times
The Capitol
Albany, New York 12224

Dear Mr. Browne:

Thank you for your interest in the Freedom of Information Law. Your inquiry pertains to denials of access to records by the Division of State Police concerning records in possession of the State Police Pistol Bureau. The issues raised in your letter are dealt with in the ensuing paragraphs.

First, according to your letter, Deputy Superintendent Warren B. Surdam provided access to statistical information compiled by the Division since 1974, but denied access to statistics reflective of analogous information compiled prior to 1974. The ground for denial is that rights of access granted by the Freedom of Information Law are not retrospective and that the Division is not obligated to provide access to records compiled before the effective date of the Law, September 1, 1974.

In this regard, shortly after the Law became effective, the Committee issued a series of resolutions dealing with basic questions arising under the Freedom of Information Law. One of the resolutions dealt with the retrospective application of the Law and stated that

> "WHEREAS, Many agencies have concluded that the Freedom of Information Law does not apply to documents that were on file prior to the Law's effective date, September 1, 1974, and
>
> WHEREAS, The Committee through its staff memorandum entitled Freedom of Information Law Historical Perspective, has explained the remedial nature of the Law, now therefore, be it...

> RESOLVED, That this Committee pursuant to its authority in Section 88(9)(a)(i) and 88(9)(a)(ii) of the Freedom of Information Law, declares that all records in possession of an agency and municipality are subject to the mandates of the Law, without regard to the date of their production, filing or promulgation."

As such, it is my opinion that the Freedom of Information Law provides access to records created prior to its effective date and that statistical materials compiled to 1974 are accessible.

Second, your request for tabulations of serial numbers of destroyed firearms furnished to the Division by the Jefferson County Sheriff's Department was denied on the ground that disclosure would result in an unwarranted invasion of personal privacy. According to your letter, the Division grounded its denial on the notion that such an invasion would occur because names of persons not involved in criminal activity would be disclosed. In my view, the rationale for the denial is inappropriate. Disclosure of serial numbers and the names of the individuals to whom serial numbers relate do not indicate that those individuals were involved in criminal activity. Moreover, Section 400.00(5) of the Penal Law clearly provides access to approved applications for licenses to carry, possess, repair and dispose of fire arms. In effect, by stating that approved applications are accessible, the Legislature found that disclosure of those records would constitute a permissible rather than an unwarranted invasion of personal privacy.

In addition, when a license is revoked due to conviction of a licensee of a felony or a serious offense, disclosure would not under such circumstances result in an unwarranted invasion of personal privacy. Booking records are clearly accessible under the Freedom of Information Law [§88(1)(f)] and judicial records reflective of a conviction are also accessible [see Judiciary Law, §255]. Therefore, even if disclosure of serial numbers could be related to names of individuals convicted of a felony or a serious offense, the release of such information would not result in an unwarranted invasion of personal privacy because the information reflective of convictions is readily available under other provisions of law. As such, disclosure of serial numbers of destroyed firearms that are identifiable to licensees would not in any case result in an unwarranted invasion of personal privacy.

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:llb

cc: Mr. Warren B. Surdam
Deputy Superintendent
Division of State Police
State Office Building Campus
Albany, New York 12226

Charles J. LaBelle, Esq.
Assistant Counsel
Division of State Police
State Office Building Campus
Albany, New York 12226

STATE OF NEW YORK
COMMITTEE ON PUBLIC ACCESS TO RECORDS

FOIL-AO-537

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

MMITTEE MEMBERS
ELIE ABEL - Chairman
T. ELMER BOGARDUS
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ROBERT W. SWEET
EXECUTIVE DIRECTOR
ROBERT J. FREEMAN

April 26, 1977

Richard S. Ringwood, P.C.
[redacted]

Dear Mr. Ringwood:

Thank you for your letter of April 22. I apologize for not being as responsive to your first inquiry as perhaps I should have been.

Your inquiry concerns whether members of a school board must disclose their votes for officers openly or whether they can vote secretly at an open meeting.

The Freedom of Information Law, §88(5), states that each agency or municipality, including a school district, controlled by a board or other group having more than one member shall maintain and make available for public inspection a record of the final votes of each member in every proceeding in which the member votes. Therefore, the School Board must compile a record which identifies each member of the Board with his or her vote. Consequently, in my opinion, voting by means of a secret ballot is prohibited by the Freedom of Information Law pursuant to the provision cited above.

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

FOIL-AO- 533
OML-AO- 99

STATE OF NEW YORK
COMMITTEE ON PUBLIC ACCESS TO RECORDS

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

April 26, 1977

Ms. Esther Kamlet
[redacted]

Dear Ms. Kamlet:

Thank you for your interest in the Freedom of Information Law and the Open Meetings Law. I am in receipt of three letters from you, and the ensuing paragraphs will deal with the issues raised in each of them.

The first letter pertains to the status of "planning sessions" which, according to your letter, have been closed to the public. In another letter, you indicated that minutes of the so-called planning sessions were read at the regular meetings of the board. In this regard, although the status of the Open Meetings Law is unclear with respect to the status of work sessions, planning sessions and the like, the Committee advised in its report to the Legislature that meetings that must be open to the public are convened when each member of a public body receives reasonable notice that the body will meet at a specific time and place and that, following notification, at least a quorum of the body convenes for the purpose of discussing public business. Therefore, if the ingredients described in the preceding sentence are present regarding the planning sessions, they are, in my opinion, meetings that must be open to the public.

It is noted that it has been argued that the term "transact" as it appears in the definition of "meeting" [§92(1)] in the phrase "officially transacting public business," means that action will be taken. However, according to an ordinary dictionary definition of the term, "transact" means merely to carry on business or to discuss. Therefore, an intent to take action need not be present.

Moreover, in one of the first decisions rendered under the Open Meetings Law, Judge Stark of the Supreme Court, Suffolk County, held that public bodies must comply with §95 of the Law. Section 95 states that an

executive session, which is defined as a portion of an open meeting during which the public may be excluded [§92(3)], may be held only upon a majority vote of the total membership of a public body, taken in an open meeting pursuant to a motion identifying the subject matter to be discussed. In addition, paragraphs (a) through (h) of §95(1) specify and limit the subjects that may be discussed during an executive session.

I believe that the preceding is also responsive to the question raised in the third paragraph of your second letter.

Your second and third letters deal generally with procedures adopted by the Plainedge Board of Education under the Freedom of Information Law. I will review the regulations and make comments on them.

First, the regulations indicate that responses for requests made under the Freedom of Information Law will be handled between the hours of 10:00 a.m. and 3:00 p.m. The regulations promulgated by the Committee, which have the force and effect of law and with which each entity of government in the state must comply, state that each entity subject to the Law shall accept requests for public access to records and produce records "during all hours they are regularly open for business" [§1401.5(a)]. Therefore, if regular business hours of the district are limited to five hours, as indicated in the district's regulations, the Committee's regulations have been followed. However, if the district's regular business hours extend beyond the five-hour period specified in its regulations, the regulations are violative of those promulgated by the Committee.

Second, with respect to "Eligibility," district procedures state that rights of access are granted only to residents of the Plainedge Union Free School District and official news media. The Freedom of Information Law provides that the nature of a record determines whether or not the record is accessible, not the status or interest of the person making the request. Consequently, the Law states and the Committee has resolved that, if records are available under the statute, they should be made equally available to any person without regard to status or interest [see enclosed resolution; see also Freedom of Information Law, §88(6)].

Under subdivision (1) of the section entitled "Procedures," it is stated that a "request must be in writing on form 375." In this regard, §1401.6(a) of the Committee's regulations states that written requests shall not be required for records that have been made customarily available without a written request. Moreover, the Committee has consistently advised that a failure to use a form prescribed by an agency is not an appropriate ground for denial of access. So long as a request is reflective of identifiable records, any request in writing should suffice.

Subdivision (2) under "Procedures" requires that an applicant state the purpose for a request. As stated previously, neither the individual's status or interest is relevant under the Freedom of Information Law. Moreover, Shapiro v. Town of Ramapo [Supreme Court, Rockland County (1975)] held that an individual need not state the purpose for making a request under the Freedom of Information Law.

Subdivision (3) under "Procedures" pertains to an appointments procedure and the availability of appropriate personnel. As noted earlier, entities having regular business hours must accept requests and produce records during all regular business hours [§1401.5(a)]. An appointments procedure is permitted only in entities of government which have no regular business hours. Furthermore, it is important to point out that the Freedom of Information Law provides a right. Consequently, it is as much the duty of school district personnel to respond to a request as it is to perform any of their other duties. Even prior to the enactment of the Freedom of Information Law, it was 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" [Sorley v. Lister, 218 NYS 2d 215 (1961)]. Therefore, "mere inconvenience" to the school district is not a sufficient ground for denial of access.

It is noted, however, that the Committee's regulations provide that a response to a request must be given promptly and within five business days of its receipt.

Enclosed for your perusal are copies of the Freedom of Information Law, the Open Meetings Law, regulations promulgated under the Freedom of Information Law, the Committee's report to the Legislature on the Open Meetings Law and a pamphlet describing your rights 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

Enclosures

cc: Mr. Gagliardo (with enclosures)
Board President
Board of Education
Plainedge Union Free School District
Hicksville Road
Bethpage, New York 11714

RJF:lbb

FOIL-AO-539

April 26, 1977

Richard S. Ringwood, P.C.
[redacted]

Dear Mr. Ringwood:

Thank you for your letter of April 22. I apologize for not being as responsive to your first inquiry as perhaps I should have been.

Your inquiry concerns whether members of a school board must disclose their votes for officers openly or whether they can vote secretly at an open meeting.

The Freedom of Information Law, §88(5), states that each agency or municipality, including a school district, controlled by a board or other group having more than one member shall maintain and make available for public inspection a record of the final votes of each member in every proceeding in which the member votes. Therefore, the School Board must compile a record which identifies each member of the Board with his or her vote. Consequently, in my opinion, voting by means of a secret ballot is prohibited by the Freedom of Information Law pursuant to the provision cited above.

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

FOIL-AO-540

STATE OF NEW YORK
COMMITTEE ON PUBLIC ACCESS TO RECORDS

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

April 29, 1977

John E. Roe, Esq.
Corporation Counsel
City of Albany
Department of Law
100 State Street
Albany, New York 12207

Dear Mr. Roe:

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

It is important to note at the outset that the news article attached to your letter pertains to the action of the Legislature with regard to the compilation of the subject matter list, which must be maintained and made available pursuant to §88(4) of the Freedom of Information Law. I have advised both houses of the Legislature that the list must make reference by category to all records in their possession and should not be restricted to categories of records which they consider to be accessible. It is my understanding that the Senate has taken appropriate action based upon the advice.

Your letter, however, pertains to the payroll record, which is required to be compiled pursuant to §88(1)(g) of the Law. I believe that both houses of the Legislature have compiled and made available payroll records identifiable to each employee that provide names, addresses, titles and salaries of all employees of the respective houses. As such, it appears that both the Senate and the Assembly have complied with §88(1)(g) of the Law.

I believe that your statement that neither house would disclose such matters without permission from the individuals involved is inaccurate and that both houses have compiled payroll records since the implementation of the Freedom of Information Law in 1974.

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:js

FOIL-AO-541

STATE OF NEW YORK
COMMITTEE ON PUBLIC ACCESS TO RECORDS

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

April 29, 1977

John E. Roe, Esq.
Corporation Counsel
City of Albany
Department of Law
100 State Street
Albany, New York 12207

Dear Mr. Roe:

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

Your inquiry pertains to a request for a voluminous amount of records and the resulting burden placed upon the office of the City Clerk. It is suggested that the regulations promulgated by the Committee, which have the force and effect of law, be reviewed (see attached). Specifically, §1401.6(b) of the regulations provides that a request must be answered promptly and within 5 business days of its receipt, except in the case of extraordinary circumstances. If the mere volume of the request in your opinion results in an "extraordinary circumstance" perhaps the records could be provided pursuant to the request in piecemeal fashion over a period of time.

Above all, the Freedom of Information Law should in my view be interpreted reasonably. On one hand, case law rendered long before the Freedom of Information Law was enacted held that "mere inconvenience" cannot be equated with detriment to the public interest or be used as a ground for denial of access [Sorley v. Lister, 218 NYS 2nd 215, 217 (1961)]. On the other hand, the Law should not be given effect to the extent that its implementation results in an inability on the part of government to function effectively.

Consequently, it is suggested that the City Clerk arrange to meet with the applicant for the records, Mr. Minsky, in order to arrange a schedule for inspection and

copying which optimally would provide a substantial number of records to Mr. Minsky while concurrently providing the City Clerk with a reasonable period of time in which to perform his other functions.

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: Bart R. Minsky

FOIL-AO-542

May 2, 1977

Mrs. Shirley Fortunato
[redacted]

Dear Mrs. Fortunato:

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

Although your letter does not specify the nature of the records sought, the Freedom of Information Law provides substantial rights of access to records in possession of a school district. Section 88(1) lists specified categories of records that must be made available, including any other records made available by any other provision of law [§88(1)(1)]. 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, when the Freedom of Information Law is read in conjunction with the statute quoted above, virtually all records in possession of a school district are available.

Enclosed for your perusal are copies of the Freedom of Information Law, the regulations promulgated by the Committee, which govern the procedural aspects of the statute and have the force and effect of law, a pamphlet entitled "The Freedom of Information Law and How to Use It" and a pocket brochure outlining 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

kf
Enc.

cc: Board of Education
Smithtown Central School District

OML-AO-103
FOIL-AO-543

STATE OF NEW YORK
COMMITTEE ON PUBLIC ACCESS TO RECORDS

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

May 3, 1977

Mrs. Rose Mary Warren
[redacted]

Dear Mrs. Warren:

Thank you for your interest in the Open Meetings Law and the Freedom of Information Law. Your inquiry pertains to both statutes and the ensuing paragraphs will deal with each of the issues raised.

First, your letter states that the school board enters into executive session when its membership does not want the public to hear particular discussions. In this regard, it is important to point out that, although the recently enacted Open Meetings Law permits public bodies to hold executive sessions, such sessions may be held only to discuss specific matters listed in the statute and that entry into an executive session must be preceded by following the procedure set forth in §95 of the Law. In relevant part, §95(1) states: [U]pon a majority vote of its total membership, taken in an open meeting pursuant to a motion identifying the general area or areas of the subject or subjects to be considered, a public body may conduct an executive session..." for purposes specified in paragraphs (a) through (h) of the provision. Therefore, a public body may not enter an executive session to discuss any matter of its choosing. As stated earlier, a public body may discuss only those matters described in paragraphs (a)through (h) of §95(1) after having followed the procedures quoted above.

Second, your inquiry concerns rights of access to notes compiled by the Superintendent of schools at the so-called executive sessions. According to your letter, it has been

contended that since the notes are not compiled by the district clerk, they are not accessible. Nevertheless, the Freedom of Information Law provides broad rights of access to school district records. Section 88(1) (i) of the Freedom of Information Law provides access to any other records made available by any other provision of law. 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 or the district at all reasonable hours, and any such voter may make copies thereof."

As such, virtually all records in possession of a school district are publicly available. Moreover, §96 of the Open Meetings Law requires that minutes be taken at executive sessions, as well as sessions that are open to the public.

With respect to staff salary negotiations, one of the subjects that may be discussed in executive session concerns collective bargaining negotiations under the Taylor Law [see Open Meetings Law, §95(1) (e)]. If the salary negotiations referred to in your letter are in fact collective bargaining negotiations, they may be held in executive session. If they do not fall within the scope of collective bargaining, it appears that such negotiations must be held during an open meeting, unless the subject matter falls within another exception [see e.g., §95(1)(f)].

The final issue raised concerns the inability of the public to obtain copies of records discussed at open meetings. As mentioned before, the Freedom of Information Law when read in conjunction with §2116 of the Education Law provides substantial rights of access to school district records. Therefore, although there may be situations in which there is an insufficient number of copies for interested persons attending the meeting, the records may be obtained thereafter by means of a request made under the Freedom of Information Law.

Enclosed are copies of the Freedom of Information Law, the regulations promulgated by the Committee which have the force and effect of law, a pamphlet entitled "Freedom of Information Law and

How To Use It", the Open Meetings Law and the Committee's first annual report to the Legislature on that 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

Robert J. Freeman
Executive Director

RF:kf
Enc.

cc: Niagara-Wheatfield School District
2292 Saunders Settlement Road
Sanborn, NY 14132

FOIL-AO-544

STATE OF NEW YORK
COMMITTEE ON PUBLIC ACCESS TO RECORDS

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

May 3, 1977

Mr. Joseph G. Zuckerman
[redacted]

Dear Mr. Zuckerman:

Thank you for your letter of April 26.

Your inquiry concerns the standards under the Freedom of Information Law for review of a denial of access. In this regard, the appeal procedure is contained in §88(8) of the statute and §1401.7 of the regulations promulgated by the Committee, which have the force and effect of law. It is noted that the appeal procedure does not include the requirement of a hearing and the presence of due process.

If after having exhausted your administrative remedies under the Law and the regulations the records continue to be unavailable, you may initiate a proceeding under Article 78 of the Civil Practice Law and Rules to review the denial.

I hope that I have been of some assistance.

Sincerely,

Robert J. Freeman

Robert J. Freeman
Executive Director

RJF:js

FOIL-AO-545

STATE OF NEW YORK
COMMITTEE ON PUBLIC ACCESS TO RECORDS

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

May 6, 1977

Mr. Leo Bernard
[redacted]

Dear Mr. Bernard:

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 both the Freedom of Information Law and the Open Meetings Law.

Your question pertains to rights of access to bills of the Towns of Wheeler and Prattsburgh, as well as the salaries of town officials. In this regard, the Freedom of Information Law provides rights of access to specified 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 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, the bills to which you referred in your letter are, in my opinion, clearly accessible.

Moreover, §88(1)(g) of the Freedom of Information Law and §1401.3 of the regulations promulgated by the Committee, which have the force and effect of law, require every entity subject to the Law to compile and make available to any person a payroll record consisting of the name, address, title and salary of each officer or employee of the entity. Consequently, the Law provides a right of access to the salary information that you have 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

Robert J. Freeman
Executive Director

RJF:js
Enc.

cc: Attorney General
Town Clerk, Town of Wheeler
Town Clerk, Town of Prattsburgh

FOIL-AO-546

STATE OF NEW YORK
COMMITTEE ON PUBLIC ACCESS TO RECORDS

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

May 6, 1977

Mr. Florence DeTuro
[redacted]

Dear Mrs. DeTuro:

Thank you for your interest in the Freedom of Information Law. Attached, as requested, is a copy of a pamphlet entitled "Freedom of Information Law and How To Use It."

The Freedom of Information Law does not provide access to individuals to records pertaining to them. The law lists specified categories of records that must be made available [see enclosed Freedom of Information Law, §88 (1)]. The records noted in your letter likely do not conform to any of the categories of accessible records. Therefore, it appears that they are not accessible. However, it is suggested that if, for example, you are a member of a union, it might be worthwhile to review your contract. It is possible that the contract provides rights of access to individuals to their personnel records.

It is also noted that the Law is applicable only to governmental entities in New York. Consequently, if your employer is outside of government, the Freedom of Information Law does not apply.

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

Enc.

FOIL-AO-547
OML-AO-105

STATE OF NEW YORK
COMMITTEE ON PUBLIC ACCESS TO RECORDS

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

May 10, 1977

Mr. Luther P. Burroughs
Orleans County Taxpayers Association
123 S. Main Street
Albion, New York 14411

Dear Mr. Burroughs:

Thank you for your interest in the Freedom of Information Law and the Open Meetings Law. Your inquiry pertains to rights of access to tape recordings of regular and special meetings of Orleans County Board of Supervisors, as well as the practices of the Orleans County Board and the Albion Village Board with respect to the Open Meetings Law.

First, according to our telephone conversation, the tapes are prepared by the Clerk of the Orleans County Board of Supervisors and are used during all open meetings of the Board. You stated further that the tape recorder is owned by the County. Based upon the foregoing, in my opinion, access to tape recordings of open meetings should be granted under the Freedom of Information Law. It is important to note that if the tape recorder was personally owned by the Clerk and if the tape recordings were used solely for the personal use of the Clerk as an aid in transcribing the minutes, it would be advised that the tape would not be accessible. However, since the tape recorder and the tapes are the property of the county, I believe that they are accessible.

The Freedom of Information Law lists specified categories of records that must be made available [§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 provides access to virtually all the records in possession of a municipality, such as a county. Therefore, when §51 is read in conjunction with the Freedom of Information Law, tape recordings of open meetings are, in my view, publicly accessible.

Moreover, §208(4) of the County Law provides that, unless otherwise provided by the 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..."

During our conversation, I believe that you stated that the County would be willing to provide a stenographic transcript of the tape recordings if you would be willing to pay for the cost of transcription. In my view, however, a duplicate of the tape recordings should be prepared on request. The fee for duplication should reflect the actual cost of its production [see attached regulations pertaining to fees, §1401.8(c)(3)].

With regard to County committee reports, such as those of the Department of Buildings or Public Works, they are, in my opinion, also accessible pursuant to the Freedom of Information Law when read in conjunction with either §51 of the General Municipal Law or §208 of the County Law under the same rationale as described above.

With respect to meetings of public bodies, the Open Meetings Law provides that all meetings of public bodies must be convened in full view of the public and that

executive sessions may be held to discuss subjects that are limited and specified in §95(1) (a) through (h) of the statute. Furthermore, a public body may enter into an executive session only after having followed the procedure set forth in §95(1) of the Law. That provision states that "[U]pon a majority vote of its total membership, taken in an open meeting pursuant to a motion identifying the general area or areas of the subject or subjects to be considered, a public body may conduct an executive session..." to discuss the subjects listed in paragraphs (a) through (h) of §95(1).

Attached for your consideration are several documents concerning both statutes that may be helpful to you.

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:kf
Enc.

cc: Orleans City Board of Supervisors

FOIL-AO-548

STATE OF NEW YORK
COMMITTEE ON PUBLIC ACCESS TO RECORDS

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

May 10, 1977

IRIDE [redacted]

Dear "IRIDE":

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

With respect to your inquiry concerning records related to an adopted child, §372 of the Social Service Law states that records relative to adoptive children "shall be deemed confidential and the board shall safeguard them from coming to the knowledge of and from inspection or examination by any person other than one authorized, by the commissioner or by a justice of the supreme court after a notice to all interested persons and a hearing, to receive such knowledge or to make such inspection or examination. No person shall divulge the information thus obtained without authorization so to do by such commissioner or by such justice." Consequently, the records that you are seeking are deniable.

Nevertheless, it is suggested that the inquiry be directed to the agency in custody of the records. It is possible that the information sought may be provided orally without physically providing access to the records.

I regret that I cannot be of further assistance. Should any further questions arise, please feel free to contact me.

Sincerely,

Robert J. Freeman

Robert J. Freeman
Executive Director

RJF:js

FOIL-AO-549

STATE OF NEW YORK
COMMITTEE ON PUBLIC ACCESS TO RECORDS

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

May 20, 1977

Mr. Michael Kennedy
[redacted]

Dear Mr. Kennedy:

Thank you for your interest in the Freedom of Information Law. Your inquiry concerns rights of access to records in possession of the Maritime College of the State University of New York concerning records relative to a denial of tenure as well as records contained in your personnel file.

The Freedom of Information Law provides access to specified categories of records [§88(1)]. Therefore, to the extent that the information sought is analogous to the categories of accessible information, such information must be made available to you. For example, a record reflective of a determination that tenure be denied would likely be accessible pursuant to §88(1)(h), which provides access to final determinations made by the governing body of an agency. However, based upon the records described in your letter, it would appear that most of the information sought does not conform to any of the categories of accessible records. Consequently, a great deal of the information sought may properly be denied.

It is noted that one of the most glaring deficiencies in the Freedom of Information Law is the failure to address the issue of access by individuals to records pertaining to them. In this regard, the Committee has proposed legislation that would if enacted be of substantial assistance to you. First, instead of providing

categories of accessible records, the proposed amendments would provide access to all records, except those specifically deemed deniable. Secondly, the Law would provide access to individuals to records pertaining to them except to the extent that such records are deemed deniable.

I regret that I cannot be of greater assistance. Should any further questions arise, please feel free to contact me.

Sincerely,

Robert J. Freeman

Robert J. Freeman
Executive Director

RJF:js

STATE OF NEW YORK
COMMITTEE ON PUBLIC ACCESS TO RECORDS

FOIL-AO-550

COMMITTEE MEMBERS
ELIE ABEL - Chairman
ELMER BOGARDUS
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ROBERT W. SWEET
EXECUTIVE DIRECTOR
ROBERT J. FREEMAN

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

May 16, 1977

Mr. Thomas Goggin
[redacted]

Dear Mr. Goggin:

Your question pertains to a request for information directed to Mr. Thomas Markham, Chief Engineer of Construction of the New York City Department of Highways. You indicated that although the request was made approximately five weeks ago, no response has yet been given.

With respect to the time limit for responding to a request, the regulations promulgated by the Committee, which have the force and effect of law, govern. In relevant part, Section 1401.6 of the regulations provides as follows:

> "(b) (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" (see attached regulations).

Moreover, Section 1401.7(c) of the regulations provides that failure to comply with the provisions quoted above "shall be deemed a denial of access" by the agency.

Since, according to your letter there has been neither a response nor an acknowledgment of your request including an explanation for the delay or an estimate of the date the determination will be made, it appears that you have been constructively denied access and that you may appeal to whomever has been designated to hear appeals.

A copy of my opinion will be sent to Mr. Markham. Perhaps it will expedite a response on the part of the Department of Highways.

I hope that I have been of some assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:kf
Enc.

cc: Mr. Thomas Markham
Department of Highways

STATE OF NEW YORK
COMMITTEE ON PUBLIC ACCESS TO RECORDS

FOIL-AO-551

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

May 18, 1977

Mr. George D. Bernstein
Journal Staff Writer
Poughkeepsie Journal
P.O. Box 1231
Poughkeepsie, NY 12602

Dear George:

Thank you for your interest in the Freedom of Information Law. Your inquiry pertains generally to denials of access by the Office of Court Administration (OCA) to statistical case load data regarding individual judges. Specifically, your questions deal with the application of the Freedom of Information Law to the Office of Court Administration, whether the OCA must adopt a procedure consistent with regulations promulgated by the Committee, and whether the OCA must make available statistical or factual tabulations, such as tabulations reflective of total arraignments and disposition of cases by individual judges.

First, Section 87(1) of the Freedom of Information Law includes within the definition of "agency" any "governmental entity performing a governmental or proprietary function for the state..." Since the OCA is a governmental entity performing a governmental function for the State, it is an agency that is subject to the rights and duties prescribed by the Freedom of Information Law.

Although the OCA deals with the judicial branch, rights of access granted by the Freedom of Information Law do not, in my view, unconstitutionally infringe upon the inherent powers of the judicial branch. In theory, a challenge to the application of the Law to the judicial branch might be based on the argument that such application would infringe upon the inherent power of the judiciary, thereby offending the principle of "separation of powers." Such a contention would, in my opinion, in this instance be inaccurate. "Separation of powers" means that the inherent functions and powers of one branch of government may not be exercised by the "same hands" which control the powers of either of the other branches (Saratoga Springs v. Saratoga Gas, Electric, Light and Power Co., 191 NY 123, 83 N.E. 693, 1921).

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

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

Second, Section 88(2) of the Freedom of Information Law requires each agency to adopt rules in conformity with those promulgated by the Committee. Therefore, the OCA must adopt rules implementing the procedural aspects of the Freedom of Information Law.

And third, assuming that the OCA has in its possession the records sought, statistical or factual tabulations relative to judges' case loads, the records are, in my opinion, accessible as of right pursuant to Section 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:kf

cc: Fred Miller
Office of Court Administration

STATE OF NEW YORK
COMMITTEE ON PUBLIC ACCESS TO RECORDS

FOIL-AO-552

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

May 23, 1977

Mr. Richard G. Thompson
Councilman
Town of Goshen
P.O. Box 217
Goshen, NY 10924

Dear Mr. Thompson:

Thank you for your interest in the Freedom of Information Law. Your question pertains to rights of access to residents of one municipality to records of another municipality.

One of the basic tenets of the Freedom of Information Law is that the nature of the records determines whether or not they are accessible, not the status of the person making a request. Moreover, as the Committee resolved shortly after the Law became effective, "...information accessible under the Freedom of Information Law shall be made equally accessible to any person, without regard to status or interest." Consequently, the status of a person requesting records has no bearing upon rights of access.

In addition, municipalities have for decades been subject to Section 51 of the General Municipal Law, which has long provided access to virtually all records of municipalities to any "taxpayer." In this regard, it is noted that "taxpayer" since 1912 has been interpreted to include any person in the state (see Matter of Egan, 205 NY 147).

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:kf
Enclosure

STATE OF NEW YORK
COMMITTEE ON PUBLIC ACCESS TO RECORDS

FOIL-AO-553

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

May 23, 1977

Mr. Henry H. Zygadlo
Supervising Principal
Mount Morris Central School
Mount Morris, NY 14510

Dear Mr. Zygadlo:

Thank you for your interest in complying with the Freedom of Information Law. Your inquiry concerns a request for a list of graduating seniors of the Mount Morris Central School.

In my opinion, access to such a list may be denied on two grounds. Under the Freedom of Information Law, Section 88(3)(d) states that an unwarranted invasion of privacy includes the sale or release of lists of names and addresses that would be used for private, commercial, or fund raising purposes. Although the purpose for the request is not specified in your letter, it is important to note that the five instances of unwarranted invasions of privacy listed in paragraphs (a) through (e) of Section 88(3) represent merely five examples among conceivable dozens of unwarranted invasions of privacy. Consequently, the Law provides the custodians of records with substantial latitude to determine when disclosure might result in an unwarranted invasion of personal privacy.

Moreover, it is possible that the list may be exempt from disclosure by statute. Specifically, the "Family Educational Rights and Privacy Act of 1974" states in essence that education records identifiable to individual students are confidential. However, if a school district has included the list of graduating seniors as directory information, the list may be made available. Nevertheless, before determining that certain records consist of directory information, a general notice must be given to the parents of students under the age of 18 in order that the parents are given an opportunity to object to the disclosure of such information. In sum, if the list in question is not included within the scope of directory information, it would appear that it is confidential by means of 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

Robert J. Freeman
Executive Director

RJF:kf

STATE OF NEW YORK
COMMITTEE ON PUBLIC ACCESS TO RECORDS

FOIL-AO-554

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

May 23, 1977

Mr. Julius Hirschfeld
Attorney at Law
250 Fulton Avenue
Hempstead, NY 11550

Dear Mr. Hirschfeld:

Thank you for your interest in the Freedom of Information Law. Your inquiry concerns a denial of access to the home address of an employee of the New York City Fire Department.

The Freedom of Information Law provides that each entity subject to the Law must compile and make available a payroll record consisting of the name, address, title and salary of each employee of the entity. However, the Law does not specify which address, home or business, must be provided. Due to the lack of specific direction of the Law, the Committee has consistently advised that if, for example, the custodian of the payroll record feels that disclosure of home addresses would result in an unwarranted invasion of privacy of the employees, the business address may be given in its stead.

It is noted that this advice is based largely upon a decision rendered in 1972 dealing with the same matter (see Winston v. Mangan, 338 NYS 2D 654, 622). In brief, the decision held that unless a specific "private" need is shown for the home address, such as protection against "cronyism", home addresses 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

Robert J. Freeman
Executive Director

RJF:kf

STATE OF NEW YORK
COMMITTEE ON PUBLIC ACCESS TO RECORDS

FOIL-AO-555

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

May 23, 1977

Ms. Marion H. Waring
[redacted]

Dear Ms. Waring:

Thank you for your interest in complying with the Freedom of Information Law. Your inquiry pertains to a proposal to amend the existing policy of the Saratoga Springs School Board regarding its implementation of the statute. In relevant part, if enacted, the resolution would premise the rights of access to records of a board member upon a request made at a public meeting that is approved by a majority vote of those attending the meeting.

Although the Board may be within its power to resolve that it acts collectively and that an individual board member alone cannot act on its behalf, I do not believe that rights of access can be restricted by action of the Board president or the Board as a whole.

It is important to note that the Freedom of Information Law provides access to specified 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 Section 2116 of the Education Law which states:

> "[T]he records, books and papers belonging or appertaining to the office of any officer of a school district are hereby declared to

> be the property of such district and shall be open for inspection by any qualified voter of the district at all reasonable hours, and any such voter may make copies thereof."

Since the quoted provision grants right of access to virtually all district records to any qualified voter of the school district, it would appear that an attempt by the school board to restrict access regarding its own members is illegal.

Moreover, although members of the public to whom access is granted may be charged a fee for copying, it would appear that the charge of a fee with respect to a member of the Board acting in the performance of his or her official duties is senseless. By means of analogy, I cannot imagine that my employer, the Department of State, would charge a member of the Committee for making copies of records that are necessary to the performance of his official duties. Similarily, it is difficult to conceive of a compelling rationale for the situation described in your letter in which a member of a school board acting in the performance of his or her duties must pay to carry out those duties.

As a general matter, it is emphasized that the regulations promulgated by the Committee, which have the force and effect of law, specifically prohibit a fee for inspection of records.

With respect to the resolution cited in your inquiry, it is noted that the Board would act "by a majority vote of those attending said meeting."

Based upon the definition of "quorum" in Section 41 of the General Construction Law as well as the Open Meetings Law, it is suggested that a majority vote of members in attendance is insufficient to act. Rather, action may be taken only by a majority vote of the total membership of a public body.

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

Sincerely,

Robert J. Freeman

Robert J. Freeman
Executive Director

RJF:kf

cc: Carl S. Zilka, President
Board of Education
Saratoga Springs City Schools
5 Wells Street
Saratoga Springs, NY 12866

STATE OF NEW YORK
COMMITTEE ON PUBLIC ACCESS TO RECORDS

FOIL-AO-556

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

May 24, 1977

Mr. John Bogack
Extended Family Project
Department of Social Services
Islip Service Center
75 Fourth Avenue
Bay Shore, NY 11706

Dear Mr. Bogack:

Thank you for your interest in the Freedom of Information Law. Your inquiry concerns the statutory authority regarding access to records by ex-mental patients seeking hospitalization histories and students seeking school records from colleges and public school systems.

The Freedom of Information Law does not specifically pertain to the records sought. However, enclosed for your perusal are copies of Section 15.13 of the Mental Hygiene Law, which provides specific guidelines concerning disclosure of records identifiable to clients in facilities of the Department of Mental Hygiene, as well as the Family Educational Rights and Privacy Act of 1974 which deals with rights of access to education records. In brief, the latter statute provides that education records are confidential except with respect to parents of students under the age of eighteen who may inspect and copy records pertaining to their children. When an individual attains the age of eighteen, that person acquires the

rights of his or her parents. In addition, the statute is applicable to most institutions of higher learning, since it applies to any educational institutions in receipt of federal funds.

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

Sincerely,

Robert J. Freeman

Robert J. Freeman
Executive Director

RJF:kf
Enclosure

STATE OF NEW YORK
COMMITTEE ON PUBLIC ACCESS TO RECORDS

FOIL-AO-557
OML-AO-113

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

May 24, 1977

Mr. William Gerry
[redacted]

Dear Mr. Gerry:

Thank you for your interest in the Freedom of Information Law. Your inquiry pertains to the denial of access by the Citizens Advisory Committee to recommendations submitted by the Committee to the School Board of the Greenwood Lake Union Free School District. Your letter indicates that the chairman of the Committee refuses to release the report on the ground of "confidentiality."

In my opinion, the report is clearly available. First, the Citizens Advisory Committee is a public body within a scope of the Open Meetings Law (see attached).

Second, since the recommendations made by the Committee are reflective of action taken by that body, the minutes of the Committee must reflect such action. In this regard, Section 96 of the Open Meetings Law states that minutes of both open meetings and executive sessions must be compiled and made publicly available.

Third, as soon as the recommendations are in the possession of the School Board, they become

accessible from that body as well. The Freedom of Information Law provides 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 Section 2116 of the Education Law which states:

> "[T]he records, books and papers belonging or appertaining to the office of any officer of a school district are hereby declared to be the property of such district and shall be open for inspection by any qualified voter of the district at all reasonable hours, and any such voter may make copies thereof."

Therefore, when the Freedom of Information Law is read in conjunction with the above quoted provision of the Education Law, virtually all records in possession of a school district must be made available to the public.

And fourth, the term "confidential" is in my opinion over-used. From a legal point of view, records are confidential only by means of a statute requiring confidentiality or by judicial interpretation. A mere statement by a public official that records are confidential is meaningless, and the courts have so held for years [see e.g., Cirale v. 80 Pine Street Corp. 35 NY 2nd 113 (1974); People v. Keating, 286 App. Div. 150; Matter of Langert v. Tenney, 5AD 2nd 586]. The thrust of the cases cited hold that records may be deemed confidential if government can prove that disclosure would on

balance be detrimental to the public interest. It is noted that a mere assertion that records are confidential is inappropriate and that only a court can make such a determination.

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

Sincerely,

Robert J. Freeman

Robert J. Freeman
Executive Director

RJF:kf
Attachment
cc: School Board
Greenwood Lake Free Union School District

STATE OF NEW YORK
COMMITTEE ON PUBLIC ACCESS TO RECORDS

FOIL-AO-558

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

May 25, 1977

Jay B. Hashmall, Esq.
Brashich and Finley
Attorneys and Counsellors at Law
501 Madison Avenue
New York, New York 10022

Dear Mr. Hashmall:

Thank you for your interest in the Freedom of Information Law. Your inquiry pertains to the policy of the Office of the New York City Register, which provides access to certified copies of records in its possession at a charge of $2.00 per page.

In my opinion, the policy in question is violative of both the New York City Charter, Sections 1113 and 1114, and the regulations promulgated by the Committee, which have the force and effect of the Law. As you are aware, the regulations state that, unless a preexisting provision of law permits a higher fee to be charged, the maximum fee for copying is twenty-five cents per page. I believe that a charge for certification is separate and distinct from a charge merely for photocopies. Moreover, apparently no rationale has been provided by the City Register concerning its ability to provide certified copies, but an inability to provide copies without certification.

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

Sincerely,

Robert J. Freeman

Robert J. Freeman
Executive Director

RJF:kf
Attachment

cc: Office of the City Register
31 Chamber Street
New York, New York

FOIL-AO-559

STATE OF NEW YORK
COMMITTEE ON PUBLIC ACCESS TO RECORDS

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

May 26, 1977

Mr. Richard M. Warshauer
Editor and Publisher
Eastside Courier
Neighborhood Newspapers Inc.
205 East 42nd Street
New York, NY 10017

Dear Mr. Warshauer:

Thank you for your interest in the Freedom of Information Law. Your inquiry pertains to a denial of access by the New York City Police Department to information in the nature of police blotters and booking records.

In this regard, §88(1)(f) of the Freedom of Information Law specifically provides access to police blotters and booking records. Although the phrase "police blotter" has no legal definition, the Committee has consistently advised that, based upon custom and usage, a blotter is a document in the nature of a log or diary in which any event reported by or to a police department is recorded. According to your letter, the records most analogous to information contained in a police blotter are complaint records (Complaint form No. 63) which have been denied. If in fact the complaint form is used in lieu of what traditionally has been known as a police blotter, it is in my opinion accessible.

Moreover, case law tends to uphold this opinion. In a recent decision, it was held that records of complaints concerning a particular police officer must be made publicly available (Walker v. City of New York, Supreme Court, Queens County, N.Y. Law Journal, May 19, 1977). Secondly, another decision held that a "general complaint report" in possession of a police department is also accessible (Sheehan v. City of Binghamton, Supreme Court, Broome County, March 16, 1977). And third, the Freedom of Information Law provides 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 §1113 of the New York City Charter, which provides access to virtually all records in possession of any New York City agency, except records of the police and law departments. Despite the exception concerning police records, the Freedom of Information Law is a statute of general application. Consequently, it has been held that to the extent the charter provision is more restrictive than the Freedom of Information Law, it is inapplicable [Matter of Elisofon, Supreme Court, Kings County, N.Y. Law Journal, July 3, 1975; see also Walker, supra]. Therefore, it appears that the sole ground for denial would be based on the argument that the records are "investigatory files compiled for law enforcement purposes," which are deniable pursuant to §88(7)(d). However, as I interpret the Freedom of Information Law, police blotters, complaint forms and the like do not fall within the quoted exception, since such records are compiled in the ordinary course of business. Similarly, a denial based upon a potential unwarranted invasion of privacy [§88(3)] would, in my opinion, be inappropriate. By implication, since the case law holds that complaint forms and the like are publicly accessible, the courts tacitly stated that disclosure

of the information included within such records would result in a permissible rather than an unwarranted invasion of privacy.

In sum, it is my view that the complaint forms are accessible as of right 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

RJF:kf

cc: Mario M. Cuomo, Secretary of State
State Senator Roy M. Goodman
Assemblyman A.B. Peter Grannis
Assemblyman Mark Alan Siegel
Assemblyman Andrew Stein
City Councilman Carter Burden
City Councilwoman Carol Greitzer
City Councilman Henry J. Stern
City Councilman Robert F. Wagner, Jr.
Deputy Commissioner Francis J. McLoughlin
Captain John Neylan
Captain John Salo
Captain Bernard McRann

STATE OF NEW YORK
COMMITTEE ON PUBLIC ACCESS TO RECORDS

FOIL-AO-560

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

May 31, 1977

Mr. James J. Brady
[redacted]

Dear Mr. Brady:

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 Freedom of Information Law.

According to your letter, it appears that maps indicating property lines in the City of Kingston have been denied. If that is the case, the denial was in my opinion inappropriate.

The Freedom of Information Law provides 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 Section 51 of the General Municipal Law, which has long provided access to

> "[A]ll books of minutes, entry or account and the books, bills, vouchers, checks, contracts or other papers connected with or used or filed in the office of, or with any officer, board or commission acting for or on behalf of any county, town,

village or municipal corporation
in the state..."

Therefore, virtually all records in possession of a municipality are accessible, unless such records fall within the categories of deniable information listed in Section 88(7) of the Freedom of Information Law. Since none of the categories of deniable information would appear to be an appropriate ground for denial of access, I believe that the maps are accessible 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

RJF:kf
Attachment

cc: Thomas Wickman, P.E.
City Engineer
City Hall
Kingston, NY 12401

STATE OF NEW YORK
COMMITTEE ON PUBLIC ACCESS TO RECORDS

FOIL-AO-561

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

May 31, 1977

Mr. Joseph Eisner
Library Director
Plainedge Public Library
1060 Hicksville Road
Massapequa, NY 11758

Dear Mr. Eisner:

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

Your inquiry pertains to a proposed revision of the regulations adopted by the Plainedge Public Library under the Freedom of Information Law. The situation that you described is likely unique to libraries, which have regular business hours that extend far beyond what are commonly known as "regular business hours." In view of the availability of records during what are traditionally known as "regular business hours", it is my opinion that the special provisions concerning additional hours are appropriate and comply with the spirit of both the Freedom of Information Law and the regulations promulgated thereunder.

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:kf

STATE OF NEW YORK
COMMITTEE ON PUBLIC ACCESS TO RECORDS

FOIL-AO-562

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

May 31, 1977

Mrs. Patricia L. Allred
[redacted]

Dear Mrs. Allred:

Your letter addressed to Secretary of State Cuomo has been transmitted to the Committee on Public Access to Records, which is housed in the Department of State and is responsible for advising with respect to the Freedom of Information Law.

Although the subject matter of the record sought is unclear, the regulations promulgated by the Committee, which have the force and effect of law, provide that a response to a request must be given within five days of its receipt. Enclosed is a copy of the regulations for your perusal. It is suggested that you review Section 1401.6, which provides time limits for responding to request.

Also enclosed are copies of the Freedom of Information Law and a pamphlet entitled "The Freedom of Information Law and How To Use It."

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

Sincerely,

Robert J. Freeman

Robert J. Freeman
Executive Director

Enc.

cc: Secretary Cuomo

STATE OF NEW YORK
COMMITTEE ON PUBLIC ACCESS TO RECORDS

FOIL-AO-563

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

May 31, 1977

Mr. Robert Samuels
[redacted]

Dear Mr. Samuels:

Thank you for your interest in the Freedom of Information Law. Attached, as requested, are two wallet size cards outlining the Freedom of Information Law. In addition, also attached are two pamphlets entitled "The Freedom Of Information Law and How To Use It."

With respect to your inquiry, the names of licensed drivers in New York State are confidential by statute [see §202(3)(b) of the Vehicle and Traffic Law]. Similarly, information concerning New York State income tax identifiable to individuals is exempt from disclosure by statute [see §384 of the Tax Law]. Consequently, both areas of information described in your letter 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

Robert J. Freeman
Executive Director

RJF:kf
Enclosure

FOIL-AD-564

STATE OF NEW YORK
COMMITTEE ON PUBLIC ACCESS TO RECORDS

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

June 6, 1977

Ms. Victoria Siegel
[redacted]

Dear Ms. Siegel:

Thank you for your letter concerning the implementation of the Freedom of Information Law by the Village of Bayville. It is noted that the copy of your letter was not received until May 31, 1977.

Your inquiry pertains to a situation in which a legal notice stated that a case file of the Village Zoning Board would be available for public inspection during regular business hours. According to your letter, however, when you sought to inspect the file, you were told that the cabinet in which the file was located was locked and that a parttime employee possessed the only key to the cabinet. Moreover, as stated in your letter, Mr. DeClue, the Village Clerk, informed you that under a judicial determination the public must give twenty-four hours notice to the village before records can be made available.

First, I am unaware of any judicial decision that states that records can be made available only after a twenty-four hour waiting period. The regulations promulgated by the Committee, which have the force and effect of law state that records must be made promptly available and within five days of the receipt of the request [§1401.6(b)]. Consequently, it is my view that when records are readily available to a municipal officer, such records should be provided for inspection and copying as immediately as possible. Therefore, the twenty-four hour waiting period discussed in your letter is in my opinion in violation of the Committee's regulations.

Some time ago, I discussed the matter with Mr. DeClue, who informed me that, although there was some delay in providing the records to you, they were made available within approximately one hour of your request. I advised Mr. DeClue that since §1401.6 of the regulations states that a response to a request must be given promptly and within five days of receipt of the request, a one hour delay in providing access was not unreasonable.

However, it is noted that §4-402 of the Village Law requires the Village Clerk to maintain custody of Village records at all rimes. Therefore, it would appear that although the regulations were not violated, perhaps the legal notice to which you referred in your letter may not have been followed.

Enclosed are copies of the Freedom of Information Law, the regulations, a pocket brochure outlining the Freedom of Information Law and a pamphlet entitled "The Freedom of Information Law and How to Use It."

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: Mr. Eugene F. DeClue
Village Clerk-Treasurer
Village of Bayville
Bayville, New York 11709

STATE OF NEW YORK
COMMITTEE ON PUBLIC ACCESS TO RECORDS

FOIL-AO-565

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

June 6, 1977

Mr. Arthur Browne
New York Daily News
220 E. 42nd Street
New York, NY 10017

Dear Mr. Browne:

Thank you for your interest in the Freedom of Information Law. Your inquiry deals with a denial of access by the City of New York to a list of individuals that the Department of Parks and Recreation had been ordered to hire for summer work by City Hall. In addition to the denial of access, your letter raises questions concerning the failure of New York City government to comply with regulations promulgated by the Committee, which have the force and effect of law (see attached).

According to your letter, the list was denied on the ground that disclosure would result in an unwarranted invasion of personal privacy pursuant to §88(3) of the Freedom of Information Law. It was also noted that the denial was made orally and that no written response to your request has been provided. With regard to the list, it is my opinion that it is accessible under the Freedom of Information Law. One of categories of accessible records included in the Law consists of "statistical or factual tabulations made by or for the agency [§88(1)(d)]. As such, the list is accessible unless the information contained therein falls within one

of the exceptions to rights of access listed in §88(7) of the Law. In this regard, the sole ground for denial offered by the City pertains to privacy.

In my view, a denial based upon a potential unwarranted invasion of privacy is inappropriate. First, based upon our discussions concerning the list, its contents include only the names and addresses of named individuals; no other information, such as work experience, is given. Second, other provisions of law can be used to provide guidance regarding the privacy considerations concerning disclosure of the list. Under the circumstances described, the individuals named in the list did not take any civil service examinations. If they were required to take civil service examinations, it would be advised that only the names of those eligible for placement should be made available. In relevant part, Part 71 of the regulations promulgated by the State Civil Service Department states that eligible lists reflective of candidates who passed an examination are accessible, while lists consisting of those taking an examination are deniable. Based upon discussions with officials of the Department of Civil Service, the rationale behind the policy of denying access to the list of those taking an examination is that, by coupling that list with the list of eligibles, one could discover the names of failing candidates. Since failing candidates might be embarrassed by disclosure of such information, it was felt that such disclosure would in effect result in an unwarranted invasion of privacy. Consequently, only the eligible list, which may be used as a means of insuring the prevention of employment favortism or "cronyism", is made available.

Although the individuals named in the list to which you were denied did not take a civil service examination, it appears that the list is analogous to the eligible list referred to above. Therefore, it is my opinion that disclosure of the list would result in a permissible rather than an unwarranted invasion of personal privacy.

Moreover, based upon our conversations, it appears that access to the list is sought for a public purpose, i.e., a showing that the hiring practices of the City may or may not be reflective of favortism.

The list may also be accessible under §88(1)(e) of the Freedom of Information Law, which makes available "...instructions to staff that affect members of the public." Since the list consists of names of individuals "the Department had been ordered to hire by City Hall," it would appear that such a list would consist of "instructions to staff that affect members of the public."

Finally, your letter indicates that New York City government has not complied with the regulations promulgated by the Committee. In this regard, Section 1401.2 of the regulations states that

> "[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 coor-

> dinating the agency response to public requests for access to records."

Consequently, the head of the municipality, the Mayor, should have designated one or more records access officers to deal with your request as well as requests by the public generally.

With respect to denial of access, Section 1401.7 of the regulations in revelant part states that

> "(a) The head or heads of each agency and municipality shall designate a person or persons or body to hear appeals for denial of access to records under the Freedom of Information Law.
>
> (b) Denial of access shall be in writing stating the reason therefor and advising the requester of his right to appeal to the individual or body established to hear appeals, and that person or body shall be identified by name, title, business address and business telephone number.
>
> (c) 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..."

Since no written denial has been given within the time limit provided in the regulations [see §1401.6(b)], it appears that your request has been constructively denied and that you may appeal the denial to the head of the agency pursuant to Section 88(8) 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:kf
Attachment

cc: Bernard Richland
Corporation Counsel
City of New York
Municipal Building
New York, NY 10007

STATE OF NEW YORK
COMMITTEE ON PUBLIC ACCESS TO RECORDS

FOIL-AO-566
OML-AO-118

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

June 7, 1977

Mr. John Hildebrand
Education Writer
Newsday
550 Stewart Avenue
Garden City, NY 11530

Dear Mr. Hildebrand:

Your inquiry pertains to the legality of a secret ballot vote taken by the Board of Regents regarding its recent selection of the Commissioner of Education. Several ancillary issues have been raised, some of which pertain to the Freedom of Information Law and others to the Open Meetings Law.

First, in my opinion, the Board of Regents cannot act by means of a secret ballot. The Freedom of Information Law, §88(5) states that

> "...each agency or municipality controlled by a board, commission or other group having more than one member shall maintain and make available for public inspection a record of the final votes of each member in every proceeding in which he votes."

Therefore, the quoted provision of the Freedom of Information Law clearly prohibits secret ballot voting and requires the Board of Regents to compile a record of votes identifiable to each member who

voted in every instance in which a vote is cast. As such, a secret ballot vote for Commissioner by the Board of Regents was in my view contrary to law.

Second, assuming that the Board of Regents refuses to reveal the vote of each of its members, such a refusal would constitute an improper denial of access to records, as well as a failure on the part of the Board of Regents as a body to perform a duty that is required to be performed by law. Under such a circumstance, after having been finally denied access, you would have standing to initiate a proceeding under Article 78 of the Civil Practice Law and Rules to compel the Board to create the record sought and thereafter to make the record available.

And third, you inquired whether the election of Commissioner Ambach would be invalid if no voting record is compiled. In my opinion, a court could order the Board of Regents to hold a new election for Commissioner.

Under the Open Meetings Law, a public body may vote during a properly convened executive session [see §95(1) of the Open Meetings Law]. After having appropriately convened an executive session, the Board may vote in executive session. Since the subject matter of the vote dealt with the employment of a person as described in §95(1)(f) of the Open Meetings Law, a discussion and vote concerning the selection of a new Commissioner would be a proper subject for executive session.

Nevertheless, §96(2) of the Open Meetings Law states that

> "[M]inutes shall be taken at executive sessions of any action that is taken by formal vote which shall consist of a record or summary of the final determination of such action, and the date and vote thereon..."

Moreover, §96(3) states that

> "[M]inutes of meetings of all public bodies shall be available to the public in accordance with, and to the same extent and in the same manner as is authorized for governing bodies by, the provisions of the freedom of information law..."

Consequently, the Open Meetings Law and the Freedom of Information Law must be read in conjunction with one another. The result of such a reading requires that public bodies compile minutes and a voting record identifiable to each member of a public body in every instance in which a member votes.

With respect to enforcement of a possible violation of the Open Meetings Law, Section 97 of the Law states that

> "[A]ny aggrieved person shall have standing to enforce the provisions of this article against a public body by the commencement of a proceeding pursuant to article seventy-eight of the civil

> practice law and rules, and/or an action for declaratory judgment and injunctive relief. In any such action or proceeding, the court shall have the power, in its discretion, upon good cause shown, to declare any action or part thereof taken in violation of this article void in whole or in part."

Therefore, it would appear that a court has discretionary authority to declare any action taken by a public body in violation of the Open Meetings Law void in whole or in part.

With respect to the policy considerations involving §88(5), I believe that the Legislature intended to ensure the accountability of public officials who individually comprise public bodies. Without a record specifying the vote of individual members of public bodies, the public in many instances would be unable to assess the performance of public officials.

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:kf

cc: James Blendell, Records Access Officer

FOIL-AO-567

STATE OF NEW YORK
COMMITTEE ON PUBLIC ACCESS TO RECORDS

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

June 7, 1977

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

Dear Dr. Yarbrough:

Thank you for your interest in complying with the Freedom of Information Law. Your letter indicates that the policy adopted by the West Seneca Central School District had been reviewed by the Committee and that, based upon the evaluation, you "had every reason to believe that these procedures met all requirements of the law."

Specifically your letter states that Mr. William Daetsch attended a meeting during which I advised that there is no necessity that a member of the public complete an application form before receiving requested information. It was further stated that my advice appeared to conflict with advice previously rendered by the Committee.

I have reviewed the initial opinion sent to you dated March 17, 1975. With respect to that opinion, please direct your attention to page 1 of the opinion, section 2, which states that:

> "[W]hile written requests may be required pursuant to the Committee's regulations, failure to use a prescribed form for submitting a written request is not a valid reason for denying access to records. Any request for a record must be replied to within five days..."

In view of the foregoing, it is clear that your office was informed that the completion of a specified form is not a prerequisite for granting access to records. As I explained during the meeting attended by Mr. Daetsch, any request in writing that identifies the records sought should suffice, and a failure to use a from prescribed by the school district can not be a valid ground for denial of access. Consequently, I do not believe there is any conflict between the advice rendered by the Committee on March 17, 1975 and the advice that I gave in May of this year. Enclosed are copies of the initial advisory opinion as well as the regulations promulgated by the Committee. Since the opinion rendered in March of 1975 cited several areas in which the school district's policy failed to reflect compliance with the Committee's regulations, which have the force and effect of law, it is suggested that you review both documents thoroughly.

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

Sincerely,

Robert J. Freeman

Robert J. Freeman
Executive Director

RJF:js
Enc.

STATE OF NEW YORK
COMMITTEE ON PUBLIC ACCESS TO RECORDS FOIL-AO-568

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

June 10, 1977

Mrs. M. Jensen
[redacted]

Dear Mrs. Jensen:

Thank you for your interest in the Freedom of Information Law. As requested, enclosed is the pamphlet entitled "The Freedom of Information Law and How to Use It."

With respect to access to personnel records, it is important to point out that the Freedom of Information Law applies only to governmental entities. Therefore, if the hospital by which you are employed is not a governmental entity, rights of access granted by the Law do not apply. If, on the other hand, the hospital is a governmental entity, certain records within your personnel file may be accessible. It is suggested that you review the categories of accessible records listed in §88(1) of the Law to determine the extent to which the records may be 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

Robert J. Freeman
Executive Director

RJF:js
Enc.

STATE OF NEW YORK
COMMITTEE ON PUBLIC ACCESS TO RECORDS FOIL-AO-569

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

June 10, 1977

Mr. Barry Barris
[redacted]

Dear Mr. Barris:

Thank you for your interest in the Freedom of Information Law. Your inquiry deals with the extent to which you have a right of access to records pertaining to yourself in possession of the Office of Vocational Rehabilitation.

I have discussed the matter with Mr. Adrian Levy, Director of the Office of Vocational Rehabilitation and Associate Commissioner of the New York State Education Department. It was Mr. Levy who reversed the original denial and provided access on February 4 to the records that had initially been denied. In response to your questions, the Office of Vocational Rehabilitation will generally provide access to all records pertaining to you except medical or psychiatric information, or interagency memoranda. In order to gain access to the records, the Freedom of Information Law requires that a request be made that identifies the records sought. The maximum fee that may be charged for a copy is twenty-five cents per page. In addition, it is suggested that if possible a request be made in person. If such a request is impossible due, for example, to a disability, a request should be made with sufficient information to identify you as the applicant for records. Identification is necessary since disclosure to others is confidential by statute (see Education Law, §1007).

There is no mechanism in the Freedom of Information Law whereby you could automatically receive copies of records newly entered into your case file. As such, it is suggested that you make periodic requests to inspect the records.

Enclosed for your perusal are copies of the Freedom of Information Law, the regulations promulgated by the Committee, which have the force and effect of law, and explanatory documents.

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

Sincerely,

Robert J. Freeman

Robert J. Freeman
Executive Director

RJF:js
Enc.

cc: Adrian Levy

STATE OF NEW YORK
COMMITTEE ON PUBLIC ACCESS TO RECORDS

FOIL-AO-570

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

June 13, 1977

Donald H. Puretz PhD, M.P.H.
Dutchess Community College
State University of New York
Pendell Road
Poughkeepsie, NY 12601

Dear Dr. Puretz:

Thank you for your interest in the Freedom of Information Law. Your inquiry pertains to rights of access to copies of annual inspection reports of local hospitals.

It is important to note at the outset that rights of access granted by the Law are applicable only to governmental entities. Therefore, if a particular hospital is not a governmental entity, the Freedom of Information Law does not provide access to its records. Nevertheless, if a governmental entity, such as a county health department or the State Health Department has possession of inspection reports pertaining to a private hospital, the reports would in my opinion be accessible from those entities.

Specifically, §88(1)(d) of the Freedom of Information Law provides access to audits and "statistical or factual tabulations" (see attached Freedom of Information Law). In all likelyhood,

the reports of portions thereof contain such statistical or factual tabulations, which must be made available to you.

Enclosed are copies of the regulations promulgated by the Committee, which govern the procedural aspects of the Freedom of Information Law and have the force and effect of law, as well as a pamphlet entitled "The Freedom of Information Law and How To Use It."

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:kf
Enclosure

STATE OF NEW YORK
COMMITTEE ON PUBLIC ACCESS TO RECORDS

FOIL-AO-571

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

June 28, 1977

Mr. Terry Skinner
Skinner's Harbour
Box 504
Sylvan Beach, New York 13157

Dear Mr. Skinner:

Thank you for your interest in the Freedom of Information Law. Your inquiry pertains to a denial of access to daily reports of engineers concerning work accomplished and materials used on a sanitation project. According to your letter, the records were denied on the ground that they are kept by the village engineer and therefore are not available for inspection.

The Freedom of Information Law provides access to specified 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

> "[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 village, are publicly accessible. Moreover, the information sought does not appear to fall within any of the categories of deniable information listed in §88(7) of the Freedom of Information Law. Consequently, in my opinion the records sought were improperly denied.

In addition, §88(1)(d) of the Freedom of Information Law provides access to statistical or factual tabulations made by or for an agency. It appears that the records sought are clearly available pursuant to the cited provision.

Enclosed for your perusal are copies of the Law, the regulations promulgated by the Committee, which have the force and effect of law, and explanatory material.

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

Sincerely,

Robert J. Freeman

Robert J. Freeman
Executive Director

RJF:js
Encs.

cc: Robert D. Charlebois
Cherry Valley Professional Center
U.S. Route 20
Cazenovia, New York 13035

Mayor Joseph DeFazio
Village of Sylvan Beach
Sylvan Beach, New York 13157

Attorney Davies Johnson
First Bank Building
Elizabeth & Genesee Streets
Utica, New York 13500

OML-AO-121
FOIL-AO-572

STATE OF NEW YORK
COMMITTEE ON PUBLIC ACCESS TO RECORDS

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

June 28, 1977

Ms. Christa Talbot
[redacted]

Dear Ms. Talbot:

Thank you for your interest in the Freedom of Information Law and the Open Meetings Law. Your letter raises issues concerning both statutes and I will attempt to deal with them in the ensuing paragraphs.

According to your letter, minutes of the June 1 meeting of the Board of Trustees of the Village of Moravia have been denied by the Village Clerk based upon the instructions of the Village Attorney. In my opinion, so long as the minutes exist, they are accessible whether or not they have been approved by the Board of Trustees. Approval of minutes by the Board or the Village Attorney is not a condition upon which denial of access can in my view be validly grounded. Section 51 of the General Municipal Law has long provided access to

> "...any 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..."

Therefore, if minutes have been compiled, they must be made available, whether or not they have been ratified by the aforementioned officials. It has been suggested that when providing access to unapproved minutes a clerk may specify that the minutes are unapproved. By so doing, the recipient is aware that the minutes may be altered, and the public body that is the subject of the minutes is also given a measure of protection.

With respect to procedures regarding the implementation of the Freedom of Information Law, each entity subject to the Law must adopt regulations no more restrictive than those promulgated by the Committee. In the attached copy of the regulations, please note that each entity subject to the Law must designate one or more records access officers who are responsible for responding to requests for records. Since the Village Clerk is responsible for maintaining custody of all Village records pursuant to Village Law §4-402(a), the Clerk in my opinion should have known both the location and the contents of procedures adopted by the Board regarding the Freedom of Information Law. Consequently, the response by the Clerk cited in your letter concerning her authority with regard to records is irrelevant; under the Village Law, the Clerk by statute has the responsibility of maintaining the custody of Village records.

It also appears that the requisite notice provisions of the Open Meetings Law were not followed by the Village. It is noted that the Open Meetings Law does not require the Village to designate an official newspaper or to pay to advertise notices of meetings. Very simply, subdivision (1) of §94 requires that notice must be given at least 72 hours prior to meetings scheduled a week in advance to the public and the news media. Subdivision (2) of §94 requires that notice to the public and the news media be given to the extent practicable prior to a meeting scheduled less than a week in advance. Therefore, if a weekly newspaper is unable to provide the appropriate notice, the Village should have given notice to other news media.

In addition, it should be pointed out that minutes of executive sessions must be compiled and made available within one week of an executive session.

Attached are copies of both the Freedom of Information Law and the Open Meetings Law.

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

Sincerely,

Robert J. Freeman

Robert J. Freeman
Executive Director

RJF:js
Encs.

cc: Mayor Gerald Green
William G. Derenberger
Ray H. Reynolds
Joseph Ruscio
Sylvia Powers
Walter C. Foulke

STATE OF NEW YORK
COMMITTEE ON PUBLIC ACCESS TO RECORDS FOIL-AO-573

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

June 28, 1977

Mr. M. J. Seguin
[redacted]

Dear Mr. Seguin:

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.

The New York statute provides access to categories of records in possession of governmental entities in the State of New York. The federal Act provides access to records in possession of federal agencies. Neither statute is applicable to records of commercial enterprises.

With respect to the substance of your complaint, employers are not required to provide detailed written explanations pertaining to the reason for refusing to hire a particular individual. In addition, when records are related to the placement of an unemployed individual, they are specifically deemed confidential pursuant to §537 of the Labor Law. If, however, the position for which you applied is chosen on the basis of a civil service examination, you have a right to inspect the eligible list in possession of the appropriate agency.

Enclosed are copies of the Freedom of Information Law, regulations promulgated by the Committee, which have the force and effect of law, and explanatory material on the subject.

I regret that I cannot be of further assistance. Should any further questions arise, please feel free to contact me.

Sincerely,

Robert J. Freeman

Robert J. Freeman
Executive Director

RJF:js
Encs.

cc: Louis J. Lefkowitz
Attorney General

STATE OF NEW YORK
COMMITTEE ON PUBLIC ACCESS TO RECORDS FOIL-AO-574

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

June 28, 1977

Mr. Eric Freedman
Knickerbocker News
645 Albany-Shaker Road
Albany, New York 12201

Dear Mr. Freedman:

Thank you for your interest in the Freedom of Information Law. Your inquiry pertains to rights of access to monitoring reports compiled by the Division of Criminal Justice Services concerning active grants in Albany, Rensselaer, Saratoga and Schenectady Counties.

Based upon your letter from Commissioner Rogers and our discussions, it appears that the records in question consist of statistical or factual tabulations or program audits, both of which are accessible under §88(1)(d) of the Freedom of Information Law. If, however, the records cannot be considered audits, it would appear that the statistical or factual tabulations contained in the records 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

RJF:js
cc: Robert M. Schlanger

STATE OF NEW YORK
COMMITTEE ON PUBLIC ACCESS TO RECORDS FOIL-AO-575

COMMITTEE MEMBERS
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ROBERT W. SWEET
EXECUTIVE DIRECTOR
ROBERT J. FREEMAN

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

June 28, 1977

Mrs. Bernice Eisenberg
[redacted]

Dear Mrs. Eisenberg:

Thank you for your letter of June 15. It is noted at the outset that access to records pertaining to students is not governed by the state Freedom of Information Law, but rather by the federal Family Educational Rights and Privacy Act of 1974.

In brief, the federal Act provides that records identifiable to students are confidential with respect to all but the parents of a student. In addition, when a student attains the age of eighteen years, he or she acquires the rights of the parents.

The regulations promulgated by the United States Department of Health, Education and Welfare define "education records" to mean "those records which: (1) are directly related to a student, and (2) are maintained by an educational agency or institution..." The regulations also specifically state that the term "education records" does not include:

> "(1) Records of instructional, supervisory, and administrative personnel and educational personnel ancillary thereto which:
> (i) Are in the sole possession of the maker thereof, and
> (ii) Are not accessible or revealed to any other individual except a substitute. For the purpose of this definition, a 'substitute' means an individual who performs on a temporary basis the duties of the individual who made the record and does not refer to an individual who permanently succeeds the maker of the record in his or her position..."

In view of the foregoing, it would appear that records pertaining to eligibility for the National Honor Society are within the scope of the definition of "education records" and are accessible to you as the parent of a student. Consequently, if the records sought exist, they must be made available to you.

With respect to destruction of records, the Education Law, §147, states that every entity of local government, including a school district, must obtain the consent of the Commissioner of Education before destroying records. In this regard, it is suggested that you request copies under the Freedom of Information Law of both the requests to destroy records by the school district and the Commissioner's response. If there was no request made by the district to destroy the records in question, §147 of the Education Law was violated. In addition, it is also suggested that you seek a written certification by the school district to the effect that the records sought do not exist. A request for such certification may be made pursuant to §1401.2(b)(6) of the regulations promulgated by the Committee (see attached). The regulations have the force and effect of law, and the school district is required by the Freedom of Information Law to adopt rules and regulations no more restrictive than those promulgated by the Committee.

In sum, first, a school district may destroy records only after having received the written consent of the Commissioner of Education. Second, as the parent of a student, you have the right to examine teachers' evaluations of your son, which resulted in his rejection from the National Honor Society, assuming that the records exist. And third, it is suggested that you determine whether or not the records exist by means of the certification referred to above, and by determining whether the Commissioner of Education provided the necessary consent to destroy the records.

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

Sincerely,

Robert J. Freeman

Robert J. Freeman
Executive Director

RJF:js

STATE OF NEW YORK
COMMITTEE ON PUBLIC ACCESS TO RECORDS

OML-AO-122
FOIL-AO-576

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

June 28, 1977

Gerald N. Jacobowitz, Esq.
Jacobowitz and Gubits
158 Orange Avenue
Post Office Box 267
Walden, New York 12586

Dear Mr. Jacobowitz:

Thank you for your continued interest in the Freedom of Information Law and the Open Meetings Law. Your inquiry concerns when minutes of a Village Board of Trustees are available to the public.

The Freedom of Information Law provides access to specified 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

> "[A]ll books of minutes, entry or account, and the books, bills, vouchers, checks, contracts or other papers connected with or used or filed in the office of, or with any officer, board or commission acting for or on behalf of any county, town, village or municipal corporation in this state..."

Since virtually all papers kept by the municipal official are available, both the Committee and the State Comptroller have advised that minutes of meetings are accessible as soon as they exist, whether or not they have been approved. It has been suggested that when minutes are sought that have not been ratified, a clerk may note on the record that the minutes are unapproved or in draft form. By so doing, the public is aware that the minutes may be altered, and the Board is given a measure of protection.

It is also noted that §96(3) of the Open Meetings Law requires that minutes of executive sessions be compiled and made available within one week of an executive 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

Robert J. Freeman
Executive Director

RJF:js

STATE OF NEW YORK
COMMITTEE ON PUBLIC ACCESS TO RECORDS FOIL-AO-577

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

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EXECUTIVE DIRECTOR
ROBERT J. FREEMAN

June 30, 1977

Mr. Ron Webster
People's Firehouse
146 Wythe Avenue
Brooklyn, New York 11211

Dear Mr. Webster:

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

Your inquiry pertains to rights of access to statistical information in possession of the New York City Fire Department. Specifically, you are seeking information reflective of the number of "runs" and the number of the alarm box to which particular engines responded. In addition, your letter indicates that you would like to know "what the final alarm was for each alarm box."

In my opinion, if the information that you have sought exists in the form of a record or records, it is accessible to you. The Freedom of Information Law specifically provides access to "statistical or factual tabulations made for or by an agency" [§88(1)(d)]. Therefore, if such tabulations exist, they are publicly available. It is noted, however, that if the information does not exist in the form of a record, the fire department has no obligation to compile a record in response to your request.

With respect to the last question raised in your letter concerning the final alarm for each alarm box, I cannot provide advice without clarification of the nature of the information 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

RJF:js

cc: John T. O'Hagan, Commissioner

STATE OF NEW YORK
COMMITTEE ON PUBLIC ACCESS TO RECORDS FOIL-AO-578

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

June 30, 1977

William F. Gordon, Esq.
35 Main Street
Brewster, New York 10509

Dear Mr. Gordon:

Thank you for your interest in the Freedom of Information Law. Your inquiry pertains to rights of access to records in possession of the Brewster Fire Department.

Specifically, after having sought information pertaining to action by the Department regarding a particular run, as well as the ambulance report related to the action, the names of the firemen involved in the run had been deleted. According to the letter from the Chairman of the Board of Fire Commissioners, it is the policy of the Department not to reveal the names of firemen involved in a particular call. It appears that this policy is based upon §88(3) of the Freedom of Information Law, which permits deletion of identifying details the disclosure of which would result in an unwarranted invasion of personal privacy.

In my opinion, denial of access to the names of the firemen involved was improper. Section 88(3) of the Law provides five examples of unwarranted invasion of privacy. Based upon a review of the examples, the Legislature apparently felt that disclosure would not result in an unwarranted invasion of personal privacy when the records are relevant or essential to the ordinary work of the agency. In this instance, the names of the particular firemen involved are relevant to the performance of their official duties. Therefore, disclosure in my view would result in a permissible rather than an unwarranted invasion of personal privacy.

Moreover, the case law dealing with privacy of public officials tends to uphold the opinion offered in the preceding paragraph. In Farrell v. Village Board of Trustees [372 NYS 2d 905 (1975)], it was held that reprimands of police officers must be made available to the public on the ground that the reprimands were reflective to the performance of the official duties of police officers. Although the situation described in your letter does not involve disciplinary action, I believe that the principle in the Farrell decision is applicable to the information that you have 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

RJF:js

cc: Louis Prisco
Homer Stevens
Charles Velardi

STATE OF NEW YORK
COMMITTEE ON PUBLIC ACCESS TO RECORDS FOIL-AO-579

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

July 8, 1977

Mr. Lorenzo Casanova
Deputy Commissioner
Legal Matters
The City of New York
Police Department
New York, New York 10013

Dear Mr. Casanova:

Thank you for your letter of June 24.

Enclosed is a copy of the inquiry of Mr. Richard M. Warshauer to which I responded. Please note that the fourth paragraph in Mr. Warshauer's letter to the Committee states clearly that, upon requesting police blotters, he was informed that the New York City Police Department does not maintain police blotters or booking records. Moreover, Mr. Warshauer's fifth paragraph states that the New York City Police Department has apparently failed to adopt procedures under the Freedom of Information Law. In this regard, §88(2) of the Law requires each municipality to issue rules and regulations concerning the procedural aspects of the Law that can be no more restrictive than those contained in the regulations promulgated by the Committee (see attached).

Your letter states that the New York City Police Department maintains not only complaint reports, but also blotters and arrest reports, which I believe are analogous to booking records. Consequently, it appears that your statement that the Police Department does indeed maintain police blotters and booking records is inconsistent with the response given to Mr. Warshauer when he requested those records from specific precincts within the Department. If the statement made in your letter is accurate, Mr. Warshauer was improperly denied access to the records sought. I would

like to emphasize that both his letter and my response are based upon the notion that the Department does not maintain a police blotter and that the complaint form was used in lieu of what traditionally has been known as a police blotter.

In addition, having discussed the Sheehan case with the Corporation Counsel of the City of Binghamton, it appears that the complaint reports of the Binghamton Police Department contain virtually the same information as that which is contained in the complaint form to which you referred.

With regard to §§1113 and 1114 of the New York City Charter, which exempts records of the police department from disclosure, case law has held that since the Freedom of Information Law is a statute of general application, the Charter exemptions are superseded to the extent that they are more restrictive than the Freedom of Information Law [see Matter of Elisofon, New York Law Journal, July 3, 1975, p. 11].

With respect to privacy, I agree that in many instances the names of witnesses appearing in police records should not be disclosed. The Freedom of Information Law, however, provides a mechanism whereby privacy can be protected while at the same time the substance of a record may be made available. Section 88(3) of the Law states that identifying details the disclosure of which would result in an unwarranted invasion of personal privacy may be deleted from records before making them available. With regard to the subject of an arrest, the courts have long held that police blotters and arrest records are accessible to the public. In addition, by specifically providing access to blotters and booking records, the Legislature in my view tacitly stated that such disclosures would result in a permissible rather than an unwarranted invasion of personal privacy..

It is true that §88(9)(a)(i) of the Law states that the Committee is authorized to advise agencies and municipalities. Nevertheless, whenever possible, the Committee sends copies of advisory opinions to agencies or municipalities when responding to an inquiry by a member of the public or the news media. By so doing, the Committee in effect is advising units of government

that they are the subject of inquiries. Moreover, due to the public nature of the Law, the Committee established the policy at its inception that advice would be given to any person. Further, the Attorney General has adopted a practice whereby requests sent to his office concerning the Law by members of the public are transmitted to the Committee for response.

In sum, if the Department does in fact maintain police blotters and booking records, Mr. Warshauer was improperly denied access. If, on the other hand, no such documents are maintained, I believe that the complaint forms are accessible in whole or in part depending upon their contents in lieu of the blotter or the booking record.

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

Robert J. Freeman
Executive Director

RJF:js
Enc.

cc: Mario M. Cuomo, Esq.
State Senator Roy M. Goodman
Assemblyman A. B. Peter Grannis
Assemblyman Mark Alan Siegel
Assemblyman Andrew Stein
City Councilman Carter Burden
City Councilwoman Carol Greitzer
City Councilman Henry J. Stern
City Councilman Robert F. Wagner, Jr.
Deputy Commissioner Francis J. McLoughlin
Captain John Neylan
Captain John Salo
Captain Bernard McRann
Mr. Richard Warshauer

STATE OF NEW YORK
COMMITTEE ON PUBLIC ACCESS TO RECORDS

FOIL-AO-58

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

July 13, 1977

Mr. Martin Walsh
[redacted]

Dear Mr. Walsh:

Thank you for your interest in the Freedom of Information Law. Your inquiry pertains to rights of access to records reflective of the determination of an internal investigation of a police officer by the New York City Police Department.

In my opinion, if there is in fact a record of a determination concerning a particular police officer, it is accessible. The Freedom of Information Law provides access to specified categories of records [§88(1)], including any other records made available by any other provision of law [§88(1)(i)]. In this regard, §§1113 and 1114 of the New York City Charter have long provided access to virtually all records in possession of any New York City agency. Although the Charter provisions contain an exemption for records of the Police Department, case law has held that the exemption regarding Police Department records is invalid to the extent that it is more restrictive than the provisions of the Freedom of Information Law, which is a general statute of statewide application (see Matter of Elisofon, New York Law Journal, July 3, 1975, page 11).

In addition, there have been two decisions rendered under the Freedom of Information Law which essentially hold that records regarding an internal investigation of a police officer are available.

In Farrell vs. Village Board of Trustees [372 N.Y.S. 2d 905(1975)], it was held that written reprimands of police officers must be made available. In discussing the reprimands, the court stated:

> "To disclose these will not result in an unwarranted invasion of personal privacy; they are "relevant--to the ordinary work of the--municipality". In effect, they are "final opinions" and "final determinations" which the Legislature directed be made available for public inspection. Disclosure, of course, will reveal the names of the police officers who were reprimanded but also let it be known, by implication, which others were not censured. Disclosure of the written reprimands will not harm the overall public interest." (id. at 908 to 909).

Furthermore, Walker vs. City of New York [394 N.Y.S. 2d 797(1977)] held that records of complaints and investigations of civilian complaints against a named officer of the New York City Police Department are accessible. Although the situation described in your letter does not constitute a civilian complaint, I believe that the principles offered in the Farrell and Walker decisions are applicable under the circumstances. Therefore, in my view, if there are records consisting of a determination regarding a police officer, such records are accessible.

Enclosed are copies of Freedom of Information Law and the fegulations promulgated by the Committee, 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

Robert J. Freeman
Executive Director

RJF:sms

Enclosure

STATE OF NEW YORK
COMMITTEE ON PUBLIC ACCESS TO RECORDS FOIL-AO-581

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

COMMITTEE MEMBERS
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EXECUTIVE DIRECTOR
ROBERT J. FREEMAN

July 13, 1977

Mrs. Exton Kelley
[redacted]

Dear Mrs. Kelley:

Thank you for your letter of July 3. Your inquiry deals with rights of access to vital records, such as birth and death records, as well as census information.

It is noted at the outset that rights of access to this information are governed not by the Freedom of Information Law but rather by the provisions of the Public Health Law. However, the language of the relevant statutes is sufficiently vague to permit the custodians of such records to determine on a case by case basis whether or not the records should be made available. For example, §4174 of the Public Health Law states that death records shall be made available when the person requesting such records can show that the request is reflective of a judicial or other "proper purpose." Due to the "proper purpose" standard, a grant or denial of access depends in many instances upon the predisposition of an individual registrar of vital records.

I have discussed the matter on many occasions with the Director of the Bureau of Vital Records in the Department of Health and have argued that the law should be amended to provide a specific standard for either granting or denying access. However, it appears that the Health Department is unwilling to seek clarifying legislation. Consequently, due to the vagueness of the Public Health Law, the situation that you have described in which the records may be provided by one clerk and denied by another is not uncommon. In my opinion, two alternatives exist. First, the Public Health Law could be amended. Second, a lawsuit could be initiated to determine exactly what constitutes a "proper purpose."

Enclosed for your perusal are copies of the relevant portions of the Public Health Law, the Freedom of Information Law, the regulations promulgated by the Committee, which have the force and effect of law, and explanatory materials that may be 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:js
Encs.

STATE OF NEW YORK
COMMITTEE ON PUBLIC ACCESS TO RECORDS FOIL-AO-582

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

July 19, 1977

Mr. Charles Mack
Din. #76-B-325
Elmira Correctional Facility
Box 500
Elmira, New York 14902

Dear Mr. Mack:

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.

Your inquiry concerns rights of access to your presentence report regarding a particular indictment. Although presentence reports and related memoranda are generally deemed confidential by statute, subdivision (2) of §390.50 of the Criminal Procedure Law states that:

> "[T]he presentence report or memorandum shall be made available by the court for examination by the defendant's attorney, or the defendant himself, if he has no attorney, in which event the prosecutor shall also be permitted to examine the report or memoranda. In its discretion, the court may except from disclosure a part or parts of the report or memoranda which are not relevant to a proper sentence, or a diagnostic opinion which might seriously disrupt a program of rehabilitation, or sources of information which have been obtained on a promise of confidentiality, or any other portion thereof, disclosure

> of which would not be in the interest of justice. In all cases where a part or parts of the report or memoranda are disclosed, the court shall state for the record that a part or parts of the report or memoranda have been excepted and the reasons for its action. The action of the court excepting information from disclosure shall be subject to appellate review."

Therefore, under the quoted provision of law, the report or portions thereof are likely 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

Robert J. Freeman
Executive Director

RJF:js

STATE OF NEW YORK
COMMITTEE ON PUBLIC ACCESS TO RECORDS FOIL-AO-583

COMMITTEE MEMBERS
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EXECUTIVE DIRECTOR
ROBERT J. FREEMAN

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

July 20, 1977

Mr. Peter Johnson
The Citizen Register
Westchester Rockland Newspapers, Inc.
Ossining, New York 10562

Dear Mr. Johnson:

Thank you for your interest in the Freedom of Information Law. Your letter pertains to a denial of access to records by the Village of Ossining.

Specifically, your letter, the attached correspondence, and news articles indicate that you have attempted without success to gain access to fiscal records of receipts and disbursements of funds pertaining to the "50-50 Club" lottery, which is run by the Ossining Volunteer Fire Department. The initial denial of access was made by Mr. Lester Kimball, the Records Access Officer of the Village of Ossining. The denial on appeal was rendered by Mr. Hugh A. Lavery, Jr., Corporation Counsel to the Village.

With respect to the initial denial, Mr. Kimball wrote that

> "[T]he only fiscal records of the Ossining Fire Department which are subject to the provisions of the 'Freedom of Information Law' are those documents which relate to the fire fighting services provided by the department including but not limited to the budget of the Village of Ossining and vouchers approved by the chief engineer...
> Records relating to fund raising activities of the various companies which comprise the Ossining Fire Department and which do not

> relate to the ordinary work of the department do not appear to come within the provisions of the Freedom of Information Law and thus your request for those records is denied."

The determination made by Mr. Lavery in response to your appeal was grounded on the reasons advanced by Mr. Kimball and in addition stated that since

> "...certain of the receipts of the 50-50 Club lottery are disbursed to members of the families of present or former members of the Ossining Fire Department, a disclosure of the records which you are seeking would amount to an unwarranted invasion of personal privacy pursuant to the provision of Section 88(7)(c) of the Public Officers Law".

The final denial stated that such a disclosure would constitute "a personal hardship on these families when the records are not relevant or essential to the ordinary work of the Village of Ossining Fire Department..."

In my opinion, the reasons for the denial offered by Mr. Kimball and Mr. Lavery are insufficient, and I believe that the records sought have been improperly denied.

The Freedom of Information Law provides access to several specified 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 Section 51 of the General Municipal Law, which has long provided access to

> "[A]ll books of minutes, entry or account, and the books, bills, vouchers, checks, contracts or other papers connected with or used or filed in the office of, or with any officer, board or commission acting for or

on behalf of any county, town, village or municipal corporation in this state..."

Therefore, virtually all records in possession of a municipality, such as the Village of Ossining, are accessible, unless the records contain information deemed deniable pursuant to Section 88(7) of the Freedom of Information Law.

Consequently, it appears that records reflective of receipts and disbursements of the 50-50 Club lottery should have been made available.

Moreover, a denial on the ground that the records in question do not relate to fire fighting services is in my view inappropriate. Neither the Freedom of Information Law nor Section 51 of the General Municipal Law distinguishes rights of access based upon the notion that a particular public official is a primary or a secondary custodian of records. Rights of access granted by both statutes are based upon possession. In my opinion, if a public official has possession of records, he or she must have them for a reason. Therefore, whether or not the records sought pertain to fire fighting services is irrelevant. The mere fact that a village official has custody of records makes those records subject to rights of access granted by the Freedom of Information Law.

With respect to privacy, the Corporation Counsel wrote that disclosure would in his opinion constitute a personal hardship on families of present or former members of the Ossining Fire Department named in the records. As such, he contended that disclosure would result in an unwarranted invasion of privacy.

Nevertheless, the specific language of Section 51 of the General Municipal Law indicates an intent to disclose records pertaining to the financial transactions of a municipality. There is no indication in the statute that the Legislature intended to protect the privacy of individuals named in records reflective of the fiscal affairs and the accountability of government. Moreover, it appears that, by implication, disclosures concerning

records that do not contain references to the families of present or former members of the fire department would not in the opinion of Mr. Lavery constitute an unwarranted invasion of personal privacy. In my view, it is difficult to understand why disclosure of analogous records would in one instance result in a permissible invasion of privacy and in another result in an unwarranted invasion of personal privacy. In addition, if the records do indeed relate to present or former members of the fire department, the public in my view would have increased desire to know the contents of such records in order to insure that the lottery is operated in a fair and impartial manner.

In view of the foregoing, it is my opinion that records of the receipts and disbursements of the fire department of the Village of Ossining were improperly denied.

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:sms

cc: Lester Kimball, Records Access Officer
Village of Ossining
16 Croton Ave.
Ossining, NY 10562

Hugh A. Lavery Jr., Corporation Counsel
Barclays Bank Building
Ossining, NY 10562

Charles M. Feuer, Esq.
175 Main Street
White Plains, NY 10601

STATE OF NEW YORK
COMMITTEE ON PUBLIC ACCESS TO RECORDS FOIL-AO-584

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

July 21, 1977

Vincent T. Franciamone
[redacted]

Dear Mr. Franciamone:

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 Freedom of Information Law. It is noted that the Committee does not have investigative authority.

Rights of access to Family Court records are governed by § 166 of the Family Court Act, which states that

> "[T]he records of any proceeding in the family court shall not be open to indiscriminate public inspection. However, the court in its discretion in any case may permit the inspection of any papers or records. Any duly authorized agency, association, society or institution to which a child is committed may cause an inspection of the record of investigation to be had and may in the discretion of the court obtain a copy of the whole or part of such record."

Since you are a party to the proceedings that are the subject of the records, it would appear a request under the circumstances would not constitute "indiscriminate public inspection".

In addition, enclosed are copies of the Freedom of Information Law, the regulations promulgated by the Com-

mittee, which have force and effect of law, and a pamphlet which will be useful to you in explaining your rights under the Freedom of Information Law.

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

Sincerely,

Robert J. Freeman

Robert J. Freeman
Executive Director

RJF:sms

Enclosures-3

cc: Department of Law
Capitol
Albany, NY

STATE OF NEW YORK
COMMITTEE ON PUBLIC ACCESS TO RECORDS

OML-AO-128
FOIL-AO-585

COMMITTEE MEMBERS
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ROBERT W. SWEET
EXECUTIVE DIRECTOR
ROBERT J. FREEMAN

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

July 21, 1977

William Goldman, Esq.
P.O. Box 417
407 Metcalf Plaza
144 Genesee Street
Auburn, New York 13021

Dear Mr. Goldman:

Thank you for your continued interest in the Open Meetings Law. Your inquiry pertains to a policy adopted by a school district which permits public access to minutes of a board of education only after they have been approved by the board.

Although the Open Meetings Law is silent with respect to a time limit for providing access to minutes of open meetings, it has consistently been advised that school board minutes are accessible as soon as they exist, whether or not they have been approved by a school board.

The Freedom of Information Law provides 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 §2116 of the Education Law, which states that:

> "The 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, except to the extent that such

records contain information deemed deniable pursuant to §88(7) of the Freedom of Information Law. It is also noted that, although §2116 grants rights of access only to a "qualified voter of the district," the Committee has advised and the courts have held that the records are available to any person [see §88(6) Freedom of Information Law; also Matter of Duncan, 394 NYS 2d 362 (1977)].

It has been suggested that when making unapproved minutes available, a clerk might note on the minutes that they are unapproved or non-final. By so doing, the public is apprised that the minutes are subject to change and the school board is given a measure of protection.

With regard to minutes of executive sessions, §96(3) of the Open Meetings Law states that such minutes "shall be made available to the public within one week from the date of the executive session." As such, the last sentence of the policy statement quoted in your letter is appropriate.

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

Sincerely,

Robert J. Freeman

Robert J. Freeman
Executive Director

RJF:js

STATE OF NEW YORK
COMMITTEE ON PUBLIC ACCESS TO RECORDS FOIL-AO-586

DEPARTMENT OF STATE, 162 WASHINGTON AVENUE, ALBANY, NEW YORK 12231
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JAMES C. O'SHEA
GILBERT P. SMITH
ROBERT W. SWEET
EXECUTIVE DIRECTOR
ROBERT J. FREEMAN

July 25, 1977

Mr. Donald D. Pauldine
School of Beauty Culture, Inc.
240 W. Water St.
Elmira, NY 14901

Dear Mr. Pauldine:

Thank you for your interest in the Freedom of Information Law. Your letter seeks advice concerning rights of access to information that you intend to request from the Chemung County BOCES.

It is important to note at the outset that the Freedom of Information Law provides access to certain categories of existing records. Therefore, if information sought does not exist in the form of a record, a new record need not be compiled in response to a request. By means of example, if the BOCES has not compiled records specifically reflective of how money received for tuition is spent, a record is not required to be compiled in order to respond to your inquiry.

Generally, statistical or factual tabulations compiled by the BOCES are accessible. For example, statistics indicating the total cost per student enrolled in a cosmetology course, the number of students enrolled in the program, the number of dropouts and other similar statistical findings are accessible, assuming that the information exists in the form of records.

Other types of factual information, however, may be denied. For example, the federal Family Educational Rights and Privacy Act requires that educational institutions

keep confidential education records identifiable to students. Therefore, the names, addresses and telephone numbers of students enrolled in the BOCES cosmetology course need not be made available, unless such information is considered "directory information". Similarly, disclosure of the names of those students who failed examinations would in my opinion result in an unwarranted invasion of personal privacy pursuant to §88(3) of the Freedom of Information Law. As such, those names may in my view be properly denied.

Enclosed for your perusal are copies of the Freedom of Information Law, the regulations promulgated by the Committee, which have the force and effect of law, and an explanatory pamphlet which may be 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

Robert J. Freeman
Executive Director

cc: Pauline G. Bush Area Occupational Center
Chemung County BOCES
431 Philo Road
Elmira, NY 14903

RJF:sms

Encl.

STATE OF NEW YORK
COMMITTEE ON PUBLIC ACCESS TO RECORDS FOIL-AO-587

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

MITTEE MEMBERS
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EXECUTIVE DIRECTOR
ROBERT J. FREEMAN

July 25, 1977

Mr. Frank H. Dobisky:
Managing Editor
The Times Record
501 Broadway
Troy, New York 12181

Dear Mr. Dobisky:

Thank you for your continued interest in the Freedom of Information Law. You have asked for my comments concerning the propriety of assertions made in an appeal directed to Superintendent Connelie of the Division of State Police following a denial of access to records.

According to the letter of appeal, Mr. McPheeters of your staff was denied access to records reflective of determinations concerning disciplinary action taken with regard to two named troopers. The subjects of the determinations are no longer employed by the Division.

I am in accord with your contentions that the records sought are neither confidential pursuant to §50-a of the Civil Rights Law, nor "part of investigatory files compiled for law enforcement purposes," which are deniable pursuant to §88(7)(d) of the Freedom of Information Law.

First, §50-a of the Civil Rights Law cannot in my opinion be appropriately cited as a ground for denial, since that provision pertains to personnel records "used to evaluate performance toward continued employment or promotion." The subjects of the disciplinary investigation and the ensuing determinations are no longer employed by

the Division of State Police. As such, the statutory exemption contained in §50-a is in my view irrelevant.

Second, several courts have held that the "investigatory files" exception contained in §88(7)(d) of the Freedom of Information Law is intended to permit criminal law enforcement agencies to maintain the integrity of criminal justice files [see e.g., Matter of Maloff, N.Y.L.J., October 20, 1976; Young v. Town of Huntington, 388 N.Y.S. 2d 1978 (1976), Westchester Rockland Newspapers, Inc. v. Mosczydlowski, Appellate Division, 2nd Department, July 11, 1977; see also Marino, The New York Freedom of Information Law, 43 Ford L. Rev. 83, 90, footnote 44(1974)]. Since the records in question pertain to an internal investigation of personnel rather than a criminal law enforcement investigation, §88(7)(d) cannot in my view be cited as a valid ground for denial of access.

And third, in an analogous situation, it was held that reprimands of police officers must be made publicly accessible [Farrell v. Village Board of Trustees, 372 N.Y.S. 2d 905 (1975)]. In discussing the reprimands, the opinion stated:

> "[T]o disclose these will not result in an unwarranted invasion of personal privacy; they are "relevant--to the ordinary work of the--municipality". In effect, they are "final opinions" and "final determinations" which the Legislature directed be made available for public inspection. Disclosure, of course, will reveal the names of the police officers who were reprimanded but also let it be known, by implication, which others were not censured. Disclosure of the written reprimands will not harm the overall public interest." (id. at 908-909).

In view of the foregoing, the determinations concerning the two former troopers were in my opinion improperly denied.

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

Sincerely,

Robert J. Freeman

Robert J. Freeman
Executive Director

cc:Mr. William G. Connelie
Superintendent
New York State Police
State Campus
Albany, New York 12226

RJF:sms

STATE OF NEW YORK
COMMITTEE ON PUBLIC ACCESS TO RECORDS FOIL-AO-588

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

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EXECUTIVE DIRECTOR
ROBERT J. FREEMAN

July 25, 1977

Mr. Rocco A. De Perno
Village Attorney
5 Rutger Park
Utica, New York 13501

Dear Mr. De Perno:

Thank you for your letter of July 11.

Your inquiry seeks verification from the Committee that records pertaining to a project for which the Village of Sylvan Beach contracted to be performed by a certified professional engineer need not be made available. The opinion that had originally been rendered at the request of Mr. Terry Skinner advised that records pertaining to the project were required to be made available on the ground that the engineer was employed by the Village. Your letter clarifies that the engineer is an independent contractor who is not a village employee.

At present, it appears that Mr. Skinner's request cannot be fulfilled since the Village does not have custody of the records sought. However, it is my understanding that the Department of Audit and Control is in the process of determining whether or not the Village must maintain custody of records in the possession of the engineer. Consequently, at this juncture, I can only advise that if the records are the property of the engineer, rights of access to those records do not exist. If, however, the Village is obliged to maintain custody of any of the records currently in the possession of the engineer, those records would become accessible to Mr. Skinner upon receipt by the 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

Robert J. Freeman
Executive Director

cc: Mr. Terry Skinner
Skinner's Harbour
Box 504
Sylvan Beach, New York 13157

RJF:sms

STATE OF NEW YORK
COMMITTEE ON PUBLIC ACCESS TO RECORDS FOIL-AO-589

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

COMMITTEE MEMBERS
(IE ABEL - Chairman
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JAMES C. O'SHEA
GILBERT P. SMITH

EXECUTIVE DIRECTOR
ROBERT J. FREEMAN

July 26, 1977

Mr. George N. Toplitz, Esq.
100 Church Street
New York, NY 10007

Dear Mr. Toplitz:

Thank you for your letter of July 19. Your inquiry pertains to a denial of access to records by the New York State Department of Audit and Control.

Three categories of records were sought. The first consists of factual data reflective of the names of individuals employed by the Comptroller to inspect or audit records of the Lasker-Goldman Corporation relative to a construction project, the hours spent by individuals engaged in inspecting or auditing, and the items audited and the dates upon which they were audited. The second category deals with contracts or retainers entered into by the Comptroller providing that the other contracting party shall audit records of Lasker-Goldman relative to the project. The third category consists of all audits and statistical or factual tabulations made by or for the Comptroller relative to the project.

The first category of records was initially denied on the ground that employment records of examiners which pertain to their audit functions need not be disclosed under the Freedom of Information Law. On appeal, this ground for denial was bolstered by the contention that §88(1)(g) of the Law, which requires compilation of a payroll record, "specifically limits the availability of employment data to the four items, i.e., name, address, title and salary, and no other data relating to assignment or work activity of individuals need be made available."

I disagree with Mr. Cohen's assertion. In addition to §88(1)(g), the Freedom of Information Law provides access to several other categories of records, including "statistical or factual tabulations" [§88(1()d)]. Therefore, any factual tabulations reflective of "assignment or work activity" are in my view accessible. Moreover, disclosure would not in my opinion constitute an "unwarranted invasion of personal privacy" pursuant to §88(3) of the Freedom of Information Law. Since the information is relevant to the performance of the official duties of public employees, disclosure would in my view result in a permissible rather that an unwarranted ivasion of privacy [see Farrell v. Village Board of Trustees, 372 N.Y.S. 2d 905 (1975)].

The second category of records sought was denied on the ground that the Comptroller has not entered into any contracts or retainers for auditing services. Since such contracts do not exist, there appears to be nothing to be made available. Nevertheless, both your request and Mr. Cohen's denial refer to paragraphs VI and VII of a modified agreement (Contract # D35646, dated February 5, 1970) concerning the ability to contract for the auditing of records related to the project in question. While your appeal implies that the Comptroller in fact entered into such contracts, Mr. Cohen's determination states that "no outside contract or retainer has been entered into for such purposes." If indeed no such contracts exist, there is nothing to be made available.

And third, you requested all audits and statistical or factual tabulations made by or for the Comptroller relative to the project. In response, Mr. Cohen wrote that all audits had been made available, except the final audit, which has not yet been completed. Based upon our discussions as well as those with officials of the Department of Audit and Control, there appear to be questions of fact surrounding the response. You have orally informed me that not all of the interim audits sought have been made available. On the other

hand, I have been informed by an official of the Department that the audits have been made available on a continuing basis. Notwithstanding these problems of communication, I believe that all audits concerning the project in possession of the Department of Audit and Control should have been made available pursuant to the request, whether or not they had been previously made available.

In addition, it is noted that the third category of information sought consisted of both audits and statistical or factual tabulations pertaining to the project. Neither the initial denial nor the denial on appeal was responsive to the request for statistical or factual tabulations. If such materials exist, they are 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

Robert J. Freeman
Executive Director

cc: Walter Holmes, Records Access Officer

Joseph L. Cohen, Records Appeals Officer

Theodore Spatz, Council

RJF:sms

STATE OF NEW YORK
COMMITTEE ON PUBLIC ACCESS TO RECORDS FOIL-AO-590

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

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EXECUTIVE DIRECTOR
ROBERT J. FREEMAN

July 29, 1977

Mrs. Fern Balok, Vice President
Chemung County Taxpayers Association
1105 Pennsylvania Ave.
Elmira, NY 14904

Dear Mrs. Balok:

Thank you for your continued interest in the Freedom of Information Law. Your letter raises questions regarding the propriety of procedures adopted by the City of Elmira.

In my opinion, the regulations adopted by the Elmira City Council by means of resolution fail to comply with the regulations promulgated by the Committee on Public Access to Records in several respects. It is noted that the Committee's regulations have the force and effect of law and that each entity of government in New York must adopt regulations no more restrictive than those promulgated by the Committee.

Having reviewed the City's resolution, there are several items that are erroneous and/or lacking. By comparing the resolution with the Committee's regulations, it has been found that no records access officer, fiscal officer or appeals officer has been specifically designated as required. The regulations promulgated by the Committee state that a records access officer must be designated by the head of a municipality. It is the records access officer who has the duty of coordinating the response to requests for records. Similarly, the resolution does not contain the required specificity regarding the means by which requests may be made and the time limits for response. The resolution contains no reference to subject matter list, which is required to be maintained and made available pursuant to §88(4) of the Freedom of Information Law. Finally the

resolution fails to contain provisions regarding denial of access to records and the right to appeal.

In sum, it is suggested that the City Manager and the City Council study the regulations promulgated by the Committee and amend the City's resolution accordingly. Enclosed are copies of the regulations and model regulations, which, if followed, will ease the task of amending the resolution. Copies of the same documents will be sent to the City Manager and the Common Council.

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

Sincerely,

Robert J. Freeman

Robert J. Freeman
Executive Director

cc: Mr. Joseph Sartori
City Manager
3rd Floor
City Hall
Lake and Church Sts.
Elmira, NY 14904

Common Council
City Hall
Lake and Church Sts.
Elmira, NY 14904

Encl.

RJF:sms

STATE OF NEW YORK
COMMITTEE ON PUBLIC ACCESS TO RECORDS FOIL-AO-591

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

August 1, 1977

Mr. Vincent McArdle,Jr.
Executive Deputy, Corporation Counsel
City of Albany
Department of Law
100 State Street
Albany, New York 12207

Dear Mr. McArdle:

Thank you for your interest in complying with the Freedom of Information Law. Your inquiry pertains to a request for determinations made by the Albany Public Safety Commission following disciplinary hearings pertaining to police officers.

In my opinion, the records in question are accessible. Judicial interpretations of the Freedom of Information Law have held that determinations resulting from internal investigations of police officers are accessible. Specifically, in its discussion of reprimands of police officers, one decision held:

> "[T]o disclose these will not result in an unwarranted invasion of personal privacy; they are "relevant--to the ordinary work of the-- municipality". In effect, they are "final opinions" and "final determinations" which the Legislature directed be made available for public inspection. Disclosure, of course, will reveal the names of the police officers who were reprimanded but also let it be known, by implication, which others were not censured. Disclosure of the written reprimands will not harm the overall public interest."
> "[Farrell v. Village Board of Trustees, Etc. 372 N.Y.S. 2d 905, 908-909 (1975)].

Similarly, a recent decision held that records of complaints and investigations of civilian complaints against named police officers are accessible [see Walker v. City of New York, 394 N.Y.S. 2d 797 (1977)].

In view of the cited decisions, I believe that the records sought are accessible 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

Robert J. Freeman
Executive Director

RJF:sms

STATE OF NEW YORK
COMMITTEE ON PUBLIC ACCESS TO RECORDS FOIL-AO-592

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

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EXECUTIVE DIRECTOR
ROBERT J. FREEMAN

August 4, 1977

Joseph Heath
Syracuse Law Collective
Law Offices of Heath, Horn &
Rosenthal
Empire Building, Room 438
472 South Salina Street
Syracuse, New York 13202

Dear Mr. Heath:

Thank you for your interest in the Freedom of Information Law. Your letter raises questions concerning the propriety of denials of access by the New York State Department of Correctional Services. The correspondence attached to your letter does not make clear exactly what was sought. Moreover, Mr. Gerald Griffin, whose letter constitutes a denial of access, has been on vacation. Consequently, I have been unable to discover which specific records were requested or the specific grounds for denial. Nevertheless, the following paragraphs will deal with each of the categories of records mentioned in your letter and the correspondence attached thereto.

Based upon your request addressed to Commissioner Ward dated July 12, the first category of records sought included amendments, repeals or inclusions to chapters V and VII of the regulations promulgated by the Department, which are published in the New York Code of Rules and Regulations. Since such rules and regulations are publicly available pursuant to §102 of the Executive Law, they are available as of right when in possession of the Department pursuant to §88(1)(i) of the Freedom of Information Law, which provides access to records made available by any other provision of law.

The second category of records sought consists of "Departmental Policy Statements as of May, 1975". Statements of policy adopted by an agency are accessible as of right pursuant to §88(1)(b) of the Freedom of Information Law. Therefore, they

should have been made available to you.

Based upon the response by Gerald Griffin dated July 21, it appears that a third category of records, "Use of Physical Force" reports regarding named inmates, were also sought and denied. Although I am not familiar with the specific contents of the reports, they were discussed generally with a representative of the office of Counsel to the Department. Based upon our discussion, it appears that such reports do not fall within any of the categories of accessible records listed in §88(1)(a) through (h) of the Freedom of Information Law. Therefore, it appears a denial of access to the reports was proper. I also inquired about the report regarding your statement that such reports are included in a list of accessible records compiled by the Department. I was informed that the forms used in making the reports are made available, but that completed reports are not accessible unless they are used as evidence in a determination concerning an inmate.

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

Sincerely,

Robert J. Freeman

Robert J. Freeman
Executive Director

cc: Gerald J. Griffin
Director of Administrative
Analysis
Department of Correctional Services
The State Office Building Campus
Albany, New York 12226

RJF:sms

FOIL-AO-543
OML-AO-133

STATE OF NEW YORK
COMMITTEE ON PUBLIC ACCESS TO RECORDS

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

August 5, 1977

Ms. Maryln Zahler
[redacted]

Dear Ms. Zahler:

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 both the Freedom of Information Law and the Open Meetings Law (see attached).

The question raised concerns the applicability of the Open Meetings Law and the Freedom of Information Law to a county mental health board.

With respect to the Open Meetings Law, Section 92(2) of the Law defines "public body" as

> "...any entity, for which a quorum is required in order to transact public business and which consists of two or more members performing a governmental function for the state or for an agency or department thereof, or for a public corporation as defined in section sixty-six of the general construction law."

A county mental health board is an entity that must act by means of a quorum (see General Construction Law, §41, quoted in full at the bottom of page three of the Committee's report to the Legislature, a copy of which is attached), it consists of more than two members and performs a governmental function for a public corporation, a county. Therefore, such a board is subject to the Open Meetings Law and must comply with each of its provisions.

Further, §93 of the Law states that all meetings of a public

body shall be open to the general public. Therefore, a public body cannot arbitrarily exclude an "agency representative" or any other person from an open meeting.

With regard to notice, §94(1) of the Open Meetings Law states that if a meeting is scheduled at least one week in advance, notice must be given to the public and the news media not less than seventy-two hours before a meeting. However, the nature of the notice that must be given is unspecified. In my opinion, a notice should be posted in one or more designated locations. By designating locations where notice will be posted, interested members of the public can be informed in a consistent manner that a public body will be meeting at a specific time and place. In the case of a meeting scheduled less than a week in advance, §94(2) states that notice must be given "to the extent practicable" to the public and news media a reasonable time prior to a meeting. With respect to the news media, notice should be provided to the newspaper or broadcast station which is most likely to make contact with the people who would be interested in attending.

Section 96 of the Law requires that minutes of meetings be compiled and made available. It is also noted that §88(5) of the Freedom of Information Law requires public bodies to maintain and make available a voting record identifiable to each member of the body in every proceeding in which the member votes.

It is emphasized that §98(3) of the Open Meetings Law exempts from its provisions matters made confidential by federal or state law. In this regard, §15.13 of the Mental Hygiene provides that records identifiable to patients are confidential. Therefore, discussions concerning specific patients would fall outside the scope of the Open Meetings Law. Nevertheless, unless the subject matter dealt with by a board can be appropriately discussed in executive session (see §95), its decision making process should be open to the public.

With respect to physically handicapped individuals, Governor Carey recently signed into law the following amendment

to the Open Meetings Law:

> "Public bodies shall make or cause to be made all reasonable efforts to ensure that meetings are held in facilities that permit barrier-free access to the physically handicapped, as defined in subdivision five of section fifty of the public buildings law."

The quoted amendment will appear as subdivision (b) of §93 of the Law and will become effective on September 1.

A county mental health board is also subject to the Freedom of Information Law, which includes within its definition of "agency" [§87(1)] "...any governmental entity" performing a governmental function. As such, a county board is subject to rights of access granted by 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

Robert J. Freeman
Executive Director

RJF:sms

STATE OF NEW YORK
COMMITTEE ON PUBLIC ACCESS TO RECORDS FOIL-AO-594

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

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EXECUTIVE DIRECTOR
ROBERT J. FREEMAN

August 25, 1977

Eugene Levy
Member of Assembly
95th District
Rockland County
Legislative Office Bldg.
Albany, New York 12248

Dear Assemblyman Levy:

Your letter of August 3 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 Freedom of Information Law.

The correspondence attached to your letter indicates that a constituent has unsuccessfully attempted to gain access to procedures used by a town assessor in arriving at valuations of real property.

In my opinion, if indeed there are written procedures in existence that are used by an assessor in arriving at determinations concerning the valuation of real property, they are accessible. Section 88(1)(b) of the Freedom of Information Law provides access to "statements of policy and interpretations which have been adopted by the agency..." Therefore, if there are written procedures upon which an assessor relies in arriving at determinations, such records are accessible. In addition, the records in question are also available pursuant to §51 of the General Municipals Law, which has long granted access to virtually all records in the possession of a municipal official.

Nevertheless, having discussed the matter with a representative of the Office of Counsel of the Board of Equalization and Assessment, it appears unlikely that written

procedures in the nature of the records sought exist. I was informed that, as stated by Kenneth H. Resnik, Town Attorney, in a memorandum sent to Ms. Clara Williams, the Town Assessor, "[T]he only test in whether or not the valuation placed on a property, is its market value". Consequently, written procedures would not be relevant in a proceeding in which a particular assessment is challenged. However, to reiterate, if such written procedures do in fact exist, they are accessible whether or not they are relevant to a determination.

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:sms

STATE OF NEW YORK
COMMITTEE ON PUBLIC ACCESS TO RECORDS FOIL-AO-595

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

August 24, 1977

Mr. Larry Shelton
[redacted]

Dear Mr. Shelton:

Thank you for your interest in the Freedom of Information Law. Your inquiry pertains to the procedures with which agencies and municipalities must comply in implementing the statute.

In this regard, the Committee promulgated regulations pertaining to the procedural aspects of the Law which have the force and effect of law. Each entity of government in the state must adopt similar regulations no more restrictive than those promulgated by the Committee.

Enclosed are copies of the existing Freedom of Information Law, the amended Freedom of Information Law which will become effective January 1, 1978, the regulations promulgated by the Committee and additional explanatory materials.

With respect to the limit for response to requests, it is suggested that you review §1401.6(b) of the regulations. That provision states that a response to a request must be given within five business days of its receipt unless extraordinary circumstances can be demonstrated. Moreover, if no response is given within five business days, it is considered a constructive denial of access that may be appealed pursuant to §1401.7(c) of 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

RJF:js
Enc.

STATE OF NEW YORK
COMMITTEE ON PUBLIC ACCESS TO RECORDS FOIL-AO-596

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

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EXECUTIVE DIRECTOR
ROBERT J. FREEMAN

August 24, 1977

Ms. Rachel Poller
Public Information Officer
Dutchess County Department of Planning
47 Cannon Street
Poughkeepsie, New York 12601

Dear Ms. Poller:

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

In my opinion, all local zoning ordinances and master plans are publicly accessible pursuant to both the Freedom of Information Law and §51 of the General Municipal Law. Ordinances and master plans are reflective of final determinations made by a governing body, which are accessible under §88(1)(h) of the Freedom of Information Law. In addition, the records in question have long been available under §51 of the General Municipal Law, which grants access to virtually all records in possession of any officer of a municipality.

You also asked whether it would be legal ro refer the public to town clerks when such information is sought. In my view, although the records may relate more closely to the operations of town government, so long as the county maintains possession of such records, copies of the records should be made on request by the county. The Freedom of Information Law does not distinguish between a primary and a secondary custodian of records. Moreover, it is the nature of records that determines whether or not they are accessible. Therefore, I believe that a failure to provide access to the records in question by your office would likely constitute an improper constructive denial of access.

With respect to fees, it is noted that the regulations promulgated by the Committee permit agencies to charge up to twenty-five cents per photocopy [see attached regulations, §1401.8]. While I am not suggesting that you raise the fee for photocopying, it is within the authority of the Department to do so.

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-597

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

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JAMES C. O'SHEA
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ROBERT W. SWEET
EXECUTIVE DIRECTOR
ROBERT J. FREEMAN

[redacted]

Mr. Paul Georgiou
[redacted]

Dear Mr. Georgiou:

Your inquiry concerns rights of access to criminal records pertaining to you.

In brief, the Freedom of Information Law provides access to specified categories of records in possession of all units of government in New York (see attached). Relevant to your inquiry, the Law provides access to final opinions made in the adjudication of cases [§88(1)(a)]. In addition, the Law provides access to any other records made available by any other provision of law [§88(1)(i)]. One such provision of law is §255 of the Judiciary Law which provides access to virtually all records in possession of a court clerk. Therefore, records reflective of the disposition of court cases are accessible from court clerks maintaining custody of such records.

In addition, the Division of Criminal Justice Services will provide access to a criminal history record to the subject of the record upon proof of identity.

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-598

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

:TTEE MEMBERS
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EXECUTIVE DIRECTOR
ROBERT J. FREEMAN

August 24, 1977

Mr. Cary E. Wood, Ed. D.
Records Access Officer
Ellenville Central School
Ellenville, New York 12428

Dear Mr. Wood:

Thank you for your interest in complying with the Freedom of Information Law. Your questions deal with the length of time that school district records must be maintained and made available and with specific information that could be considered "confidential."

With regard to the maintenance and disposition of records, the State Archives maintains a Local Records Section which has compiled and disseminated to all units of local government maintenance and disposal schedules for records. If you are not yet familiar with these schedules, it is suggested that you contact Mr. John Lieth, Local Records Section of State Archives, Room 1807, 99 Washington Avenue, Albany, New York 12230. I am sure that Mr. Lieth will be happy to provide you with whatever assistance is necessary.

In terms of access to the records, as long as records are in possession of a school district, they are accessible to the public pursuant to both the Freedom of Information Law, which is retrospective due to its remedial nature, and §2116 of the Education Law, which has been in effect since 1947 and provides access to virtually all records in possession of a school district.

With regard to confidentiality, I believe the term "confidential" is much overused. In my opinion, records are confidential only if a statute provides for nondisclosure or if a court determines that records need not be disclosed.

However, there are records in possession of a school district which may properly be deemed confidential. Specifically, the federal Family Educational Rights and Privacy Act (commonly known as the "Buckley Amendment") generally provides that education records identifiable to students are confidential to all but the parents of a student until a student attains the age of eighteen years, at which time the student acquires the rights of his or her parents. Other than the prohibitions contained in the Buckley Amendment, I am unaware of any records possessed by school districts which are deemed confidential by statute. Once again, I believe that the Local Records Section of the State Archives can provide additional assistance in this matter.

Enclosed for your perusal are copies of the current Freedom of Information Law, the amended Freedom of Information Law which will become effective January 1, 1978, regulations promulgated by the Committee that have the force and effect of law and additional explanatory materials.

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: Mr. John Lieth

STATE OF NEW YORK
COMMITTEE ON PUBLIC ACCESS TO RECORDS FOIL-AO-599

COMMITTEE MEMBERS
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EXECUTIVE DIRECTOR
ROBERT J. FREEMAN

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

August 26, 1977

Lawrence Shelton
City of Kingston Republican Committee
31 Arlmont Street
Kingston, New York 12401

Dear Mr. Shelton:

Thank you for your interest in the Freedom of Information Law. Your inquiry pertains to information sought from the City Clerk of the City of Kingston. Specifically, information was requested regarding the expenditure of public funds for a dinner honoring the Mayor of Kingston, the City debt, and the title and salary of a particular City employee.

Having discussed the matter with Louis DeCicco, the City Clerk, records have been made available in response to your requests to the extent that such records exist. It is noted that the Freedom of Information Law provides access to records. Therefore, if information sought by a member of the public does not exist in the form of a record, there is nothing to be made available. Similarly, an agency is not obligated to create a record in response to a request. For example, although each entity subject to the Law must compile a payroll record consisting of the name, address, title and salary of all employees of the entity, a record need not be created in response to a request for payroll information concerning a particular employee or employees. In such a situation, it would be recommended that the entire payroll record be requested for either inspection or copying. Based upon that record, the member of the public making the request could gain the specific information desired.

With regard to rights of access generally, records reflective of the expenditure of public monies, the City debt, and the payroll information described earlier are clearly accessible to any person pursuant to both the Freedom of Information Law [§88(1)(a) through (i)] and §51 of the General Municipal Law, which has long provided substantial rights of access to records in possession of municipalities.

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: Louis DeCicco
City Clerk
City of Kingston
City Hall
1 Meadow Street
Kingston, New York 12401

RJF:sms

STATE OF NEW YORK
COMMITTEE ON PUBLIC ACCESS TO RECORDS

FOIL-AO-601

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

August 26, 1977

Ms. Camille F. Coulborn
[redacted]

Dear Ms. Coulborn:

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

Your inquiry pertains to denials of access to unapproved minutes and tape recordings of school board meetings, as well as the ability of a member of the public to record discussion at a meeting with his or her tape recorder.

It is important to note at the outset that the Freedom of Information Law has been substantially amended. Enclosed are copies of the amendments, which become effective January 1, 1978, as well as a memorandum describing problems that have arisen under the current statute and solutions offered by the amendments.

First, as stated in earlier opinions, I believe that minutes of meetings are accessible as soon as they exist, whether or not they have been approved. It has been advised that when making unapproved minutes available, an agency could label them "unapproved" or "not final". By so doing, the public is aware that the minutes are subject to change, and the agency is given a measure of protection.

Second, rights of access to tape recordings are questionable, although they are in my view accessible. The basic problem involves the term "record", which is not defined in the existing Freedom of Information Law. If a tape recording is considered to be a record, which I believe

is the case, it is accessible under the Freedom of Information Law when read in conjunction with §2116 of the Education Law. In brief, §2116 provides access to "[T]he records, books and papers belonging or appertaining to the office of any officer of a school district..." As such, if a tape recording is a record, it is accessible. It is emphasized that the amendments to the Freedom of Information Law will remove the confusion in this matter, since "record" will be defined as "...any information...in any physical form whatsoever..." [see §86(4)]. Therefore, when the amendment becomes effective, rights of access to tape recordings of open meetings will be clarified.

And third, the right of a member of the public to record discussion at an open meeting is in my opinion unresolved at this juncture. The only judicial determination of which I am aware that deals with the issue held that a public body may make reasonable rules to govern its own proceedings and that it was reasonable to prohibit the use of a tape recorder by a member of the body (Davidson v. Common Council of City of White Plains, 244 NYS 2d 385). The decision, which was rendered in 1963, stated that a rule prohibiting the entry of a tape recorder was valid, since the presence of such a device in the judgment of the City Council "...distracts from the true deliberative process of the body..." (id. at 388).

In my view, it is doubtful that the same outcome would be reached in the situation described in your letter. First, due to the sophistication of tape recording devices, which are now small and noiseless, it is questionable whether a public body could reasonably assert that the presence of such devices intrudes upon the deliberative process. Second, and more important, if the Board has determined to use its own tape recorder, which it does not consider to be intrusive, the introduction of other tape recorders could

not in my opinion be considered intrusive. Thus, it would be inconsistent if not unreasonable to establish a rule prohibiting the use of tape recorders by the school board when the board itself employs a tape recorder.

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

Sincerely,

Robert J. Freeman

Robert J. Freeman
Executive Director

Enclosure

RJF:sms

STATE OF NEW YORK
COMMITTEE ON PUBLIC ACCESS TO RECORDS FOIL-AO-602

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

August 29, 1977

Mr. John Kavanagh
[redacted]

Dear Mr. Kavanagh:

Thank you for your interest in the Freedom of Information Law. Your inquiry pertains to unsuccessful attempts to gain access to records in possession of the City Clerk of the City of Schenectady.

The Freedom of Information Law provides rights of access to several categories of records [§88(1)], including any other records made avaiable by any other provision of law [§88(1)(i)].

Relevant to your inquiry, one such provision of law is Section 255 of the Judiciary Law, which states:

> "§255. Clerk must search files upon request and certify as to result. 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, can not be found."

In view of the quoted statute, a court clerk is obligated to diligently search the records requested and to provide access to virtually all records in his or her possession. As such, the denial of access to which you referred in your letter was in my opinion improper.

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

Sincerely,

Robert J. Freeman

Robert J. Freeman
Executive Director

cc: Peter J. Ryan
Office of Court Administration
Agency Building 4
Empire State Plaza
Albany, New York

Francis Woidzik
City Court Clerk
City of Schenectady
City Hall
Schenectady, New York 12309

RJF:sms

STATE OF NEW YORK
COMMITTEE ON PUBLIC ACCESS TO RECORDS

OML-AO-141
FOIL-AO-603

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

August 30, 1977

Mrs. Mabel A. Cavanagh
[redacted]

Dear Mrs. Cavanagh:

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

Your first question pertains to rights of access to minutes of meetings of the Delhi Town Board. According to your letter, the Board entered into executive session to discuss appointments to the Planning Board. In this regard, the Town Board could legally discuss appointments to the Planning Board during an executive session pursuant to §95(1)(f) of the Open Meetings Law. Any action taken during the executive session is required to be recorded in the form of minutes which must be compiled and made available within one week of the executive session [see attached, Open Meetings Law, §96(3)]. If no action was taken, minutes need not be compiled.

Your second question pertains to letters sent to a cross section of the Town's inhabitants in order to elicit opinions regarding zoning. As I understand the situation, it would appear that the Town engaged in what might be considered to be a survey.

With regard to rights of access to the letters, the Freedom of Information Law provides 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 filed with, used by or in possession of a municipal official. Consequently, the letters or portions thereof are in my opinion accessible.

It is noted that §88(3) of the Freedom of Information Law states that an agency may delete identifying details when making records available in order to protect against unwarranted invasions of personal privacy. Under the circumstances, it is possible that disclosure of the names and addresses of members of the public who responded to the survey might result in an unwarranted invasion of personal privacy. In such a case, the substance of the letters, the responses, should be made available after having deleted the identifying details which if disclosed would result in an unwarranted invasion of personal privacy.

Enclosed are copies of the Freedom of Information Law, the amendments to the Law which will become effective on January 1, 1978, regulations promulgated by the Committee, which have the force and effect of law, and explanatory materials dealing with the Freedom of Information Law. Also enclosed is a copy of the Open Meetings Law.

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

Sincerely,

Robert J. Freeman

Robert J. Freeman
Executive Director

RJF:js
Encs.

STATE OF NEW YORK
COMMITTEE ON PUBLIC ACCESS TO RECORDS FOIL-AO-604

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

August 30, 1977

Ms. Marjorie E. Karowe
Associate Counsel
The Civil Service Employees
Association, Inc.
33 Elk Street
Box 125
Capitol Station
Albany, New York 12224

Dear Ms. Karowe:

Thank you for your interest in the Freedom of Information Law. Your inquiry raises questions concerning the legality of a release by a public employer of payroll information that indicates which employees are members of the Civil Service Employee Association "having automatic dues check off".

You wrote that in the interest of protecting privacy of members of your organization, you feel that the information in question "should not be discoverable under the Freedom of Information Law".

In my opinion, the information in question need not be made available under the Freedom of Information Law and is not accessible as a matter of right. Nevertheless, a public employer may disclose any information in his or her possession, so long as there is no statute which proscribes the employer from disclosing.

Section 88(1)(g) of the Freedom of Information Law provides that the person charged with the duty of preparing the payroll for an agency shall compile a payroll record consisting of the name, address, title and salary of each officer or employee of the agency, except law enforcement officers, whose names and addresses need not be made available. The cited provision is somewhat unique and has resulted in several

problems concerning its interpretation. First, the provision is one of the few in the Freedom of Information Law which requires an agency to compile or create a record. In general, the Law provides access to existing records. Therefore, in the vast majority of cases, an agency need not compile a record in response to a request. Second, §88(1)(g) appears to provide access to the payroll record only to members of the news media. Nevertheless, the Committee has advised and its regulations, which have the force of law, state that the payroll record shall be made accessible to any person [see attached regulations, §1401.3(b)]. This determination is based upon a decision rendered in 1972 which stated that payroll information must be made available to the public (see Winston v. Mangan, 338 N.Y.S. 2d 654, 662). Since §88(10) of the Law states that nothing in the Law shall be construed to limit or abridge rights of access granted by other proviaions of law or by the courts, rights of access granted by case law are preserved, and the payroll record is therefore available to members of the public as well as members of the news media. And third, problems have arisen with regard to the addresses of public employees. The Law does not specify which address, home or business, must be made available. In this regard, the Committee has generally advised that, if, for example, the custodian of the payroll record feels that disclosure of employees' home addresses would result in an unwarranted invasion of personal privacy, the payroll record should make reference to business address. It is also noted that the amendments to the Freedom of Information Law, which will become effective January 1, 1978, require the compilation of a record setting forth "the name, public office address, title and salary of each officer or employee of an agency" [see amendments attached, §87(3)(b)]. In sum, the record that is envisioned by the Freedom of Information Law contains but four items of information: name, address, title and salary. In my opinion, it was not intended that a payroll record should contain additional information reflective of membership in a public employee union, for example, the number of deductions claimed by an employee, or a social security number.

In terms of privacy, the Committee has consistently advised that information relative to the official duties of

a public employee or the agency by which the employee is employed is accessible. On the other hand, information not relevant to the performance of the official duties of the employee or the agency is deniable on the ground that disclosure of such information would result in an unwarranted invasion of personal privacy. By means of example, each of the items required to be made available is relevant to the official duties of a public employee and the agency by which that person is employed. As stated in the decision cited previously, "[T]he identities of the employees and their salaries are vital statistics kept in the proper recordation of departmental functioning and are the primary sources of protection against employee favoritism" (id. at 662). However, disclosure of information, such as the social security number or the number of deductions claimed by a particular employee, has no relevance to the performance of the official duties of either the employee or the agency. Similarly, membership or non-membership in a public employee union has no relevance to the performance of the official duties of an employee or his or her employer. Therefore, in my opinion information of this nature may be withheld by means of deletion of such details from a payroll record before making the record available.

As noted at the outset, a public officer may disclose any records in his possession, so long as he or she is not prohibited from so doing by statute. Likewise, the Freedom of Information Law is permissive. Although rights of access are granted to a limited number of categories of records, nowhere in the Law is there a statement that prohibits an agency from disclosing records. Therefore, while a request may not be reflective of records that are accessible as of right, the agency may nonetheless disclose.

In my view, however, disclosure of the details of the lives of public employees that are not relevant to the performance of their official duties would result in an unfortunate precedent. As a consequence, this office has consistently advised agencies that information that is irrelevant to the performance of public employees' official duties need not be disclosed, based upon the notion that

such disclosure would result in an unwarranted invasion of personal privacy pursuant to §88(3) of the Freedom of Information Law.

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

Sincerely,

Robert J. Freeman

Robert J. Freeman
Executive Director

Enclosures

RJF:sms

STATE OF NEW YORK
COMMITTEE ON PUBLIC ACCESS TO RECORDS FOIL-AO-605

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

September 1, 1977

Ms. Elaine N. Baxter
[redacted]

Dear Ms. Baxter:

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

Your question pertains to your rights of access as an employee to personnel records in possession of your employer. In this regard, it is important to note at the outset that rights of access granted by the Freedom of Information Law pertain only to records in possession of governmental entities. The Law does not apply to private employers.

If you are employed by government, some of your personnel records may be accessible. It is suggested that you review the categories of accessible records listed in §88(1) of the current Freedom of Information Law, a copy of which is attached. Any records falling within the categories listed are accessible to you. It is emphasized that the Freedom of Information Law was recently amended. Consequently, I have also enclosed a copy of the amendments to the Law which become effective January 1, 1978, as well as regulations dealing with the procedural aspects of the Law and additional explanatory materials.

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

Sincerely,

Robert J. Freeman

Robert J. Freeman
Executive Director

Enclosures

STATE OF NEW YORK
COMMITTEE ON PUBLIC ACCESS TO RECORDS FOIL-AO-606

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

September 1, 1977

Mr. Bertram Z. Kaden
[redacted]

Dear Mr. Kaden:

Thank you for your interest in the Freedom of Information Law. Your inquiry pertains to attempts to inspect and copy records in possession of the Town of Wawarsing.

It is important to note at the outset that the Freedom of Information Law provides access to existing records. As such, if information that you are seeking does not exist in the form of a record or records, the agency in receipt of the request has no obligation to create a record in response to the request. For example, your letter of August 27 to Mr. Donald Mekulik, the Town Code Enforcement Officer, contains a request for a list of campgrounds situated in the Town. If no such list exists, the Town has no obligation to compile a list in response to your request.

With respect to rights of access, the Freedom of Information Law provides access to several specified categories of records [§88(1)], including any other records made available by any other provision of law [§88(1)(i)]. Relevant to your inquiry, one such provision of law is §51 of the General Municipal Law which has long granted 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 the Town of Wawarsing, are accessible.

It is noted that the Freedom of Information Law does not require you to describe the records sought down to the last detail. The regulations promulgated by the Committee (see enclosed) require that one or more records access officers assist you in identifying the records sought if necessary. Moreover, each entity of government subject to the Law must compile and make available a "subject matter list". The subject matter list must categorize all records in possession of an agency and must be "sufficiently detailed to permit the requester to identify the file category of the record sought" [regulations, §1401.6(c)(1)]. A request for records falling within a category included within a subject matter list "shall conform to the standard that records be identifiable "[regulations, §1401.6(e)]. In addition, the courts have 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 individual folders as alleged by respondents, is sufficiently identifiable as to meet the requirements of

the Law." [Dunlea v. Goldmark, 380 N.Y.S.2d 496, 499 (1976); affirmed, 389 N.Y.S.2d 423 (1976)].

In sum, if the records sought exist, they should be made available to you. Nevertheless, where no records in the nature of those requested exist, new records need not be created, nor does the Freedom of Information Law require that questions be answered by officials of government.

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

Sincerely,

Robert J. Freeman

Robert J. Freeman
Executive Director

cc: Donald Mekulik
Code Enforcement Officer
Town of Wawarsing
108 Canal Street
Ellenville, New York 12428

Franklin Sahler
Supervisor
Town of Wawarsing
Canal Street
Ellenville, New York 12428

Enclosure

RJF:sms

STATE OF NEW YORK
COMMITTEE ON PUBLIC ACCESS TO RECORDS FOIL-AO-607

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

September 1, 1977

Mr. George Kalman
[redacted]

Dear Mr. Kalman:

Thank you for your interest in the Freedom of Information Law. Your inquiry pertains to a denial of access to records concerning mortgage payments by the Poughkeepsie Savings Bank.

The Freedom of Information Law provides rights of access to records in possession of governmental entities in New York State. As such, it is not applicable to records of the private sector, such as the Poughkeepsie Savings Bank.

I believe, however, that you have begun to follow the most appropriate course of action, inasmuch as the correspondence attached to your letter indicates that you have contacted the Consumer Protection Board. Perhaps that agency will be able to help you.

I regret that I cannot be of further assistance.

Sincerely,

Robert J. Freeman

Robert J. Freeman
Executive Director

RJF:js
Enc.

STATE OF NEW YORK
COMMITTEE ON PUBLIC ACCESS TO RECORDS FOIL-AO-608

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

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EXECUTIVE DIRECTOR
ROBERT J. FREEMAN

September 2, 1977

Sigmund V. Mazur, Esq.
2601 Lodi Street
Syracuse, New York 13208

Dear Mr. Mazur:

Thank you for your interest in the Freedom of Information Law. Your inquiry pertains to a denial of access to a complaint received by the Department of State regarding Mr. James Watling.

In my opinion, the complaint is deniable under the Freedom of Information Law. Section 88 of the Law provides access to nine limited categories of records [see attached, Freedom of Information Law §88(1)(a) through (i)]. Based upon a review of the cited provision, a complaint does not fall within any of the categories of accessible records and is, therefore, deniable.

It is noted, however, that the Freedom of Information Law has been amended. The amendments (see attached) which will become effective on January 1, 1978, will reverse the logic of the existing Law. Rather than granting access to specified records to the exclusion of all others, the amendments will provide access to all records, except those records or portions thereof that are specifically deemed deniable.

Under the amendments, it would appear that the substance of the complaint would be accessible. The only portions of the record in question that could in my view be appropriately denied would be those identifying the complainant. If the Department had determined to take further action, I believe that the identity of the complainant would be relevant to the proceeding and therefore would be accessible. Nevertheless, since no proceeding is envisioned, the identity of the complainant is in my opinion irrelevant. As such, although the substance of the

complaint would be accessible under the amended statute, the identity of the complainant could justifiably be deleted on the ground that disclosure would result in an unwarranted invasion of privacy pursuant to §87(2)(b).

Both the existing Law and the amendments provide examples of unwarranted invasions of privacy [see §88(3) of current statute and §89(2) of amendments]. Although the examples are merely illustrative, they can be used as a guide to the intent of the Legislature. With respect to a complaint, its substance determines whether or not action should be taken by the Department. The identity of the complainant is in all likelihood merely incidental to an investigation. Under the circumstances described in the correspondence attached to your letter, no cause for action was found by the Department after having conducted an investigation. Consequently, disclosure of the complainant's identity might in this instance result in "economic or personal hardship" and therefore 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
Executive Director

RJF:js
Enc.

cc: Willard Roff

STATE OF NEW YORK
COMMITTEE ON PUBLIC ACCESS TO RECORDS FOIL-AO-609

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

September 2, 1977

Mr. Haywood Cromwell
[redacted]

Dear Mr. Cromwell:

Thank you for your interest in the Freedom of Information Law. Your inquiry pertains generally to rights of access to criminal records.

The Law provides access to several categories of records in possession of government in New York [§88(1)], including any other records made available by any other provision of law. One such provision of law is §255 of the Judiciary Law, which provides access to virtually all records in possession of a court clerk in New York State. As such, records of the disposition of felony cases are available from the clerk in possession of such records. In addition, the Law provides access to police blotters and booking records [§88(1)(f)], both of which are accessible from the arresting agency.

It is noted that an agency may deny access to "investigatory files compiled for law enforcement purposes" [§88(7)(d)]. As such, records containing such information may be withheld.

With respect to records in custody of the federal government, a request should be directed to the appropriate federal agencies under the Freedom of Information Act, a copy of which is enclosed.

Also enclosed are copies of the New York Freedom of Information Law, regulations dealing with the procedural aspects of the Law, and additional explanatory materials.

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

Sincerely,

Robert J. Freeman

Robert J. Freeman
Executive Director

RJF:js
Enc.

STATE OF NEW YORK
COMMITTEE ON PUBLIC ACCESS TO RECORDS FOIL-AO-610

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

September 6, 1977

[redacted]

Dear [redacted]:

Thank you for your continued interest in the Freedom of Information Law. Your inquiry pertains to records relative to an application for unemployment insurance benefits.

It is noted that the Committee has no authority to force compliance with the Freedom of Information Law, but rather merely has the power to advise agencies of government in New York State. Consequently, a copy of this response will be sent to the branch office of the Unemployment Insurance Division of the Department of Labor to which you referred in your letter.

The Freedom of Information Law is not relevant to your request in this instance, since the Labor Law deals with records concerning claims for umemployment insurance benefits. Although Section 537 of the Labor Law generally prohibits disclosure of records acquired from employers or employees, it specifically states that "[S]uch information insofar as it is material to the making of a claim for benefits shall be available to the parties affected..." Therefore, if the questionnaire that was submitted to the Division is material to your claim for benefits, it is in my opinion 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

Robert J. Freeman
Executive Director

RJF:js
cc: Department of Labor

STATE OF NEW YORK
COMMITTEE ON PUBLIC ACCESS TO RECORDS FOIL-AO-611

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

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EXECUTIVE DIRECTOR
ROBERT J. FREEMAN

September 7, 1977

Mr. Isidore Gerber
Executive Director
Liberty Taxpayers Association
Liberty, New York 12754

Dear Mr. Gerber:

Thank you for your interest in the Freedom of Information Law. Your inquiry pertains to unsuccessful attempts to gain access to records relative to the activities of the Liberty Central School Student Council.

According to your letter and the attached correspondence, you are seeking records reflective of rules, laws and by-laws concerning the expenditure of Student Council funds, the jurisdiction of the Student Council to "use monies as they see fit," the number of Student Council representatives that must be present to vote to expend funds, and the percentage of voter approval required to expend Student Council funds.

In my opinion, to the extent that the records sought exist, they are accessible. The Freedom of Information Law provides 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 §2116 of the Educational Law, which states that:

> "[T]he records, books and papers belonging or appertaining to the office of any officer of a school district are hereby declared to be the property of such district and shall be open for inspection by any

> qualified voter of the district at all reasonable hours, and any such voter may make copies thereof."

In view of the quoted provision, virtually all of the information sought is in my opinion accessible, if it exists in the form of records or papers, and if it "belongs or appertains" to the office "of any officer" of the school district.

Materials attached to your letter indicate that you have already obtained records relevant to your inquiry. The rules adopted on April 28, 1974, provide that the Student Council can expend funds only after having received the approval of "at least two faculty members," the controller of the district and the faculty advisor of the extraclassroom activity. In addition, the rules specify that "two separate and independent sets of records and receipts and expenditures shall be maintained" and that an independent audit must be conducted annually. At least one set of records as well as the audits are accessible. Further, records indicating the approval of expenditures by the school district officials designated to grant such approvals are accessible. Records in possession of the Central Treasurer, such as prenumbered receipts, records of receipts and disbursements, monthly reports, and activity treasurers' receipts and disbursements, are also accessible.

Thus it is clear that students do not have the authority to expend monies "as they see fit," but rather are subject to a number of controls and procedures that must be carried out by both themselves and district officials.

With respect to the procedures of the Student Council regarding quorum requirements and enactment of resolutions to expend monies, §172.2 of the regulations promulgated by the Commissioner of Education requires the Board of Education "to make rules and regulations for the establishment, conduct, operation and maintenance of extraclassroom activities..."

If these rules have been issued, they are accessible; if no such rules have been issued, the Board has failed to perform a duty that is required to be performed by law.

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

Sincerely,

Robert J. Freeman

Robert J. Freeman
Executive Director

cc: Mr. S. Richard Gross
Attorney for Liberty Central School District
P. O. Box 245
Liberty, New York 12754

Mr. Clarence Parry
Office of the Superintendent
Liberty Central School District
Liberty, New York 12754

Mrs. Eugene Diamond
President of the LCS Board of Education
Deleware Avenue
Liberty, New York 12754

Mr. Lowell W. Heffley
LCS Student Council Advisor
267 South Main Street
Liberty, New York 12754

RJF:sms

STATE OF NEW YORK
COMMITTEE ON PUBLIC ACCESS TO RECORDS

FOIL-AO-612
OML-AO-143

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

September 8, 1977

Ms. Elsbeth K. Larson
[redacted]

Dear Ms. Larson:

Thank you for your interest in the Freedom of Information Law and the Open Meetings Law. Your inquiry pertains to a request for an appraisal made by a third party for the Scotia-Glenville School District, as well as the extent to which the School Board is required to discuss the leasing of real property under the Open Meetings Law.

The Freedom of Information Law provides access to several categories of records [§88(1)], including any other records made available by any other provision of law. One such provision of law is §2116 of the Education Law, which states that:

> "[T]he records, books and papers belonging or appertaining to the office of any officer of a school district are hereby declared to be the property of such district and shall be open for inspection by any qualified voter of the district at all reasonable hours, and any such voter may make copies thereof."

As such, virtually all records in possession of a school district are accessible. Moreover, none of the grounds for denial of access to information set forth in §88(7) of the Law could in this instance be appropriately invoked.

> However embarrassing or flattering the furnished study may prove to be to the Park District administration, is not determinative or relevant. It is a public record" [Winston v. Mangan, 338 N.Y.S. 2d 654, 660-661 (1975)].

Based on the decisions cited in the preceding paragraphs, it appears that a denial could be based only upon an assertion that disclosure would at this juncture result in detriment to the public interest, and only a court can make such a determination.

It is noted that, according to your letter, the School District agreed not to divulge the appraisal at the request of the appraiser. In my opinion, a promise or agreement of this nature is meaningless. It has long been held that a request for confidentiality or privilege by a third party is irrelevant. "The concern...is with the privilege of the public officer, the recipient of the communication, rather than with the maker of the communication" [Matter of Langert v. Tenney, 5 A.D. 2d 586, 588 (1958); see also Cirale, supra, and People v. Keating, 286 App. Div. 150 (1955)].

With regard to the Open Meetings Law, §95(1)(h) of the Law permits a public body to enter into an executive session to discuss:

> "the proposed acquisition, sale or lease of real property, but only when publicity would substantially affect the value of the property."

Therefore, if in fact public discussion of the issue in question "would substantially affect the value of the property," discussion may be held in executive session. If the discussion would not substantially affect the value of the property, discussion by the Board must be held during an open meeting.

Nevertheless, there is a case that held that in some circumstances records may be denied if premature disclosure would result in detriment to the public interest [Sorley v. Village of Rockville Centre, 30 A.D. 2d 822 (1968)]. The situation described in the decision cited above dealt with a request for records relative to an incomplete transaction of an urban renewal agency. If the records sought had been disclosed when requested, the agency could not have consummated the transaction. On that basis, the court found that disclosure would on balance result in detriment to the public interest and therefore the records were found to privileged until consummation of the transaction. I cannot gauge from your letter whether disclosure of the appraisal would in fact be detrimental to the public interest. It is further noted that only a court can determine whether or not an assertion that records are privileged is proper, and the agency asserting such a claim has the burden of proving to a court that disclosure would indeed be detrimental to the public interest [see Cirale v. 80 Pine Street Corp., 35 N.Y. 2d 113 (1974)].

Other decisions appear to arrive a different result. For example, it has been held that records in possession of a city assessor relating to valuation of realty are accessible, even though some of the information had been obtained from third parties upon the express condition that such information would not be revealed by the assessor [Sears Roebuck & Co. v. Hoyt, 107 N.Y.S. 2d 756 (1951)]. Also, in a situation in which a village contracted with a third party for a study to be performed regarding a skating rink, the court stated:

> "[U]ndoubtedly, the public interest in the results of the study is high for the skating rink entailed a substantial financial outlay of public monies and taxpayers have a profound right to know the value and result of that investment.

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: Records Access Officer
Scotia-Glenville Central School
District
One Worden Road
Scotia, New York 12302

RJF:sms

STATE OF NEW YORK
COMMITTEE ON PUBLIC ACCESS TO RECORDS FOIL-AO-613

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

September 6, 1977

Mr. George A. Mayes
[redacted]

Dear Mr. Mayes:

I am in receipt of your letter of August 27 and the correspondence attached thereto. Your inquiry pertains to a denial of access to investigatory records by the New York State Board of Elections.

I have discussed the matter on your behalf with Mr. Donald J. McCarthy, Jr., Counsel to the Board of Elections. Based upon our conversation, it appears that the Board has granted access to the records sought to the extent that they are accessible as of right. The Freedom of Information Law provides access to several specified categories of records [§88(1)(a) through (h)]. The records that were not made available do not appear to fall within any of the categories of accessible records and, therefore, are deniable. It is also noted that much of the information sought consists of "investigatory files compiled for law enforcement purposes" and is specifically deemed deniable by §88(7)(d) of the Law.

With respect to the request directed to Mr. John Mannix, Warren County Attorney, it is noted that the Freedom of Information Law provides access to certain existing records. It does not require that questions be answered or that records be created in response to a request. Therefore, if the information sought does not exist in a form of a record, the official to whom the request was made has no obligation to prepare new records in order to respond to your request. Moreover, some of the information sought may be subject to the attorney-client privilege which exempts from disclosure communications between an attorney and his client.

As requested, attached is a copy of the amended Freedom of Information Law. The amendments will become effective January 1, 1978.

I hope that I have been of some assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:js
Enc.

cc: Donald J. McCarthy, Jr.
John Mannix

STATE OF NEW YORK
COMMITTEE ON PUBLIC ACCESS TO RECORDS FOIL-AO-614

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

September 12, 1977

Mr. John P. Boardman, President
Town of Manchester Senior Citizens
45 State Street
Manchester, New York 14504

Dear Mr. Boardman:

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 Freedom of Information Law.

Your inquiry pertains to your right to inspect records reflective of the expenditures of the Village of Manchester.

The Freedom of Information Law provides 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

> "[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..."

As such, all records of expenditures of a municipality, such as the Village of Manchester, are accessible to you.

Enclosed are copies of the current Freedom of Information Law, the amendments to the law which will become effective on January 1, 1978, regulations promulgated by the Committee that have the force and effect of law and with which each unit of government in the state must comply, as well as a pamphlet explaining how to use the Freedom of Information Law.

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

Sincerely,

Robert J. Freeman

Robert J. Freeman
Executive Director

cc: Louis J. Lefkowitz, Attorney General
State of New York
Department of Law
Capitol, Albany, NY

Enclosure

RJF:sms

STATE OF NEW YORK
COMMITTEE ON PUBLIC ACCESS TO RECORDS FOIL-AO-615

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

September 12, 1977

Mr. Michael Hurley
Box 149 [72B89]
Attica, New York 14011

Dear Mr. Hurley:

Although I realize that your incarceration and the resulting lack of funds has made it difficult for you to obtain copies of records under the Freedom of Information Law, there is little that I can do on your behalf.

While the Committee's regulations do not require that a fee be charged for copies, the regulations permit an agency to set a fee of up to twenty-five cents per page. With respect to the Department of State, the Executive Law requires the Department to charge fifty cents per page unless otherwise authorized by statute. I am not aware of any "indigency plan" that would permit you to pay for copies on a long-term basis. As such, there is little that I can do for you.

I regret that I cannot be of further assistance.

Sincerely,

Robert J. Freeman

Robert J. Freeman
Executive Director

RJF:js

STATE OF NEW YORK
COMMITTEE ON PUBLIC ACCESS TO RECORDS FOIL-AO-616

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

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September 16, 1977

Mr. Joseph F. Tackenberg
[redacted]

Dear Mr. Tackenberg:

Thank you for your interest in the Freedom of Information Law. Your question pertains to a denial of access by the New York City Department of Personnel to records relative to formulation of eligibility requirements concerning specific civil service examinations.

It is noted at the outset that the Freedom of Information Law provides access to certain existing records. Therefore, if a request is made for information that does not exist in the form of a record or records, an agency need not create a record in response to the request.

In my opinion, to the extent that the records sought exist, they are accessible. The Freedom of Information Law provides access to several categories of records [§88(1)], including any other records made available by any other provision of law, [§88(1)(i)]. In this regard, §§1113 and 1114 of the New York City Charter have long provided that virtually all records in possession of City departments are accessible, except those in possession of the Police and Law Departments. As such, if the records sought exist, they are accessible.

Moreover, the Freedom of Information Law specifically provides access to

> "...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..." [§88(1)(b)].

Consequently, the documents upon which an agency relies in carrying out its duties, as well as the statistical or factual materials upon which reliance was placed are accessible under the Law.

In addition, it is noted that the brief denial of access signed by Mr. Henry Leonard Toker, Esq., failed to comply with regulations promulgated by the Committee (see attached). The regulations, which govern the procedural aspects of the Freedom of Information Law and have the force and effect of law, state in relevant part that a person denied access "shall be advised of his right to appeal" and the person or body designated to hear appeals must be identified in the denial [§1401.7(b)]. The denial appended to your letter indicates that you were neither advised of your right to appeal, nor was the person to whom an appeal should be directed identified. As such, the Personnel Department failed to comply with a legal requirement with which it must comply.

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

Sincerely,

Robert J. Freeman

Robert J. Freeman
Executive Director

RJF:js
Enc.

cc: Francis Morris, Chief Counsel
Henry Leonard Toker, Esq.

STATE OF NEW YORK
COMMITTEE ON PUBLIC ACCESS TO RECORDS FOIL-AO-617
DEPARTMENT OF STATE, 162 WASHINGTON AVENUE, ALBANY, NEW YORK 12231
(518) 474-2518, 2791

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ROBERT J. FREEMAN

September 16, 1977

Mr. Louis Freeman
Director of Business Operations
East Ramapo Central School District
50A South Main Street
Spring Valley, New York 10977

Dear Mr. Freeman:

Thank you for your interest in the Freedom of Information Law. Your question pertains to a denial of access to insurance experience ratings by the Department of Civil Service.

The Freedom of Information Law provides access to several categories of records [§88(1)(a) through (i)]. Relevant to your inquiry, the Law grants access to "statistical or factual tabulations" that are used in the formulation of policy [§88 (1)(b)] or that are "made by or for the agency" [§88(1)(d)]. Therefore, if the records sought indeed consist of statistical or factual tabulations, I would disagree with Mr. Sam D. Freeman of the Civil Service Department, who implied in a letter dated August 19, 1977, that the requested records do not fall within the purview of §88(1) of the Freedom of Information Law.

Moreover, Mr. Freeman wrote that even if the records sought were otherwise available, they could be properly denied under §88(7)(b) of the Freedom of Information Law. I again disagree with Mr. Freeman's opinion. In order to deny access based upon §88(7)(b), each of three conditions precedent must be met. First, the information must be "confidentially disclosed to an agency." Second, it must be maintained for the "regulation of commercial enterprise," for the "grant or review of a license to do business" or consist of a trade secret.

And third, disclosure must have the predictable effect of permitting "an unfair advantage to competitors of the subject enterprise." In my opinion, the second condition precedent is not supportable. I do not believe that the Department of Civil Service engages in "regulation of commercial enterprise," nor do I believe that the records in question are maintained for the "grant or review of a licence to do business." Consequently, §88(7)(b) cannot in my view be appropriately offered as a ground for denial.

Finally, §88(10) of the Freedom of Information Law provides that nothing in the statute "shall be construed to limit or abridge" rights of access granted either by other provisions of law or by judicial determination. In this regard, a decision was rendered in which the court granted access to information which I believe was analogous to that sought by your office [see City School District of the City of Binghamton v. Civil Service Commission of the New York State Department of Civil Service, Supreme Court, Albany County (1976)]. To be more specific, the petitioner, a participant in the Civil Service health plan, sought access to "...records which show the number of claims and amounts of claims filed by the employees, retired employees, and dependents of employees" under the plan for particular fiscal years. In granting access the court found that reliance upon §88(7)(b) as ground for denial was "without merit" and further stated that the Civil Service Department "...does not regulate the activities of the insurance carriers who underwrite its health insurance program..."

In addition, Mr. Freeman's response to you cites advice that I had given to the Department in a similar situation. The opinion, a copy of which is attached, discussed what is known as the "governmental privilege." In brief, the privilege may be successfully asserted when the agency in possession of records can prove that disclosure would on balance be detrimental to the public interest. The opinion cited the leading case on the matter and quoted the following portion of the decision in which the privilege was discussed:

> "[S]uch a determination is a judicial one and requires that the governmental agency come forward and show that the public interest would indeed be jeopardized by a disclosure of the information" [Cirale v. 80 Pine Street Corporation, 35 NY2d 113, 119 (1974)].

Admittedly, based upon a statement by a member of the Civil Service Commission, I wrote that it was my opinion that a court would likely conclude that disclosure would result in detriment to the public interest. Nevertheless, the Committee is not a part of the judicial branch, and opinions of the Committee need not be relied upon by a court. In this instance, the decision in City of Binghamton, supra, differed from my own. In discussing the privilege, the court held:

> "[B]eyond the specific exemptions provided for in section 88 of the Public Officers Law, information should be withheld only where the public interest would be harmed if the information sought became public. Here, it is in the interest of the petitioner's constituents that the information sought may be beneficial and result in tax savings to that governmental agency."

Since the court effectively found that disclosure would not harm the overall public interest, the records sought were made available.

In view of the similarity of the present controversy to the circumstances described in the City of Binghamton decision, the records sought are 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

RJF:sms
cc: Mr. Sam D. Freeman

Enclosure

STATE OF NEW YORK
COMMITTEE ON PUBLIC ACCESS TO RECORDS FOIL-AO-618

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

September 19, 1977

William L. Burke, Esq.
Madison County Attorney
Hamilton, New York 13346

Dear Mr. Burke:

Thank you for your interest in complying with the Freedom of Information Law. Your inquiry pertains to rights of access to preliminary budget estimates reviewed by a county budget officer pursuant to §354 of the County Law.

The Freedom of Information Law provides access to several categories of records [§88(1)], including "statistical or factual tabulations made by or for the agency" [§88(1)(d)]. Numerous questions regarding the nature and scope of the quoted provision have been raised. To date, judicial interpretations of the Freedom of Information Law concerning similar materials have resulted in determinations in which the courts ordered production of the records. The basic question involves an interpretation of what constitutes "statistical or factual tabulations." Must such a tabulation be based upon fact, or can it include statistics that are in essence of an advisory nature and which have no basis in fact? In Dunlea v. Goldmark [54 AD 2nd 446 (1976)], the Appellate Division held that columns of estimates furnished by a state agency to the Division of the Budget constituted statistical tabulations and as such are accessible under the Law. It is noted that the state agency that withheld the information argued that the phrase "statistical or factual tabulations" should be interpreted so as to restrict its meaning to "objective information" or "objective reality" (id. at 448). Although the court found that it may be harmful for government to operate in a "goldfish bowl" (id. at 449), the court further stated that

> "There is no statutory requirement that such data be limited to 'objective'

information and there is no apparent necessity for such a limitation" (id.)

As such, although the estimates submitted to the Division of the Budget by the agency were solely advisory and were not based upon fact, they were nonetheless held to fall within the scope of "statistical or factual tabulations" and as such were found to be accessible.

In addition, in a similar circumstance, preliminary budget material that had been denied by a town was found to be accessible notwithstanding silence concerning rights of access to such material in §106 of the Town Law [Application of Dullea, Supreme Court, Albany County (1975)].

Similarly, §88(1)(i) of the Freedom of Information Law provides access to any other records made available by any other provision of law. One such provision of law is §51 of the General Municipal Law, which has long provided access to virtually all records filed, kept or used by a municipal official. Reading the Freedom of Information Law in conjunction with §51 of the General Municipal Law all records in possession of a municipality, such as a county, are accessible, except to the extent that information may be denied pursuant to §88(7) of the Freedom of Information Law. In my opinion, none of the exceptions contained in §88(7) can in this instance be appropriately cited.

Moreover, since meetings of a budget committee designated by a county board of supervisors must be open to the public pursuant to §93 of the Public Officers Law (Open Meetings Law), budget estimates would in many instances be discussed in public. In my opinion, a denial of access to records that are discussed publicly would be anomalous. As such, the agrument that the records in question are accessible is in my view further reinforced.

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

OML-AO- 148
FOIL-AO-619

STATE OF NEW YORK
COMMITTEE ON PUBLIC ACCESS TO RECORDS

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

September 19, 1977

Mr. Isidore Gerber
Executive Director
Liberty Taxpayers Association
Liberty, New York 12754

Dear Mr. Gerber:

Thank you for your continued interest in the Freedom of Information Law. Your inquiry pertains to what constitutes a "proper agenda" of a public body.

Neither the Freedom of Information Law nor the Open Meetings Law deals with what appropriately should constitute an agenda. Neither statute provides that an agenda must be compiled. Consequently, I cannot advise that the agenda attached to your letter is either proper or improper.

Nevertheless, it has been advised that an agenda becomes accessible to the public as soon as it exists. Therefore, the policy of a school board that permits public disclosure of an agenda no sooner than the day of a meeting may be inappropriate if an agenda is in fact created prior to the day of the meeting.

It is also noted that the Open Meetings Law is silent with respect to public participation at open meetings. As such, although a public body may permit public participation at a meeting subject to reasonable rules, it need not.

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

Sincerely,

Robert J. Freeman

Robert J. Freeman
Executive Director

RJF:js

cc: Board of Education Liberty Central School

STATE OF NEW YORK
COMMITTEE ON PUBLIC ACCESS TO RECORDS FOIL-AO-620

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

September 26, 1977

John Pace, Esq.
Pace & Pace
P.O. Box 216
400 Montauk Highway
West Islip, New York 11795

Dear Mr. Pace:

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

It is important to note at the outset that the Freedom of Information Law was recently amended. The amended statute, a copy of which is attached, will become effective January 1, 1978.

With respect to your inquiry, the Law provides access to certain existing records. Therefore, an agency, such as a school district, need not create a record in response to a request. The amendments to the Law specify that nothing in the statute shall be construed "to require any entity to prepare any record not possessed or maintained by such entity" except those records required to be compiled pursuant to §87(3) [see §89(3)]. It is also noted, however, that the amendments contain a definition of "record" which includes "any information kept, held, filed, produced or reproduced by, with or for an agency...in any physical form whatsoever..." Therefore, although an agency need not create a record, the amendments specify that items that may not have been traditionally considered records will be considered as such as of January 1.

With regard to fees, §1401.8 of the regulations promulgated by the Committee (see attached) provide that an agency may charge a maximum of twenty-five cents per page for photocopies. In addition, the same section provides that an agency may not charge a search fee

unless a fee for searching had been adopted by law prior to the effective date of the Freedom of Information Law, September 1, 1974.

The regulations, which have the force and effect of law, will be amended shortly after the first of the year. Most of the alterations will be based upon specific procedural requirements contained in the amended statute. As such, it is doubtful in my opinion that the attached regulations will be significantly altered when the amendments to the Law become effective.

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

Sincerely,

Robert J. Freeman

Robert J. Freeman
Executive Director

RJF:js
Enc.

STATE OF NEW YORK
COMMITTEE ON PUBLIC ACCESS TO RECORDS FOIL-AO-621

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

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EXECUTIVE DIRECTOR
ROBERT J. FREEMAN

September 27, 1977

Edward G. McCabe, Esq.
Town Attorney
Town of North Hempstead
Town Hall
Manhasset, New York 11030

Dear Mr. McCabe:

Thank you for your interest in complying with the Freedom of Information Law. Your question pertains to the obligation on the part of a town to provide copies of documents to town officials.

I agree with your contention that a distinction may be made between a request for copies made in pursuance of one's official duties, as opposed to a request that does not relate to the performance of one's official duties. Under the first circumstance, it would appear that a town official has a need to know, as opposed to a right to know, as in the case of a request made under the Freedom of Information Law. Under the second circumstance, a town official should in my view be treated in the same manner as any member of the public who requests copies of records.

Consequently, in my opinion, no charge should be assessed when a public official requests copies for the purpose of carrying out his official duties, but a fee may be charged when a public official requests copies of records that do not relate to the performance of his official duties.

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-622

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

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EXECUTIVE DIRECTOR
ROBERT J. FREEMAN

October 3, 1977

Chief Thomas Delaney
Sheriff's Office
Court House
White Plains, NY 10601

Dear Chief Delaney:

Thank you for your interest in the Freedom of Information Law. Your inquiry pertains to a denial of access by the Chief of the Westchester County Parkway Police regarding the 1978 budget proposal submitted by the Parkway Police to the County Budget Director.

It is emphasized at the outset that the use of the Freedom of Information Law under the circumstances should in my opinion be unnecessary. As I understand the situation, you did not initially make a request for the information in question as a member of the public pursuant to the Freedom of Information Law; on the contrary, you requested the information as a public official acting in the performance of your official duties. As such, your request was in my view reflective of a need to know as opposed to a right to know under the Freedom of Information Law.

Nevertheless, in my opinion the information sought is available to any person pursuant to the provisions of the Freedom of Information Law. The Law provides access to several categories of records [§88(1)], including "statistical or factual tabulations made by or for the agency" [§88(1)(d)]. Numerous questions regarding the nature and scope of the quoted provision have been raised. To date, judicial interpretations of the Freedom of Information Law concerning similar materials have resulted in determinations in which the courts ordered production of the records. The basic question involves an interpretation of what constitutes "statistical or factual tabulations." Must such a tabulation be based upon fact, or can it include

statistics that are in essence of an advisory nature and which have no basis in fact? In Dunlea V. Goldmark [54 AD 2nd 446 (1976)], the Appellate Division held that columns of estimates furnished by a state agency to the Division of the Budget constituted statistical tabulations and as such are accessible under the Law. It is noted that the state agency that withheld the information argued that the phrase "statistical or factual tabulations" should be interpreted so as to restrict its meaning to "objective information" or "objective reality" (id. at 448). Although the court found that it may be harmful for government to operate in a "goldfish bowl" (id. at 449), the court further stated that

> "There is no statutory requirement that such data be limited to 'objective' information and there is no apparent necessity for such a limitation" (id.)

As such, although the estimates submitted to the Division of the Budget by the agency were solely advisory and were not based upon fact, they were nonetheless held to fall within the scope of "statistical or factual tabulations" and as such were found to be accessible.

In addition, in a similar circumstance, preliminary budget material that had been denied by a town was found to be accessible notwithstanding silence concerning rights of access to such material in §106 of the Town Law [Application of Dullea, Supreme Court, Albany County (1975)].

Moreover, §88(1)(i) of the Freedom of Information Law provides access to any other records made available by any other provision of law. One such provision of law is §51 of the General Municipal Law, which has long provided access to virtually all records filed, kept or used by a municipal official. Reading the Freedom of Information Law in conjunction with §51 of the General Municipal Law all records in possession of a municipality, such as a county, are accessible, except to the extent that information may be denied pursuant to §88(7) of the Freedom of Information Law. In my opinion, none of the exceptions contained in §88(7) can in this instance be appropriately cited.

Further, since meetings of a budget committee designated by a county board of supervisors must be open to the public pursuant to §93 of the Public Officers Law (Open Meetings Law), budget estimates would in many instances be discussed in public. In my opinion, a denial of access to records that are discussed publicly would be anomalous. As such, the argument that the records in question are accessible is in my view further reinforced.

Therefore, the budget information submitted to the County Budget Director by the Chief of the Parkway Police should in my opinion be made accessible to you not only as a governmental official acting in the performance of your duties, but also as a member of the public 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

Robert J. Freeman
Executive Director

RJF:ph

cc Alfred B. DeBello
County Executive

Carl Fulgenzi
Acting Chief,
Westchester County Parkway Police

Thomas Keane
Chairman, Board of Legislators

David Bainin
County Attorney

STATE OF NEW YORK
COMMITTEE ON PUBLIC ACCESS TO RECORDS FOIL-AO-623

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

October 3, 1977

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

Dear Ms. Zeller:

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

Your initial question deals with rights of access to records reflective of requests made under the Freedom of Information Law. In my opinion, the substance of applications for requests for records must be made available. However, identifying details the disclosure of which would result in an unwarranted invasion of personal privacy may be deleted pursuant to §88(3) of the Freedom of Information Law. The Committee has consistently advised that it is the nature or substance of records that determines whether or not records are available. Moreover, Committee has resolved that if records are accessible under the Law, they must be made equally available to any person, without regard to status or interest. Consequently, if a person refuses to provide his or her name or purpose for a request, the refusal cannot be used as a valid ground for denial of access. Therefore, the name of the person making the request is irrelevant and may be deleted on the ground that such a disclosure could constitute an unwarranted invasion of personal privacy.

The second question pertains to the appeal procedure under the Freedom of Information Law. First, the Law does not require that a hearing be held following an appeal of a denial of access. Second, an appeal may be handled by a single individual as opposed to a board. Nevertheless, since in this situation a board has been designated to determine appeals, it is a public body subject to the Open Meetings Law and as such must hold its meetings open to the public.

Finally, in the event that a hearing date is scheduled but the appellant fails to appear, it is suggested that the Board arrive at a determination regardless of the absence of the appellant. Section 88(8) of the Freedom of Information Law requires that decisions on appeal be rendered within seven business days of receipt of the appeal. Therefore, a determination on appeal should be made within the time limit specified by the Law whether or not the appellant is present.

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:ph

STATE OF NEW YORK
COMMITTEE ON PUBLIC ACCESS TO RECORDS FOIL-AO- 624

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

October 4, 1977

Mr. E. Goldstein
[redacted]

Dear Mr. Goldstein:

As requested, attached is a pamphlet entitled "The Freedom of Information Law and How to Use It." It is noted that the pamphlet will shortly be out of date due to the enactment of amendments to the Freedom of Information Law. As such, also attached are copies of the amended Freedom of Information Law, which will become effective January 1, 1978, as well as a memorandum explaining distinctions between the current and future statutes.

Since the Freedom of Information Law is applicable only to governmental entities, records in possession of private hospitals do not fall within its scope. Nevertheless, Title 10, §405.1026(b) of the New York Code of Rules and Regulations states that hospital records of private hospitals must be preserved either in their original form or by means of microfilm "for a period of time not less than that determined by the statute of limitations in the respective State." In New York, the statute of limitations is six years. Therefore, although a private hospital may close its doors, records in its possession must be preserved for at least six years beyond the date of its closing. With regard to records related to adults, the records must be preserved at least six years. With respect to minors, records must be preserved at least six years beyond the attainment of majority. In addition, I have been informed by Health Department Officials that some hospitals contract with private record keeping firms, which preserve hospital records indefinitely and serve as a central repository for such records.

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

Sincerely,

Robert J. Freeman

Robert J. Freeman
Executive Director

RJF:js
Enc.

STATE OF NEW YORK
COMMITTEE ON PUBLIC ACCESS TO RECORDS

FOIL-AO-625

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

October 5, 1977

Mr. Carl DeFlumer, Jr.
157-955
354 Hunter Street
Ossining, New York 10562

Dear Mr. DeFlumer:

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

Your inquiry pertains to your inability to gain access to regulations and directives issued by the Department of Correctional Services relative to parole revocation hearings. I agree with your contention that if such records exist, they are accessible to you.

The Freedom of Information Law provides access to statements of policy adopted by an agency [§88(1)(d)]. Under the circumstances, any regulations adopted by the Department concerning parole revocation, as well as directives; memoranda, or other records upon which the Department relies in carrying out its duties should be made available to you under the Freedom of Information Law.

Since the library at the facility does not have possession of the records sought, it is suggested that you prepare a similar request and direct it to the Records Access Officer at the Department of Correctional Services.

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

Sincerely,

Robert J. Freeman

Robert J. Freeman
Executive Director

RJF:ph

cc Agenor Castro
Director of Public Relations
Department of Correctional Services

STATE OF NEW YORK
COMMITTEE ON PUBLIC ACCESS TO RECORDS

FOIL-AO-626

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

October 11, 1977

Mr. Joseph T. Del Vecchio
#76701-158
P.O. Box 1000
Leavenworth, Kansas 66048

Dear Mr. Del Vecchio:

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

Your inquiry concerns a denial of access by the New York City Police Department with respect to information in its possession pertaining to you.

The current Freedom of Information Law, a copy of which is attached, provides access to several categories of records, including police blotters and booking records [§88(1)(f)]. However, §88(7)(d) of the Law states that an agency may deny access to "investigatory files compiled for law enforcement purposes". Therefore, under the current statute, the Department may deny access to information pertaining to you to the extent that it consists of investigatory files compiled for law enforcement purposes.

Nevertheless, the Freedom of Information Law has been amended. The amendments (see attached) which become effective January 1, 1978, reverse the presumption of the existing statute. Instead of providing categories of accessible records, the amended statute will state that all records are accessible except those specifically deemed deniable. I direct your attention to §87(2)(e) of the amendments, which provide specific grounds for denial regarding records compiled for law enforcement purposes. If none of the exceptions is appropriate, the records will be accessible to you after January 1, 1978. Moreover, while the current Law requires a member of the public to prove that a denial of access is unreasonable, the amendments will provide that the agency will have the burden of proving that records denied fall within one or more of the categories of deniable records.

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:ph
Enc.

STATE OF NEW YORK
COMMITTEE ON PUBLIC ACCESS TO RECORDS

FOIL-AO-627

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

October 12, 1977

Mr. Chungchin Chen
Deputy Director
Capital District Regional
Planning Commission
79 N. Pearl Street
Albany, NY 12207

Dear Mr. Chen:

Thank you for your interest in complying with the Freedom of Information Law. Your inquiry deals with rights of access to project applications submitted to the Capital District Regional Planning Commission that have not been reviewed and acted upon by the Commission.

It is important to note at the outset that the existing Freedom of Information Law has been amended. Therefore, the ensuing paragraphs will express opinions under both the current and amended Freedom of Information Law.

The existing statute provides access to specified categories of accessible records [§88(1)(a) through (i)]. Therefore, if requested records do not conform to any of the categories, they are deniable. With respect to applications, it would appear that little of the information contained in them would fall within the categories of accessible records. In all likelihood, the only portions of the applications that are accessible from your office would be "statistical or factual tabulations" [§88(1)(d)].

The amended Freedom of Information Law reverses the logic of the existing statute. Instead of providing access to specified categories of records, the amendments will provide that all records are accessible except those falling within specified categories of deniable records. Although "inter-agency or intra-agency materials" will

be deniable, portions of such materials consisting of "statistical or factual tabulations or data" will be accessible [see attached amendments, §87(2)(g)]. As such, when the amendments become effective on January 1, 1978, the substance of the applications will become accessible.

In addition, the last category of accessible records contained in the current statute provides that any other records made available by any other provision of law continue to be accessible under the Freedom of Information Law [§88(1)(i)]. One such provision of law is §51 of the General Municipal Law, which has long provided access to

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

Consequently, virtually all records in possession of a unit of local government are accessible. Therefore, it would appear that the applications are accessible from the units of local government that submitted them to you.

In addition, the Open Meetings Law requires that public bodies conduct their business during open meetings. Therefore, a local planning board, for example, may have discussed its application during an open meeting and may in some instances have previously disclosed the application to the public. In situations in which a public body at the municipal level has publicly discussed the contents of an application, a denial of access to the application by the Commission would in my view be anomalous.

I hope that I have been of some assistance. Should

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

Sincerely,

Robert J. Freeman

Robert J. Freeman
Executive Director

RJF:ph
att.

STATE OF NEW YORK
COMMITTEE ON PUBLIC ACCESS TO RECORDS

FOIL-AO-628
OML-AO-153

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

October 12, 1977

Mr. James C. Cooper
Associate Counsel
Department of Audit and Control
Albany, New York

Dear Jim:

Thank you for your thoughtful letter.

The status of volunteer fire companies has been both perplexing and continuous. In my view, the problem in a nutshell involves drawing a line of demarcation between companies' governmental functions and their other functions, such as social or athletic activities. I believe that such a line can be drawn with respect to the application of both the Freedom of Information Law and the Open Meetings Law to volunteer fire companies.

Under the Freedom of Information Law, the same problem of interpretation will arise under the definition of "agency" in the amendments [§86(3)] as in the existing definition [§87(1)]. Both definitions include any "...governmental entity performing a governmental... function for...one or more municipalities..." in the state. The question, therefore, is whether volunteer fire companies are governmental entities that perform a governmental function. To date, there is but one decision of which I am aware that deals even tangentially with the issue. In Everett v. Riverside Hose Company [261F. Supp. 463(1966)] a federal court held that a volunteer fireman is "in the public service" and is therefore a public servant even though no salary is paid. The rationale for the holding involved a finding that a volunteer fire company performs what traditionally has been deemed a governmental function. On that basis, the decision inferred that a volunteer fire company is a governmental entity notwithstanding its status as a not-for-profit corporation. But for the Everett decision, I would agree that a volunteer fire company is not a "governmental entity" and therefore is not subject to the Freedom of Information Law.

Nevertheless, it is the only decision that deals with the status of such companies in relation to statutes that ordinarily apply only to entities of government. Perhaps, as you tacitly suggested, litigation dealing with the specific issue is necessary to finally determine the status of volunteer fire companies under the Freedom of Information Law.

Assuming that such companies are subject to the Freedom of Information Law under the Everett decision, I believe that distinctions may be made between the governmental functions of volunteer fire companies and their other functions, and that a dividing line may be drawn between records pertinent to their governmental functions and records relative to the remainder of their activities. Perhaps two sets of books or records could be kept, one regarding governmental or official duties as firefighters, and the other regarding social functions, athletic activities, lotteries and the like. The former category of records would be subject to the Freedom of Information Law, since it relates to companies in the performance of their governmental functions, while the latter would be treated as private records not related to the performance of official duties and therefore beyond the application of the Freedom of Information Law.

Making a distinction between records related to a company acting in the capacity as a governmental entity and records not related to its firefighting duties should not in my view be difficult to accomplish. Moreover, I cannot envision solid grounds for objection to the kind of accountability suggested.

I should add that I take issue with your contention that, if applicable at all, rights granted by the Freedom of Information Law and the Open Meetings Law can be asserted only with respect to the finances of a company. There may be other instances in which companies perform governmental functions, such as staffing, routes to be used, types of training, etc. In sum, there may be activities in which a company engages that are governmental in nature but which do not relate directly to the expenditure of funds.

Coverage of volunteer fire companies under the Open Meetings Law is in my view easier to justify legally.

First, the Open Meetings Law defines "public body" [§92(2)] to include:

> "...any entity, for which a quorum is required in order to transact public business and which consists of two or more members, performing a governmental function for the state or for an agency or department thereof, or for a public corporation as defined in section sixty-six of the general construction law.

It is important to emphasize the definitional distinction between "agency" in the Freedom of Information Law and the definition quoted above from the Open Meetings Law. The Freedom of Information Law specifies that its coverage includes only "governmental" entities performing a governmental function. The Open Meetings Law, however, includes within the definition of "public body" "...any entity... performing a governmental function". Again, if it can be assumed under the Everett case that a volunteer fire company performs a governmental function, such a company is a public body subject to the Open Meetings Law.

Viewing the definition of "public body" in terms of its elements, a volunteer fire company is an entity for which a quorum is required (see Not-for-Profit Corporation Law, §608), it transacts public business according to Everett, and it performs a governmental function, also according to Everett, for one or more public corporations.

In the case of the Open Meetings Law, the line of demarcation between governmental and nongovernmental activity may be drawn based upon the definition of "meeting" [§92(1)]. "Meeting" is defined as "...the formal convening of a public body for the purpose of officially transacting public business." Since there is a statement of purpose in the definition, it would appear that the Open Meetings Law applies only to the extent that a company engages in the transaction of public business. Other portions of meetings in which nongovernmental activities are discussed do not fall within the statement of purpose and, therefore, are outside the definition of "meeting" prescribed by the Law. In the same manner as public bodies distinguish between discussion during an open meeting and discussion appropriately held in executive session [see §95(1)], I believe that a volunteer fire company could separate its meetings into "governmental" and nongovernmental segments.

If you would like to discuss the matter further, please do not hesitate to call. I hope that I have been of some assistance.

Sincerely,

Bob Freeman

Robert J. Freeman
Executive Director

RJF:ph

STATE OF NEW YORK
COMMITTEE ON PUBLIC ACCESS TO RECORDS

FOIL-AO-629

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

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EXECUTIVE DIRECTOR
ROBERT J. FREEMAN

October 13, 1977

Rev. Francis Joseph Case
[redacted]

Dear Reverend Case:

Thank you for your interest in the Freedom of Information Law. Your inquiry pertains to the effect of the Freedom of Information Law when read in conjunction with Section 235 of the Domestic Relations Law.

The statement made in the brochure that all court records are accessible is general in nature. It is based upon §255 of Judiciary Law, which in brief states that all records in possession of a court clerk are available. Nevertheless, the records to which you alluded in Section 235 of the Domestic Relations Law remain confidential.

Section 88(7)(a) of the Freedom of Information Law (see attached) states that rights of access granted by the statute do not apply to information that is "specifically exempted by statute". Under the circumstances, records reflective of the pleadings or testimony in a matrimonial action are "specifically exempted" from disclosure by Section 235 of the Domestic Relations Law.

With respect to the specific information cited in your letter, "Findings of Fact and Conclusions of Law" and "Judgment", I believe that such information remains confidential pursuant to subdivision three of Section 235, which states that:

> "Upon the application of any person to the county clerk or other officer in charge of

> public records within a county for evidence of the disposition, judgment or order with respect to a matrimonial action, the clerk or other such officer shall issue a "certificate of disposition" duly certifying the nature and effect of such disposition, judgment or order and shall in no manner evidence the subject matter of the pleadings or testimony derived in any such action."

Under the quoted provision, it is my opinion that only the "certificate of disposition" is accessible while the other information, such as "findings of fact" is deniable. It is noted that the matter was discussed with officials of the Office of Court Administration who concur with my interpretation of Section 235.

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

Sincerely,

Robert J. Freeman

Robert J. Freeman
Executive Director

RJF:ph
att.

UML - NO - 1ST

FOIL-AO-630

STATE OF NEW YORK
COMMITTEE ON PUBLIC ACCESS TO RECORDS

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

October 13, 1977

Mrs. Eric C. Warren
[redacted]

Dear Mrs. Warren:

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

Enclosed are copies of the current Freedom of Information Law, the amendments to the Law that become effective January 1, 1978, regulations issued by the Committee, the Open Meetings Law and the Committee's report to the Legislature on that statute. It is noted that the regulations, which have the force and effect of law, will be amended shortly after the effective date of the amendments to the Freedom of Information Law. All governmental entities in the state, including school districts, will receive copies of the new regulations.

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 §2116 of the Education Law, which states that:

> The 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.

When reading the Freedom of Information Law in conjunction with the provision quoted above, all records in possession of a school district are accessible except to the extent that the records are reflective of the deniable information set forth in §88(7) of the Freedom of Information Law. Therefore, the information to which you refer in your letter, such as records dealing with the expenditures of public money, are accessible.

In addition, the regulations provide that a school district must respond to your request within five business days of its receipt of the request [see regulations, §1401.6]. Moreover, if you are denied access, the denial must be in writing giving you the reasons therefor and must apprise you of both your right to appeal and the name of the person or body to whom an appeal should be directed.

The Open Meetings Law states that all meetings of public bodies must be convened in public and that an executive session is a portion of an open meeting. Furthermore, a public body may enter into an executive session only upon a majority vote of the body taken during an open meeting in which the reason for entering into an executive session is cited. Section 95(1)(a) through (h) specifies and limits the grounds for entering into an executive session.

With respect to minutes, I believe that the statement appearing in the news clipping that minutes of executive sessions are not required to be kept unless action is taken is accurate. Please note that the provision concerning minutes of executive sessions, §96(2), merely requires that minutes of executive sessions consist of "a record or summary of the final determination...and the date and vote thereon...". However, it is also noted that although public bodies generally may vote during an appropriately convened executive session, school boards may vote in executive session only with respect to issues concerning tenure under §3020-a of the Education Law. In all other instances, school boards must vote in public pursuant to §1708(3) of the Education Law, which has been judicially interpreted to require public voting by school boards.

I hope that I have been of some assistance. Should

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

Sincerely,

Robert J. Freeman

Robert J. Freeman
Executive Director

RJF:ph
Enc.

cc Niagara-Wheatfield School Board

STATE OF NEW YORK
COMMITTEE ON PUBLIC ACCESS TO RECORDS

FOIL-AO-631

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EXECUTIVE DIRECTOR
ROBERT J. FREEMAN

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

October 14, 1977

Mr. Jeffrey R. Schiff
Attorney at Law
4469 Bedford Avenue
Brooklyn, NY 11235

Dear Mr. Schiff:

Thank you for your interest in the Freedom of Information Law. Your inquiry pertains to rights of access to attendance records of named employees of the Law Department of the City of New York, as well as the address of a particular employee.

It is emphasized at the outset 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, an agency has no obligation to create a record in response to your request.

Attendance records are in my opinion accessible under the Freedom of Information Law. The information contained therein constitutes "statistical or factual tabulations made by or for the agency" and as such is accessible as of right pursuant to §88(1)(d) of the Law. I do not believe that disclosure of the information in question would constitute an "unwarranted invasion of personal privacy" pursuant to §88(3) of the Freedom of Information Law. Since the information is relevant to the performance of the official duties of public employees, disclosure would in my view constitute a permissible rather than an unwarranted invasion of personal privacy.

With respect to your request for the address of a named employee, §88(1)(g) of the Law requires each agency to compile and make available a payroll record consisting of the name, address, title and salary of each officer or employee of the agency,

except law enforcement officers, whose names and addresses need not be included. Therefore, although the Law Department has no obligation to create a record pertaining to a named individual, it does have an obligation to provide access to its payroll record, which must make reference to an employee of the 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

RJF:ph

cc Irwin L. Herzog
Records Access Officer

STATE OF NEW YORK
COMMITTEE ON PUBLIC ACCESS TO RECORDS

FOIL-AO-632

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

October 14, 1977

Mr. Jeffrey R. Schiff
Attorney at Law
4469 Bedford Avenue
Brooklyn, NY 11235

Dear Mr. Schiff:

Thank you for your interest in the Freedom of Information Law. Your inquiry pertains to a request for records reflective of changes in title, leaves of absence with or without pay and the reasons therefor regarding named individuals employed by the Law Department of the City of New York.

It is emphasized at the outset 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, an agency has no obligation to create a record in response to a request.

According to the attachment to your letter, the rules adopted by the New York City Department of Civil Service state that

> "[T]he Department of Personnel shall maintain an official roster of the classified service, setting forth in detail the employment listing of each employee and each change of status from the time he enters service until he separates or is separated therefrom."

Based upon the quoted provision, it appears that the material sought is accessible not only under the Freedom of Information Law, which provides access to both "statistical or factual tabulations" [§8B(1)(d)], and a payroll record consisting of the name, address, title and salary of all officers or employees of an agency,

except law enforcement officers, whose name and addresses need not be provided [§88(1)(g)], but also under the regulations cited above. It is noted that the Freedom of Information Law preserves rights of access granted by any other provision of law [see §88(1)(i) and (10)].

In my opinion, disclosure of the information in question would not constitute "an unwarranted invasion of personal privacy" pursuant to §88(3) of the Freedom of Information Law. Since the information sought is relevant to the performance of the official duties of public employees, disclosure would in my view constitute a permissible rather than an unwarranted invasion of personal privacy.

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

Sincerely,

Robert J. Freeman

Robert J. Freeman
Executive Director

RJF:ph

cc Frances Morris
Counsel

STATE OF NEW YORK
COMMITTEE ON PUBLIC ACCESS TO RECORDS

FOIL-AO-633

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

October 18, 1977

Mr. Edward Luksik
[redacted]

Dear Mr. Luksik:

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

Your inquiry pertains to a denial of access to the "Middle Atlantic States Report" regarding Deer Park High School.

It is noted at the outset that the ground for denial, a copy of which is attached to your letter, was that the report was returned by the school district to the Middle States Association. If in fact the school district no longer has possession of the report or a copy of the report, the denial was proper. Very simply, if there is no report in possession of a school district, it cannot be made available.

If on the other hand a copy of the original report remains in possession of the school district, it is in my opinion available. The Freedom of Information Law grants access to several categories of records [§88(1)], including any other records made available by any other division of law [§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 the quoted section of the Education Law, all records in possession of a school district are accessible except to the extent that the records contain information deemed deniable pursuant to §88(7) of the Freedom of Information Law. Since the report does not appear to fall within any of the four categories of deniable information listed in §88(7), it is accessible if it is in possession of the school 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

Robert J. Freeman
Executive Director

RJF:ph

STATE OF NEW YORK
COMMITTEE ON PUBLIC ACCESS TO RECORDS

FOIL-AO-634

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

October 18, 1977

Mr. Isidore Gerber
Executive Director
Liberty Taxpayers Association
Liberty, New York 12754

Dear Mr. Gerber:

Thank you for your continued interest in the Freedom of Information Law. Your inquiry pertains to rights of access to unapproved minutes of a school board.

In my opinion, unapproved minutes are accessible as soon as they exist pursuant to the provisions of both the Freedom of Information Law [§88(1)(c)and(i)] and the Education Law, §2116.

It has been suggested that when a board provides access to unapproved minutes, the minutes should be marked "unapproved," "nonfinal," or "draft." By so doing, the public is apprised that the minutes are subject to change and a board is also given a measure of protection.

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

Sincerely,

Robert J. Freeman

Robert J. Freeman
Executive Director

RJF:ph

cc Clarence Parry
Superintendent of Schools

STATE OF NEW YORK
COMMITTEE ON PUBLIC ACCESS TO RECORDS FOIL-AO-635

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

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EXECUTIVE DIRECTOR
ROBERT J. FREEMAN

October 19, 1977

Mr. John J. Sheehan
[redacted]

Dear Mr. Sheehan:

Thank you for your letter of October 13.

Until I had received your communication, I was unaware of the alteration of policy by the City of Binghamton with respect to its "press release."

With regard to the denials of access attached to your letter, it is noted that the Freedom of Information Law provides access to certain existing records. Therefore, an agency need not create or compile a record in response to a request. In the case of the three denials, it appears that no records exist that would be responsive to your inquiries. As such, the City of Binghamton need not create records on your behalf in response to your request.

It is emphasized that although the Freedom of Information Law involves information in possession of government, it is an access to records statute and is not in my opinion intended to be used as a vehicle for cross-examining public officials.

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-636

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

October 20, 1977

Mr. Raymond Furchak
[redacted]

Dear Mr. Furchak:

Thank you for your interest in the Freedom of Information Law. Your letter describes a situation in which you were denied access to team rosters that identify participants in a softball league sponsored by the Town of Brookhaven. According to your letter the request was denied initially by Mr. Peter Poulos, Superintendent of Culture and Recreation, and the denial was later affirmed by the Town Board. In addition, it is clear that you requested that records for "political" purposes.

The Freedom of Information Law provides access to several categories of records [§88(1)], including "statistical or factual tabulations" [§88(1)(d)]. Consequently, it would appear at first glance that the rosters are accessible.

Nevertheless, §88(7) of the Law lists four categories of information to which rights of access granted by §88(1) do not apply. Relevant to your inquiry, one of the categories of deniable information pertains to information the disclosure of which would result in an unwarranted invasion of personal privacy pursuant to the standards set forth in §88(3) [§88(7)(c)]. Section 88(3) provides five examples of unwarranted invasions of personal privacy. One of the examples concerns "the sale or lease 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" [§88(3)(d)]. Therefore, the primary question is whether the rosters would be used for "private, commercial or fund raising purposes." A secondary question is whether a political purpose constitutes a "private" purpose.

The area of privacy has continually been perplexing to both myself and to the Committee. Determinations involving privacy in many instances involve the imposition of a value judgment made by a single individual. For example, there may be situations in which I might feel that disclosure of information would result in a permissible as opposed to an unwarranted invasion of personal privacy. However, you might feel that disclosure of the same information would clearly result in an unwarranted invasion of personal privacy.

With respect to the records in question, I am hesitant to render advice that would be based solely upon my own inclination. In my view, there may be members of the softball league whose names appear on the roster that would feel offended if they were to receive political solicitations. As such, those individuals might feel that disclosure of the rosters would constitute "an unwarranted invasion of personal privacy" and therefore should be withheld. On the other hand, one might argue that virtually the same information may be accessible from other sources and therefore should be made available in this instance. For example, a local board of elections has in its possession voter registration lists that identify registered voters by party affiliation. Those lists are accessible to any person. By implication, in making such lists publicly available, it would appear that the Legislature felt that disclosure of voter registration lists would constitute a permissible as opposed to an unwarranted invasion of personal privacy. Nevertheless, since the rosters single out individuals who are identified only because they participate in an athletic activity, it would be inappropriate to conjecture whether or not disclosure in this instance would constitute an unwarranted invasion of personal privacy.

To avoid the possibility of infringing upon personal privacy in an unwarranted fashion, it is suggested that the custodian of the rosters provide the participants in the league with an opportunity to provide a release or to object to disclosure of their names and addresses. By so doing, the members of the league would be given the opportunity to determine for themselves whether or not disclosure would constitute a permissible or an unwarranted invasion of their 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

Robert J. Freeman
Executive Director

RJF:js

cc Mr. Peter Poulos
Councilman Ray Calabrese
Councilwoman Karen Lutz
Supervisor John Randolph
Mr. Eugene Dooley, Town Clerk

STATE OF NEW YORK
COMMITTEE ON PUBLIC ACCESS TO RECORDS

FOIL-AO-637

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

October 24, 1977

Ms. Ruth L. Kleinfeld
Associate Commissioner
The Commonwealth of Massachusetts
Dept. of Corporations and Taxation
Leverett Taltonstall Building
100 Cambridge Street
Boston, Massachusetts 02204

Dear Ms. Kleinfeld:

Your inquiry addressed to Secretary Cuomo has been transmitted to the Committee on Public Access to Records, which operates in the Department of State and is responsible for advising with respect to the Freedom of Information Law.

It is noted at the outset that the Freedom of Information Law was recently amended. Consequently, enclosed for your consideration are copies of the current Freedom of Information Law, amendments to the Law that will become effective January 1, 1978, a memorandum entitled "Problems and Solutions" that highlights distinctions between the existing Law and the amendments, regulations pertaining to the procedural aspects of the statute and a pamphlet entitled "The Freedom of Information Law and How to Use It." Since the regulations will soon be out of date, also enclosed is a draft proposal concerning regulations to be adopted after the effective date of the amended statute. In the proposed regulations, material in brackets consists of language to be deleted; underlined material consists of new language.

With regard to records in possession of municipal assessors, collectors, and treasurers, the current Freedom of Information Law provides access to "statistical or factual tabulations"[§88(1)(d)]. Similarly, the amendments will grant access to "statistical or factual tabulations or data"[§87(2)(g)]. As such, virtually all of the information upon which assessors, collectors, and treasurers of municipalities rely in carrying out their duties is accessible.

In addition, judicial decisions rendered long before the enactment of the Freedom of Information Law in 1974 held that assessment information is accessible to the public. The statutory basis for those determinations was §51 of the General Municipal Law, which has long provided substantial rights of access to records in possession of municipalities.

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

Sincerely,

Robert J. Freeman

Robert J. Freeman
Executive Director

RJF:ph
Enc.

STATE OF NEW YORK
COMMITTEE ON PUBLIC ACCESS TO RECORDS

FOIL-AO-638

DEPARTMENT OF STATE, 162 WASHINGTON AVENUE, ALBANY, NEW YORK 12231
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EXECUTIVE DIRECTOR
ROBERT J. FREEMAN

October 24, 1977

Mr. Joseph Boley
[redacted]

Dear Mr. Boley:

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

As requested, attached are copies of the current Freedom of Information Law and the regulations adopted by the Committee, which have the force and effect of law. Please note that both of those documents will shortly be out of date due to the enactment of amendments to the Law. The amended statute, a copy of which is attached, will become effective January 1, 1978.

With respect to minutes of criminal proceedings, §255 of the Judiciary Law generally provides that all records in possession of a court clerk are accessible unless they are sealed. Under the circumstances, the records to which you referred are accessible unless a judge has rendered them confidential.

I hope that I have been of some assistance.

Sincerely,

Robert J. Freeman

Robert J. Freeman
Executive Director

RJF:ph
Enc.

STATE OF NEW YORK
COMMITTEE ON PUBLIC ACCESS TO RECORDS

FOIL-AO-639

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, 1977

Mr. Joseph P. Mangine
[redacted]

Dear Mr. Mangine:

Your inquiry pertains to requests for records of the Albany Housing Authority. Specifically, you have requested information regarding a waiting list for occupancy at a home operated by the Authority, including the average "wait" prior to entry, dates of submission of applications, and the names of persons who have waited longest.

It is noted at the outset that the Freedom of Information Law provides access to certain existing records (see attached, Freedom of Information Law, §88(1)). Therefore, an agency such as the Authority has no obligation to create a record in response to a request. For example, if there is no record in which the average "wait" is tabulated, the Authority is not required to tabulate the time each applicant has waited for entry to arrive at an average waiting time. Similarly, if your request for the number of persons on a waiting list has not been tabulated, the Freedom of Information Law does not require the Authority to tabulate the number of applicants and create a new record.

With regard to privacy, Section 88(3) and (7)(c) of the Freedom of Information Law enable agencies to withhold information or delete identifying details the disclosure of which would result in an "unwarranted invasion of personal privacy." In terms of your request, it is my opinion that the Authority may withhold or delete any identifying details relative to applicants. If, for example, there is a waiting list in existence that provides names and addresses of applicants and the date of submission of their applications, the Authority could properly delete the names and address of applicants prior to furnishing you with the list. On the other hand, if there is a record indicating the average wait that does not

identify applicants, the record is accessible under §88(1)(d) of the Law, which provides access to "statistical or factual tabulations.

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:ph
att.

cc Joseph F. Laden
Executive Director

STATE OF NEW YORK
COMMITTEE ON PUBLIC ACCESS TO RECORDS FOIL-AO-640

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

October 27, 1977

Mr. Daniel Jean Lipsman
[redacted]

Dear Mr. Lipsman:

I apologize for the delay in responding to your inquiries. Several questions have been raised in your letters addressed to the Committee dated August 8, September 19, and October 1. I will attempt to answer each question to the extent possible.

It is noted at the outset that in your letter of August 8, you stated that the Office of Counsel for the City University of New York would be "compelled" to supply the Committee with a copy of its decisions and the reasons therefor. Under the existing Freedom of Information Law, there is no such requirement. One of the problems that the Committee has faced involves the inability to learn of problems arising under the Law and inappropriate denials of access to records. Although the existing Law does not require agencies to inform the Committee of their determinations, the amendments to the Law which will become effective January 1, 1978, will require agencies to submit to the Committee copies of all appeals that follow initial denials of access as well as the determinations on appeal rendered by the head or governing body of an agency or whomever has been designated to hear appeals.

Your first question pertains to the grade distributions in certain doctoral courses taken by your wife. According to your letter, such information "generally appears in grade postings." In my opinion, if there are records reflective of grade distributions, they are accessible so long as the records do not identify individual students. If a record indicating grade distributions has been compiled that does make reference to students, identifying details concerning students should be deleted on the ground that disclosure of

identifying details in this instance would constitute "unwarranted invasion of personal privacy" pursuant to §88(3) of the Freedom of Information Law. Further, disclosure of identifying information would be violative of the Family Educational Rights and Privacy Act, which is commonly known as the "Buckley amendment" (see 20USC 1232g).

The policy of posting grades may be common, but it is in my view questionable due to the provisions of the Buckley amendment. The regulations adopted by the United States Department of Health, Education and Welfare implementing the Buckley amendment define "education records" as those records which "(1) [A]re directly related to a student, and (2) are maintained by an educational agency or institution or by a party acting for the agency or institution" [§99(3)]. In addition, "disclosure" is defined as "permitting access or the release, transfer, or other communication of education records of the student or the personally identifiable information contained therein, orally or in writing, or by electronic means, or by any other means to any party" [§99(3)]. Consequently, if records in which grades appear identify students, a policy of disclosing such records would violate federal law. As you have written, it would be inconsistent for the University to maintain that disclosure of such information would constitute an unwarranted invasion of privacy with respect to one school within the University, but no such invasion with respect to other schools within the University. As such, I concur with your contention that the University's policy regarding the posting of grades should be uniform since the Buckley amendment, a federal statute, supersedes state law and policies adopted by individual educational institutions.

Your second question pertains to a request for two evaluation reports submitted to CUNY by the Middle States Association of Colleges and Secondary Schools. In my opinion, the evaluations are likely available under the current statute and will clearly be available under the amended Freedom of Information Law. The existing Law provides access to audits amd statistical or factual tabulations [§88(1)(d)]. Although the term "audit" is not defined by the Law, an expansive dictionary definition of the term includes records consisting of a review of an existing situation with findings of fact and recommendations. Assuming that the courts interpret the term "audit" as broadly as I have suggested, the reports in question would be available under the existing statute.

Under the amendments, it does not appear that any of the categories of deniable records listed in §87(2) could be appropriately asserted as a ground for denial. In addition, as you are aware, your request for the reports should have resulted in a prompt response, which, according to your letter, was not the case.

The third question concerns a request for a legal clarification of a policy adopted by the Board of Higher Education. In this regard, it is important to emphasize that the Freedom of Information Law provides access to certain existing records. Therefore, an agency need not create or compile a new record in response to a request. With respect to your request, a clarification of policy, if no records exist containing the information sought, the Board has no obligation to prepare a record on your behalf. However, if such records do exist, those records or portions thereof may be accessible under §88(1)(b), which grants access to statistical or factual tabulations that led to the formulation of policy.

Similarly, your fourth question appears to involve a request for a response to questions rather than a request for records. Although the Freedom of Information Law does involve access to information, it is an access to records statute rather than a statute that permits cross-examination of public officials. If, however, there are records reflective of the action taken by the Board with regard to your question, those records are available pursuant to any one of a number of categories of accessible records listed in §88(1). For example, the records might consist of opinions made in the adjudication of cases [§88(1)(a)], statements of policy upon which the Board relies in carrying out its official duties [§88(1)(b)], instructions to staff that affect the public [§88(1)(e)], or final determinations made by the Board [§88(1)(h)].

The fifth question, which deals with the means by which the Doctor of Social Welfare Program is implemented by the Hunter College School of Social Work, also pertains to information which may or may not exist in the form of records. Nevertheless, to the extent that procedures, policies, administrative staff manuals reflective of the means by which the School carries out its administrative duties exist, they are accessible.

With respect to your request concerning the hiring of an individual before or after graduation from the doctoral program, I believe that such information is accessible by means of obtaining the payroll record required to be compiled by §88(1)(g) of the Freedom of Information Law. As you are aware, the cited provision requires the fiscal officer charged with the duty of preparing the payroll to compile and make available a current payroll record consisting of name, address, title and salary of public employees. By obtaining a copy of the payroll record, you should be able to discover when a particular public employee began performance of his or her duties. In addition, attendance records are in my view accessible since they constitute "factual tabulations" [see §88(1)(d)].

Your second letter deals solely with a request for the payroll record of the Board of Higher Education. According to the letter, you were asked to direct the request to the Office of Counsel. In my opinion, this direction was improper under the Freedom of Information Law. As stated previously, §88(1)(g) of the Law states that a payroll record is to be made available by the fiscal officer in charge of preparing the payroll. Moreover, although the Law appears to provide access to the payroll record only to "bona fide members of the news media," the Committee has consistently advised, and its regulations, which have the force and effect of law, state that the payroll record is required to be compiled by §88(1)(g) and made available by the designated fiscal officer to any person [see attached regulations, §1401.3]. This conclusion was reached under §88(10) of the Law, which provides that nothing in the Law shall be construed to limit or abridge existing rights of access granted by other provisions of law or by judicial determination. With regard to payroll information, several decisions rendered prior to the enactment of the Freedom of Information Law held that payroll information is accessible to any person [see e.g., Winston v. Mangan, 338 NYS 2nd 654, 662 (1972)]. Since case law established a right of access to payroll information prior to the enactment of the Freedom of Information Law, the apparent restriction in the Law regarding members of the news media is of no effect.

With respect to the means by which a request is made, the regulations provide that in most instances an agency may require that a request be made in writing. However, the regulations also state that written requests need not be made for records that have

customarily been made available without a written request. Under the circumstances, the proper method for submitting a request would depend upon the practice of the Board prior to the enactment of the Freedom of Information Law. In addition, the Committee has consistently advised that a failure to complete a form prescribing by an agency cannot be a valid ground for denial of access. Any request made in writing that identifies the records sought should suffice.

In conjunction with your plans to initiate judicial proceedings against the Board, it is noted that under the existing Freedom of Information Law the burden of proof is on the petitioner, who must demonstrate that a denial was unreasonable. However, under the amendments to the Law, the burden of proof is on the agency to demonstrate that the records denied fall within one or more categories of deniable information listed in §87(2).

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

Sincerely,

Robert J. Freeman

Robert J. Freeman
Executive Director

RJF:js

cc Ms. Mary Bass

STATE OF NEW YORK
COMMITTEE ON PUBLIC ACCESS TO RECORDS

FOIL-AO-641

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

October 28, 1977

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

Dear Mr. Wolfe:

Thank you for your continued interest in the Freedom of Information Law. Your inquiry pertains to the status of the judicial branch under the amendments to the Law.

First, "judiciary" is defined by §86(1) of the amendments to include the courts of the state. Second, "agency" is defined by §86(3) in such a manner that the "judiciary" is specifically excluded from the scope of the statute. Although the courts are implicitly subject to the existing Freedom of Information Law under its definition of "agency" [§87(1)], the Freedom of Information Law has no substantive effect upon court records. Consequently, the courts were excluded from the coverage of the amendments.

Several statutes regarding access to court records and the procedures that must be followed by courts and court clerks were enacted prior to the enactment of the Freedom of Information Law in 1974. In terms of access, general provisions, such as §255 of the Judiciary Law, §2019-a of the Uniform Justice Court Act and §2501 of Surrogate's Court Procedure Act, have long granted to all records in possession of a court or a court clerk unless sealed or exempt from disclosure pursuant to a special statute. Examples of special statutes requiring confidentiality are §784 of the Family Court Act and §235 of the Domestic Relations Law.

In sum, due to the combination of statutory rights of access and statutory exemptions from disclosure regarding court records, neither the existing Freedom of Information Law nor the amendments to the Law (if they had been applicable) add or detract from

rights of access to court records. It is on that reasoning that I believe the Legislature excluded the courts from the provisions of the amended Freedom of Information Law.

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

Sincerely,

Robert J. Freeman

Robert J. Freeman
Executive Director

RJF:ph

STATE OF NEW YORK
COMMITTEE ON PUBLIC ACCESS TO RECORDS

FOIL-AO-642

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

October 28, 1977

Paul A. Martineau, Esq.
Village Attorney
Village of Pleasantville
County Trust Building
Pleasantville, New York 10570

Dear Mr. Martineau:

Thank you for your continued interest in complying with the Freedom of Information Law. Your inquiry deals with the ability to disseminate "police information regarding minors/juveniles" to a Certified Social Worker employed by the Village of Pleasantville.

Although the Freedom of Information Law is permissive, there are special statutes pertinent to your inquiry which restrict the disclosure of the records in question.

First, distinctions must be made among the terms to be used concerning "minors" and "juveniles". The Family Court Act, §712(a) defines "juvenile delinquent" as:

> "[A] person over seven and less than sixteen years of age who does any act which, if done by an adult, would constitute a crime."

Subdivision (b) of the same section defines "person in need of supervision" as:

> "[A] male less than sixteen years of age and a female less than eighteen years of age who does not attend school in accord with the provisions of part one of article sixty-five of the education law or who is incorrigible, ungovernable or habitually disobedient and beyond the lawful control of parent or other lawful authority."

And finally, the Criminal Procedure Law, §720.10(1), defines "youth" as:

> "...a person charged with a crime alleged to have been committed when he was at least sixteen years old and less than nineteen years old."

With respect to juvenile delinquents and persons in need of supervision, upon completion of a dispositional hearing by a Family Court judge, records prepared by the probation service for the court are confidential pursuant to §746(b) of the Family Court Act, which states:

> "[R]eports prepared by the probation service for use by the court at any time prior to the making of an order of disposition shall be deemed confidential information furnished to the court which the court in a proper case may, in its discretion, withhold from or disclose in whole or in part to the law guardian, counsel, party in interest, or other appropriate person. Such reports may not be furnished to the court prior to the completion of a fact-finding hearing, but may be used in a dispositional hearing."

In addition, §784 of the Family Court Act, which is entitled "[U]se of police records," provides that:

> "[A]ll police records relating to the arrest and disposition of any person under this article shall be kept in files separate and apart from the arrests of adults and shall be withheld from public inspection, but such records shall be open to inspection upon good cause shown by the parent, guardian, next friend or attorney of that person upon the written order of a judge of the family court in the county in which the order was made or, if the person is subsequently convicted of a crime, of a judge of the court in which he was convicted."

Therefore, it is clear that police records related to the arrest or disposition of a juvenile must remain confidential. However, in situations in which there is no arrest, it would appear that police records may be disclosed. It is important to emphasize that I am not suggesting that records identifiable to juveniles be disclosed under the Freedom of Information Law. On the contrary, it is advised that requests by the public for records of this nature may generally be denied on the ground that disclosure would constitute an "unwarranted invasion of personal privacy" [§88(3)]. Nevertheless, under the circumstances described in the correspondence attached to your letter, the police records are not being sought by a member of the public under the Freedom of Information Law, but rather by a public servant who is attempting to perform his official duties.

If a youth is adjudicated a "youthful offender" under §720.20 of the Criminal Procedure Law, records identifiable to the youth are generally deemed confidential. Section 720.35(2) of the Criminal Procedure Law states that:

> "[E]xcept where specifically required or permitted by statute or upon specific authorization of the court, all official records and papers, whether on file with the court, a police agency or the division of criminal justice services, relating to a case involving a youth who has been adjudicated a youthful offender, are confidential and may not be made available to any person or public or private agency, other than an institution to which such youth has been committed, or a probation department of this state that requires such official records and papers for the purpose of carrying out duties specifically authorized by law."

Police records related to a youth not adjudicated a youthful offender may in my view be disclosed, but only on the grounds suggested earlier, i.e., that the disclosure is made to a public employee acting in the performance of his official duties rather than pursuant to a request made under the Freedom of Information Law.

Please be advised that none of the preceding statements is intended to suggest that denial of access be made in every instance in which records are identifiable to minors. For example, a blotter entry or booking record relative to a youth remains accessible under §88(1)(f) of the Freedom of Information Law unless and until the subject of the record is adjudicated as a youthful offender by a 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

Robert J. Freeman
Executive Director

RJF:js

STATE OF NEW YORK
COMMITTEE ON PUBLIC ACCESS TO RECORDS FOIL-AO-643

DEPARTMENT OF STATE, 162 WASHINGTON AVENUE, ALBANY, NEW YORK 12231
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EXECUTIVE DIRECTOR
ROBERT J. FREEMAN

October 31, 1977

Ms. Sally Mendola
Staff Attorney
The Legal Aid Society
15 Park Row - 19th Floor
New York, New York 10038

Dear Ms. Mendola:

Thank you for your interest in the Freedom of Information Law. You have sought an advisory opinion regarding the allegations appearing in the petition attached to your letter. The petition pertains to an Article 78 Proceeding initiated against the New York City Department of Corrections.

In brief, you have sought to compel the Department to compile and make available "a subject matter list." I can add little to your allegations since the Law is clear with respect to this issue. Very simply, each agency is required to compile and make available a subject matter list pursuant to §88(4) of the Freedom of Information Law, which states:

> "[E]ach agency or municipality shall maintain and make available for public inspection and copying, in conformity with such regulations as may be issued by the committee on public access to records, a current list, reasonably detailed, by subject matter of any records which shall be produced, filed, or first kept or promulgated after the effective date of this article. Such list may also provide identifying information as to any records in the possession of the agency or municipality on or before the effective date of this article."

Since the Department of Corrections is an agency subject to the Freedom of Information Law (see §87, Freedom of Information Law), it is in my view required to compile and make available the record that is the subject of the litigation.

I hope that I have been of some assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:js
Enc.

STATE OF NEW YORK
COMMITTEE ON PUBLIC ACCESS TO RECORDS FOIL-AO-644

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

November 1, 1977

Mr. Hank Kuczynski
[redacted]

Dear Mr. Kuczynski:

Your inquiry pertains to unsuccessful attempts to gain access to vouchers and invoices in possession of the County of Saratoga.

According to the correspondence attached to your letter, the Saratoga County Auditor advised you that a request for "[A]ll vouchers and invoices made out to the 'North End Meat Market' and/or 'Mr. Pastor'" constitutes "an extraordinary circumstance." Consequently, the Auditor's response to you stated that the records sought could not be made available within five business days of receipt of the request but that they would be made available on an ongoing basis "as time permits." Additional correspondence indicates that three weeks have passed without the production of any of the records sought and that all processed vouchers are in fact kept on file with the County Department of Social Services.

In my view, the ground for delay, which in the words of the Auditor was the "breadth of the request," would not likely constitute an "extraordinary circumstance" and therefore a reasonable basis for delay. Although responses to requests for records may be delayed due to "extraordinary circumstances" (see attached regulations, §1401.6), the request for records in this instance was quite specific and in my opinion could not be characterized as broad or unduly burdensome. In addition, if the records sought are filed in a single location and can easily be extracted for the purpose of copying, the rationale for the delay would appear to lack merit.

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 Helen K. Williams
Commissioner Gemmiti

STATE OF NEW YORK
COMMITTEE ON PUBLIC ACCESS TO RECORDS FOIL-AO-645

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

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November 7, 1977

Mr. Glenn L. Williams
Field Representative
New York Educators Association
Vestal Service Center
2539 Vestal Parkway East
Vestal, New York 13850

Dear Mr. Williams:

Thank you for your interest in the Freedom of Information Law. Your question pertains to a policy adopted by the Franklin Central School Board that permits a fee of fifty cents to be charged for each copy made pursuant to a request under the Freedom of Information Law.

Section 1401.8 of the regulations promulgated by the Committee states that the maximum that may be charged for photocopies is twenty-five cents per page, except where a higher fee had been established by law, rule or regulation prior to September 1, 1974. Since the policy of charging fifty cents per page was adopted after September 1, 1974, it violates the regulations issued by the Committee. It is noted that the regulations promulgated by the Committee have the force and effect of law and that every entity of government in the state must adopt regulations no more restrictive than those issued by the Committee.

In addition, it is emphasized that the amendments to the Freedom of Information Law (see attached) which will become effective January 1, 1978, specifically state that no more than twenty-five cents per photocopy may be charged unless a different fee may be charged pursuant to an applicable provision 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

Robert J. Freeman
Executive Director

RJF:js
cc Kenneth J. Eysaman

STATE OF NEW YORK
COMMITTEE ON PUBLIC ACCESS TO RECORDS FOIL-AO-646

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

November 7, 1977

Mr. Henry D. Blumberg, President
Mid-York Library System
1600 Lincoln Avenue
Utica, New York 13502

Dear Mr. Blumberg:

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.

Your inquiry concerns the propriety of disclosure by the Director of the Utica Library System to the Mayor of the registration list of borrowers from the System's bookmobile. While the disclosure did not in my view violate any provision of law, the list could have been denied under the Freedom of Information Law. In addition, the disclosure violated the policy on confidentiality of library records adopted January 20, 1971, by the American Library Association Council (see attached).

Section 88(3) of the Freedom of Information Law states that an agency may withhold information or delete identifying details from records when disclosure would result in an "unwarranted invasion of personal privacy." The Law lists five examples of such invasions which may be used as a guide in determining whether disclosure would constitute a permissible as opposed to an unwarranted invasion of personal privacy.

With respect to the record in question, §88(3)(d) of the Law provides that an unwarranted invasion of personal privacy includes:

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

Although the list in question may be denied, the Freedom of Information Law is permissive. In terms of the privacy provision, the Law merely states that an agency has discretion to withhold; however, there is nothing in the Law that requires an agency to withhold information the disclosure of which would result in an unwarranted invasion of personal privacy. Therefore, to reiterate, while the records in question could have been denied, the Law does not require that they be withheld.

Enclosed for your consideration is a copy of an advisory opinion rendered approximately two years ago pertaining to the same subject, as well as the existing Freedom of Information Law and the amendments to the Law that become effective January 1, 1978.

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 Alfred C. Hasemeier

STATE OF NEW YORK
COMMITTEE ON PUBLIC ACCESS TO RECORDS

FOIL-AO-647

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

November 9, 1977

Mr. Richard A. Delaney
[redacted]

Dear Mr. Delaney:

Thank you for your continued interest in the Freedom of Information Law. Your inquiry pertains to payroll information in possession of a school district.

In general, the Law grants access to certain existing records, and an agency is not obligated to create a record in response to a request. However, §88(1)(g) of the Freedom of Information Law requires the fiscal officer of each agency to compile a payroll record consisting of the name, address, title, and salary of all officers or employees of the agency, except law enforcement officers, whose names and addresses need not be provided.

Although §88(1)(g) appears to provide access to the payroll record only to "bona fide members of the news media," the Committee's regulations, which have the force and effect of law, state that the payroll record shall be made available to "any person." The direction in the regulations is based upon §88(10) of the Law, which states that nothing in the Law shall be construed to limit or abridge existing rights of access granted by other provisions of law or by means of judicial determination. In the case of payroll information, public rights of access to payroll information were established by the courts prior to the enactment of the Freedom of Information Law in 1974. That right is preserved by §88(10) of the Law and the payroll record required to be compiled by §88(1)(g) is accessible not only to members of the news media, but to members of the public as well.

It is also noted that the amendments to the Freedom of Information Law (see attached), which will become effective January 1, 1978, make no distinction between the public and the news media [see §87(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

Robert J. Freeman
Executive Director

RJF:ph
Att.

STATE OF NEW YORK
COMMITTEE ON PUBLIC ACCESS TO RECORDS

FOIL-AO-648

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

November 9, 1977

Mr. Lawrence Alexander
Staff Attorney
Mid-Hudson Legal Services, Inc.
124 Dubois Street
Post Office Box 590
Newburgh, New York 12550

Dear Mr. Alexander:

Your inquiry addressed to Lieutenant Governor Krupsak has been transmitted to the Committee on Public Access to Records, which is responsible for advising with respect to the Freedom of Information Law.

According to your letter, the Newburgh Housing Authority recently adopted a resolution permitting the Authority to charge forty cents for photocopies up to 8 1/2 by 11 inches and sixty cents for photocopies up to 8 1/2 by 14 inches. The fees authorized by the resolution fail to comply with law.

The regulations promulgated by the Committee (see attached), which have the force and effect of law, state that:

> "[E]xcept where fees or exemptions from fees have been established by law, rule or regulation prior to September 1, 1974:
>
> (c) An agency may charge a fee for copies of records provided that:
>
> (1) The fee for copying records shall not exceed 25 cents per page for photocopies not exceeding 8 1/2 by 14 inches..."

Since the resolution does not have the force of law and was adopted after September 1, 1974, its provisions concerning fees violate the quoted regulations.

It is noted further that the amended Freedom of Information Law (see attached), which will become effective January 1, 1978, states that fees

> "...shall not exceed twenty-five cents per photocopy not in excess of nine inches by fourteen inches, or the actual cost of reproducing any other record, except when a different fee is otherwise prescribed by law [§87(1)(b)(iii)]."

As such, under the amendments to the Law, no more than twenty-five cents per photocopy may be assessed with regard to photocopies of records up to 8 1/2 by 14 inches. Fees for reproduction of records that are not subject to conventional photocopying methods (i.e. tape recordings, computer discs) may be assessed on an actual cost basis.

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:ph
Att.

cc Lieutenant Governor Krupsak

Michael Gutman, Managing Director
Newburgh Housing Authority

STATE OF NEW YORK
COMMITTEE ON PUBLIC ACCESS TO RECORDS FOIL-AO-649

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November 9, 1977

Mr. Charles S. Adams
Editor
Pennysaver News
Executive Office
21 Third Avenue
Box 590P
Bayshore, New York 11706

Dear Mr. Adams:

Thank you for your interest in the Freedom of Information Law. Your inquiry pertains to problems encountered regarding requests for records directed to the Suffolk County Departments of Personnel and Labor.

The first question pertains to unsuccessful attempts to gain access to records regarding the appointment of the Director of Environmental Protection for the Town of Brookhaven, Mr. Proios. According to your letter, the individual appointed to the position was initially found unqualified but was nonetheless later appointed provisionally. In my opinion, some of the records sought are accessible, while others may be deniable.

According to a letter written by Howard Pachman, Suffolk County Attorney, you have been denied access to visitors logs and telephone logs kept by George Meyer, who apparently is an employee of the County Personnel Department. In my view, both the visitors logs and the telephone logs are accessible. The Freedom of Information Law provides access to "statistical or factual tabulations" [§88(1)(d)]. Since both logs in question consist of factual tabulations, they are accessible. Mr. Pachman's letter indicates that "those logs are Mr. Meyer's personal records and his personal property..." Mr. Pachman's contention is in my view erroneous. The logs are relevant to the performance of the official duties of Mr. Meyer. Consequently, these records are

neither his personal property nor would disclosure constitute an unwarranted invasion of personal privacy pursuant to §88(3) of the Freedom of Information Law. As a general matter, the Committee has advised that disclosure of records relevant to the performance of a public employee's official duties would constitute a permissible as opposed to an unwarranted invasion of personal privacy. With respect to the contention that the logs are Mr. Meyer's personal property, two questions may be asked: would Mr. Meyer have possession of such records if he did not maintain his position with the Personnel Department and would he keep a log if it was not relevant and necessary to the performance of his official duties? In my opinion, any record in possession of a public employee or filed in a government office is a public record; whether it is an accessible record is answered by the provisions of the Freedom of Information Law.

The denial of access to the employment application submitted by Mr. Proios was in my view proper. One of the examples of unwarranted invasions of personal privacy listed in the Freedom of Information Law pertains to applications for employment [§88(3)(b)]. As such, the denial of access to the application appears to have been appropriate.

Letters, memoranda, or other documents that resulted in a decision to appoint an individual who had been earlier found to be unqualified for the position may to some extent be accessible. Section 88(1)(b) of the Law provides access to statements of policy as well as statistical or factual tabulations contained in records that led to the formulation of policy. In addition, §88(1)(e) grants access to instructions to staff that affect members of the public. Under the circumstances, an instruction to staff that led to the reversal, the decision to hire, by the Civil Service Department would in my view be accessible. Such an instruction would affect the public at least indirectly. If, for example, individuals on an eligible list scored higher than the individual appointed, one could argue that the Civil Service Law was violated and that the public is not reaping the benefits of the merit system.

The second question involves the County Labor Department and a charge that "civil service list busting tactics" have been employed. Upon request for records reflective of the employment status of particular employees, you were denied on the ground

that disclosure would result in an invasion of privacy. Again, in my opinion, such records would if disclosed result in a permissible invasion of personal privacy as opposed to an unwarranted invasion of personal privacy. Disclosure of the status of a particular employee as provisional, temporary or permanent would not reflect upon any personal details of the life of a public employee. On the contrary, disclosure would permit the public to be informed as to the status, qualification and continuity of employees as well as the operations of a governmental office.

It is noted that a list of all employees taking a particular civil service examination need not be made available. The regulations adopted by the State Civil Service Department provide that eligible lists of persons who passed an examination are accessible (§71.3). By implication, disclosure of the names of all those taking an examination would indicate the names of those failing the examination by comparing such a list with the eligible list described in the preceding sentence. Discussions with the Department of Civil Service regarding the rationale behind its regulations indicate that disclosure of the names of failing candidates would in some instances be embarrassing and as such may justifiably be denied. Nevertheless, statistical or factual information regarding a particular employee, such as the date of entry into service, the employment status, attendance and the like are in my opinion accessible since they are relevant to the performance of the official duties of a given employee.

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

Sincerely,

Robert J. Freeman

Robert J. Freeman
Executive Director

RJF:js

cc Mr. Vincent J. Valva
Mr. Paul H. Greenberg
Howard E. Pachman, Esq.

STATE OF NEW YORK
COMMITTEE ON PUBLIC ACCESS TO RECORDS FOIL-AO-650

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

November 15, 1977

Mr. Louis Millowitz
[redacted]

Dear Mr. Millowitz:

Thank you for your interest in the Freedom of Information Law. Your inquiry pertains to a determination rendered in a New York City Small Claims Court auto accident case. According to your letter, you have unsuccessfully attempted to gain "insight as to how the judge could have arrived at the dollar amount of the decision..."

It is emphasized at the outset that the amended Freedom of Information Law, which will become effective January 1, 1978 (see attached), specifically excludes the courts from its scope. Nevertheless, §255 of the Judiciary Law states that virtually any records in possession of a court clerk are accessible. Therefore, in my opinion, you have a right to inspect and copy any records contained in the case file in which you are interested.

It is also noted that neither the Judiciary Law nor the Freedom of Information Law requires a governmental entity in receipt of a request for information to create a new record. As such, if there is no record in existence that is reflective of information sought, there is no obligation to prepare such a record at your request.

In addition, in my view, records indicating the thought processes of a particular judge would be deemed privileged. However, any affidavits, briefs, or other materials submitted to the court by either plaintiff or defendant included in the case file should be made 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

Robert J. Freeman
Executive Director

RJF:js
Enc.

STATE OF NEW YORK
COMMITTEE ON PUBLIC ACCESS TO RECORDS

FOIL-AO-651

DEPARTMENT OF STATE, 162 WASHINGTON AVENUE, ALBANY, NEW YORK 12231
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November 15, 1977

Mr. Lawrence A. Roman
[redacted]

Dear Mr. Roman:

Thank you for your interest in the Freedom of Information Law. Your inquiry concerns a request to review questions, your answers and accepted answers concerning an examination for the position of social welfare examiner.

It is emphasized at the outset that the new Freedom of Information Law to which you referred in your letter will not become effective until January 1, 1978. In addition, under the amendments a civil service commission will have an appropriate ground for denial of access to some examination questions and answers. Specifically, the amendments to the Law will state that an agency may deny access to records that "are examination questions or answers which are requested prior to the final administration of such questions" [see attached, amendments to the Freedom of Information Law, §87(2)(h)]. As such, after January 1, if questions contained in a particular examination will no longer be used, they will be accessible. However if the questions will be given in the future, the questions and answers will be deniable.

Based upon previous discussions concerning civil service examinations with the Department of Civil Service, I have been informed that the review process concerning the examinations may differ from one examination to another. Consequently, although a candidate may in some instances review an examination within a specific period after having taken an examination, other examinations are not reviewable. I would suggest that you contact the Office of Counsel of the New York State Department of Civil Service to determine exactly what procedures for review have been adopted regarding the examination in question.

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:ph
Att.

STATE OF NEW YORK
COMMITTEE ON PUBLIC ACCESS TO RECORDS

FOIL-AO-652

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ROBERT J. FREEMAN

November 17, 1977

Mr. Joseph Mangine
[redacted]

Dear Mr. Mangine:

Your letter once again pertains to the "inexplicable reluctance" of the Albany Housing Authority to provide access to information relative to a waiting list concerning a particular home for senior citizens.

Throughout your letter, you noted that no names have been sought. I do not believe that my response to you dated October 25 stated that you are seeking names. On the contrary, I attempted to answer in a manner that would be responsive to any grounds for denial that might be offered by the Authority. To reiterate, it was advised that the Authority has no obligation to create records in response to a request for information. Moreover, I wrote that:

> "...the Authority may withhold or delete any identifying details relative to applicants. If, for example, there is a waiting list in existence that provides names and addresses of applicants and the date of submission of their applications, the Authority could properly delete the names and addresses of applicants prior to furnishing you with the list. On the other hand, if there is a record indicating the average wait that does not identify applicants, the record is accessible under §88(1)(d) of the Law, which provides access to "statistical or factual tabulations."

Consequently, I merely advised that if names appear, the list could constitute a factual tabulation that is clearly accessible.

As you are aware, a copy of my response to you was sent to Mr. Laden, the Executive Director of the Housing Authority. Since the Committee does not have the authority to enforce compliance with the Freedom of Information Law, but merely has the power to advise, there is little that I can do to assist you further. It is suggested that you appeal any denial of access pursuant to §88(8) of the Law. After having received a final denial of access on appeal, you may seek review of that determination by means of initiation of a judicial proceeding.

I regret that I cannot be of further assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:ph

cc Joseph F. Laden, Executive Director
Albany Housing Authority

STATE OF NEW YORK
COMMITTEE ON PUBLIC ACCESS TO RECORDS

FOIL-AO-653

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

November 22, 1977

John L. Arons, Esq.
Office of the Town Attorney
Town Hall
Mahopac, New York 10541

Dear Mr. Arons:

Thank you for your interest in complying with the Freedom of Information Law. Your question deals with the Law insofar as it is applicable to a volunteer fire department.

Under the Freedom of Information Law, the same problem of interpretation will arise under the definition of "agency" in the amendments [§86(3)] as in the existing definition [§87(1)]. Both definitions include any "...governmental entity performing a governmental... function for...one or more municipalities..." in the state. The question, therefore, is whether volunteer fire departments are governmental entities that perform a governmental function. To date, there is but one decision of which I am aware that deals even tangentially with the issue. In Everett v. Riverside Hose Company [261F. Supp. 463(1966)] a federal court held that a volunteer fireman is "in the public service" and is therefore a public servant even though no salary is paid. The rationale for the holding involved a finding that a volunteer fire company performs what traditionally has been deemed a governmental function. On that basis, the decision inferred that a volunteer fire company is a governmental entity notwithstanding its status as a not-for-profit corporation. But for the Everett decision, one could conclude that a volunteer fire company is not a "governmental entity" and therefore is not subject to the Freedom of Information Law. Nevertheless, it is the only decision that deals with the status of such departments in relation to statutes that ordinarily apply only to entities of government. Perhaps, litigation dealing with the specific issue is necessary to finally determine the status of volunteer fire companies under the Freedom of Information Law.

Assuming that such companies are subject to the Freedom of Information Law under the Everett decision, I believe that distinctions may be made between the governmental functions of volunteer fire departments and their other functions, and that a dividing line may be drawn between records pertinent to their governmental functions and records relative to the remainder of their activities. Perhaps two sets of books or records could be kept, one regarding governmental or official duties as firefighters, and the other regarding social functions, athletic activities, lotteries and the like. The former category of records would be subject to the Freedom of Information Law, since it relates to companies in the performance of their governmental functions, while the latter would be treated as private records not related to the performance of official duties and therefore beyond the application of the Freedom of Information Law.

In sum, it is my opinion that the records of a volunteer fire department are subject to the Freedom of Information Law to the extent that they are reflective of the performance of the department's governmental functions.

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

Sincerely,

Robert J. Freeman

Robert J. Freeman
Executive Director

RJF:ph

STATE OF NEW YORK
COMMITTEE ON PUBLIC ACCESS TO RECORDS

FOIL-AO-654

DEPARTMENT OF STATE, 162 WASHINGTON AVENUE, ALBANY, NEW YORK 12231
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EXECUTIVE DIRECTOR
ROBERT J. FREEMAN

November 22, 1977

Mr. John Kapcio
[redacted]

Dear Mr. Kapcio:

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 questions raised in your letter pertain to the procedural aspects of the Freedom of Information Law. In this regard, I have enclosed a copy of the regulations promulgated by the Committee, the current Freedom of Information Law, the amended law, which will become effective January 1, 1978, and a memorandum entitled "Problems and Solutions" which highlights distinctions between the existing law and the amendments. The regulations have the force and effect of law, and each agency in the State must adopt rules no more restrictive than those issued by the Committee. As a general matter, the head of each agency is required by the regulations to designate one or more "records access officers" who are responsible for coordinating the agency's response to requests for records (see regulations, §1401.2). Once a records access officer or other official responsible for responding to a request has received a request, he or she has five business days to grant access to the records, deny access, or acknowledge receipt of the request and indicate that "extraordinary circumstances" prohibit a response from being made within five business days (see regulations, §1401.6). In addition, if access is not granted, if no denial is made, or if no acknowledgement is given within five business days, a person is "constructively" denied access [see regulations, §1401.7(c)]. In such a case, the person may appeal the denial to the head of the agency or whomever has been designated to hear appeals.

With respect to denial of access, a denial must be in writing (except in the case of a constructive denial), the reason for the denial must be given, you must be apprised of

your right to appeal, and the person to whom an appeal should be directed must be named. Moreover, §88(8) of the Law states that any person denied access to records

> "...may appeal such denial to the head or heads, or an authorized representative, of the agency or municipality. If that person further denies such access, his reasons therefore shall be explained fully in writing within seven business days of the time of such appeal."

As such, prior to initiating a judicial proceeding you must exhaust your administrative remedies by means of completion of the appeal procedure described above. If on appeal the agency provides a final denial of access, the denial may be reviewed in a judicial proceeding initiated under Article 78 of the Civil Practice Law and Rules.

It is noted that the existing Law provides no mechanism to apprise the Committee of appeals following denial of access. The amendments to the Law, however, which will become effective January 1, 1978, will require each agency to transmit to the Committee copies of appeals and the determinations thereon. Consequently, the Committee will have the ability to intercede in disputes or advise agencies that denials of access may in its opinion be unjustified.

Moreover, under the existing Law, the burden of proof in a judicial proceeding is on the public to demonstrate that a denial is unreasonable. The amendments reverse the burden. In a judicial proceeding under the amended Law, the agency will have the burden of proving that records denied fall within one or more enumerated categories of deniable records.

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

Sincerely,

Robert J. Freeman

Robert J. Freeman
Executive Director

RJF:js
Enc.

cc Louis J. Lefkowitz, Attorney General
R. Simberg

STATE OF NEW YORK
COMMITTEE ON PUBLIC ACCESS TO RECORDS

FOIL-AO-655

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

November 23, 1977

Phyllis S. Jaffe, Esq.
Plunkett, Wetzel & Jaffe
1 North Broadway
White Plains, New York 10601

Dear Ms. Jaffe:

Thank you for your interest in complying with the Freedom of Information Law. Your inquiry pertains to rights of access to tape recordings of a meeting prepared by the clerk of a school board.

Two responses must be given, the first of which pertains to the existing Freedom of Information Law and the second to the amended Freedom of Information Law, which will become effective January 1, 1978.

The existing Law fails to define the term "record." Moreover, rights of access are restricted to those records listed in §88(1)(a) through (i) of the statute. Tape recordings are not listed among the accessible records in §88(1). In addition, §2116 of the Education Law, also an access statute, similarly fails to define what constitutes a record, despite the breadth of its language. Consequently, rights of access to tape recordings are at best questionable under either the Freedom of Information Law or the Education Law.

The amendments to the Law, however, will remove the lack of clarity regarding the issue. The amendments define "record" to include:

> "...any information kept, held, filed, produced or reproduced by, with or for an agency or the state legislature, in any physical form whatsoever including, but not limited to, reports, statements,

> examinations, memoranda, opinions, folders, files, books, manuals, pamphlets, forms, papers, designs, drawings, maps, photos, letters, microfilms, computer tapes or discs, rules, regulations or codes" [§86(4)].

Thus, it is clear that tape recordings fall within the definition of "record" under the amendments. Further, it would not appear that any of the grounds for denial could be appropriately envoked to withhold a tape recording of an open meeting.

Your question dealing with whether a tape recording must be made available to the public for recording by the public is also clarified by the amendments to the Law. Since the definition of "record" clearly includes tape recordings, and since the Law requires that accessible records be copied upon request, I believe that the amendments will enable the public to have copies of tape recordings made. In such a case, the fee for copying a tape would be based upon §87(b)(iii). The cited provision permits a fee of twenty-five cents for photocopies, or "the actual cost of reproducing any other record." Under the circumstances, the actual cost of reproducing a tape could be assessed.

In addition, it is suggested that you review the retention and disposal lists for records that are issued by the State Department of Education. Those schedules specify the length of time that particular records in possession of school districts must be maintained before they are destroyed. The schedule might indicate the amount of time that a tape recording of a meeting must be kept.

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-656

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EXECUTIVE DIRECTOR
ROBERT J. FREEMAN

November 25, 1977

Mr. Daniel Jean Lipsman
[redacted]

Dear Mr. Lipsman:

Thank you for your continued interest in the Freedom of Information Law. Your inquiry pertains to a request for records reflective of the disbursement of "several hundred thousand dollars" by the Chancellor of the City University of New York during a period of approximately six years. The monies to which you referred have been labeled as "the Chancellor's Fund" or the "Discretionary Fund." Your letter indicates that upon your request for an accounting of the expenditures, the request was refused.

As emphasized in previous communications, the University has no obligation to create a record in response to your request. Nevertheless, if the records do exist, they are in my opinion accessible under both the existing Freedom of Information Law and the amendments to the Law that will become effective January 1, 1978.

The current Freedom of Information Law grants access to "statistical or factual tabulations made by or for an agency" [§88(1)(d)]. Similarly, the amendments will grant access to "statistical or factual tabulations or data" in possession of an agency [§87(2)(g)(i)]. Consequently, to the extent that such tabulations or data exist, they are in my view 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

Robert J. Freeman
Executive Director

RJF:ph
cc Mary P. Bass, City University
Vice Chancellor & General Counsel
for Legal Affairs

STATE OF NEW YORK
COMMITTEE ON PUBLIC ACCESS TO RECORDS

FOIL-AO-657

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

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EXECUTIVE DIRECTOR
ROBERT J. FREEMAN

November 25, 1977

Mr. G. Guy DiPietro
Superintendent of Schools
Brentwood Union Free School District
Brentwood, New York 11717

Dear Mr. DiPietro:

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

According to your letter, the Board of Education of the Brentwood Union Free School District has requested that you write to the Committee "to find out what information the Board can and cannot release to the Public."

The question is quite broad and deals with the crux of the Freedom of Information Law. I feel that I can only attempt to summarize what I believe to be the intent of the statute.

It is emphasized at the outset that the Freedom of Information Law is permissive. Although certain records may be accessible as of right, there is nothing in the Law that requires an agency, such as a school district, to deny access to records, unless a specific provision of law so states. An example of such a provision of law is the Family Educational Rights and Privacy Act (20 USC 1232 g), which is commonly known as the "Buckley Amendment." Pursuant to that federal statute, records identifiable to students are deemed confidential except under specifically enumerated circumstances. It is only under analogous situations, situations in which a statute provides for confidentiality, that the school district must deny access.

In all other circumstances, responses to requests for records should be based upon §87(2) of the Law. The cited provision states that all records or portions thereof are accessible except that an agency may deny access to records or portions thereof that fall within the categories of deniable records listed in paragraphs (a) through (h) of the provision. It is also noted that most of the exceptions

contained in §87(2) are based upon the effects of disclosure rather than the nature of records. For example, the Law states that an agency may deny access to records or portions thereof which "if disclosed would impair present or imminent contract awards or collective bargaining negotiations..." Consequently, if a member of the public seeks records relevant to collective bargaining negotiations, the school district does not have the ability to deny access unless disclosure would "impair" the progress of such negotiations.

The only exception that does not specifically deal with the effects of disclosure is paragraph (g) of §87(2).

That provision states that an agency may deny access to records or portions thereof that:

"are inter-agency or intra-agency which are not:

i. statistical or factual tabulations or data;

ii. instructions to staff that affect the public; or

iii. final agency policy or determinations..."

According to the Assembly sponsor of the amendments to the Freedom of Information Law:

> "[T]he basic intent of the quoted provision is twofold. First, it is the intent that any so-called "secret law" of an agency be made available. Stated differently, records or portions thereof containing any statistical or factual information, policy, or determinations upon which an agency relies is accessible. Secondly, it is the intent that written communications, such as memoranda or letters transmitted from an official of one agency to an official of another or between officials within an agency might not be made available if they are advisory in nature and contain no factual information upon which an agency relies in carrying out its duties. As such, written advice provided by staff to the head of an agency that is solely reflective of the opinion of staff need not be made available."

I will be happy to provide you with more specific information when issues pertaining to particular records arise.

I hope that I have been of some assistance.

Sincerely,

Robert J. Freeman

Robert J. Freeman
Executive Director

RJF:ph

STATE OF NEW YORK
COMMITTEE ON PUBLIC ACCESS TO RECORDS

FOIL-AO-65

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

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EXECUTIVE DIRECTOR
ROBERT J. FREEMAN

November 29, 1977

Mr. H. James Heffern, Jr.
Attorney
Village of Port Dickinson
Village Hall
786 Chenango Street
Port Dickinson, NY 13901

Dear Mr. Heffern:

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 Freedom of Information Law.

According to your letter, the Village Board of Trustees is interested in knowing whether examples can be provided concerning the records that may and may not be made available under the amendments to the Freedom of Information Law. Your letter also specifies that the Board is especially interested in outlining the records of the Police Department that are accessible.

Section 87(2) of the amendments is the key provision of the Freedom of Information Law with respect to rights of access. In essence, it states that all records are available, except that an agency may deny access to records or portions thereof that fall within the categories of deniable records listed thereafter in paragraphs (a) through (h) of the cited provision. In most instances, the categories of deniable records are written in terms of the effects of disclosure, rather than the nature of records.

With regard to records of the Police Department, two of the exceptions are particularly relevant. Specifically, the Law provides that an agency may deny access to records or portions thereof that:

> "(e) are compiled for law enforcement purposes and which, if disclosed would:
>
> i. interfere with law enforcement investigations or judicial proceedings;

ii. deprive a person of a right to a fair trial or impartial adjudication;

iii. identify a confidential source or disclose confidential information relating to a criminal investigation; or

iv. reveal criminal investigative techniques or procedures, except routine techniques and procedures;

(f) if disclosed would endanger the life or safety of any person..."

As such, upon request for records in possession of the Police Department, case by case determinations will have to be made to determine whether or not access could be appropriately denied.

In terms of other records, the standard would be similar. For example, §87(2)(c) states that an agency may deny access to records which if disclosed "would impair present or imminent contract awards or collective bargaining negotiations." Therefore, although records may relate to collective bargaining negotiations, they cannot be denied unless disclosure would "impair" the progress of such negotiations.

The only exception that does not specifically deal with the effects of disclosure is paragraph (g) of §87(2). That provision states that an agency may deny access to records or portions thereof that:

"are inter-agency or intra-agency which are not:

i. statistical or factual tabulations or data;

ii. instructions to staff that affect the public; or

iii. final agency policy or determinations..."

According to the Assembly sponsor of the amendments to the Freedom of Information Law:

"[T]he basic intent of the quoted provision is twofold. First, it is the intent that any "secret law" of an agency be made available.

> Stated differently, records or portions thereof containing any statistical or factual information, policy or determinations upon which an agency relies is accessible. Secondly, it is the intent that written communications, such as memoranda or letters transmitted from an official of one agency to an official of another might not be made available if they are advisory in nature and contain no factual information upon which an agency relies in carrying out its duties. As such, written advice provided by staff to the head of an agency that is solely reflective of the opinion of staff need not be made available."

I will be happy to provide you with more specific information when issues pertaining to particular records arise.

I hope that I have been of some assistance.

Sincerely,

Robert J. Freeman

Robert J. Freeman
Executive Director

RJF:ph

STATE OF NEW YORK
COMMITTEE ON PUBLIC ACCESS TO RECORDS FOIL-AO-659

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

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EXECUTIVE DIRECTOR
ROBERT J. FREEMAN

December 7, 1977

Mr. Peter E. Skerrett, Secretary
Laurelton Fire District
405 Empire Boulevard
Rochester, New York 14609

Dear Mr. Skerrett:

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

Your inquiry concerns an interpretation of the provision pertaining to fees in the amendments to the Freedom of Information Law [§87(b)(iii)]. According to your letter, the Fire District office does not have a photocopy machine, and your question is whether you are obligated to respond immediately to a request and travel two miles to the nearest photocopy machine in order to make copies.

In my opinion, the situation can be handled in several ways. First, the Law states that upon request for records reasonably described, an agency has five business days to respond to the request [§89(3)]. Consequently, when a request is received by your office, you need not provide copies immediately. Second, the current regulations promulgated by the Committee under the existing Freedom of Information Law provide that:

> "[I]n agencies or municipalities which do not have photocopying equipment, a transcript of the requested records shall be made upon request. Such transcripts may either be typed or hand-written. In such cases, the requester may be charged for the clerical time involved in making the transcript [1401.8(c)(2)]."

Although new regulations will be issued pursuant to the amendments to the Law, I believe that the provision quoted

above will remain intact. Moreover, the provision concerning fees in the amendments states that an agency may charge "the actual cost of reproducing" records that cannot be copied by conventional photocopying methods. And third, if you do not have a photocopying machine but wish to provide photocopies, it is suggested that while you may charge no more than twenty-five cents per photocopy, you may add the actual cost of transportation used to travel to the site of the photocopying machine. For example, if a gallon of gasoline is required to travel back and forth to the location of the copy machine, you may charge for the actual cost of a gallon of gasoline, in addition to the cost of photocopying.

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

Sincerely,

Robert J. Freeman

Robert J. Freeman
Executive Director

RJF:ph

STATE OF NEW YORK
COMMITTEE ON PUBLIC ACCESS TO RECORDS

OML-AO-171
FOIL-AO-660

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

December 7, 1977

Mr. Thomas Egan
[redacted]

Dear Mr. Egan:

Thank you for your interest in the Open Meetings Law.

I apologize for the delay in responding to your letter, which was initially received by the Department of Audit and Control and was subsequently transmitted to this office.

Your inquiry pertains to the legality of the procedure under which the position of Chairman of the Greene County Youth Program was filled. According to your letter, there was neither public notice nor public discussion concerning the creation of the position or the appointment of a named individual to the position.

If there was no public discussion concerning the creation of the position by the Greene County Legislature, the Open Meetings Law was in my opinion violated. From a legal point of view, §41 of the General Construction Law permits the County Legislature (or any other public body) to act only at a duly convened meeting. Second, §93(a) of the Open Meetings Law states that every meeting of a public body "shall be open to the general public," except that an executive session may be called in accordance with the procedure set forth in §95(1) of the Law. Third, "executive session" is clearly defined as a portion of an open meeting during which the public may be excluded [§92(3)]. Fourth, §95(1)(a) through (h) specifies and limits the subject matter that may be discussed in executive session. And fifth, although a public body may generally vote during a properly convened executive session, it must vote in public with respect to the appropriation of public monies. If your assertion that the position in question was newly created is accurate, any vote by the County Legislature to appropriate money to fund the salary for the position should

have been taken during an open meeting in full view of the public.

It is noted that §95(1)(f) of the Law permits a public body to enter into executive session to discuss:

> "the medical, financial, credit or employment history of any person or corporation, or matters leading to the appointment, employment, promotion, demotion, discipline, suspension, dismissal or removal of any person or corporation..."

Consequently, the County Legislature had the authority under the Open Meetings Law to discuss the appointment of individuals to the position of Chairman of the Youth Program in executive session.

With respect to your ability to challenge an alleged violation of the Open Meetings Law, §97 of the Law states that any aggrieved person may seek an order from a court to render a determination made by a public body in violation of the Open Meetings Law null and void. Although the Law does not provide for a "citizen's suit," it does state that a court may in its discretion award reasonable attorney fees to the victorious party in a judicial proceeding commenced under the Open Meetings Law.

The Freedom of Information Law may also be of substantial utility regarding the creation of the position in question. For example, the existing Freedom of Information Law, which will be replaced by an amended Freedom of Information Law on January 1, 1978, grants access to statements of policy [§88(1)(b)], administrative staff manuals and instructions to staff that affect the public [§88(1)(e)], minutes of meetings [§88(1)(c)] and final determinations made by a governing body, such as the County Legislature [§88(1)(h)]. Moreover, §88(5) of the Freedom of Information Law requires every board, commission or other group having more than two members to compile a voting record identifiable to each member in every proceeding in which the member votes.

In addition, it is suggested that you seek to review any rules, regulations or procedures upon which the County Civil Service Commission relies in carrying out its duties. You might also want to attempt to

discover whether the position in question has been filled provisionally and whether it is a civil service position that requires that an examination be given. It is noted that, although an agency may charge for photocopying records, you may inspect records for free.

Enclosed for your consideration are copies of the Open Meetings Law, the current Freedom of Information Law, the amendments to the Freedom of Information Law and a memorandum entitled "Problems and Solutions" which highlights distinctions between the current Freedom of Information Law and the amendments.

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

Sincerely,

Robert J. Freeman

Robert J. Freeman
Executive Director

RJF:ph
Enc.

cc Greene County Legislature

STATE OF NEW YORK
COMMITTEE ON PUBLIC ACCESS TO RECORDS FOIL-AO-661

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

December 8, 1977

Richard Narducci, Esq.
117 South Main Street
Nanuet, New York 10954

Dear Mr. Narducci:

Thank you for your letter of December 1. Your letter pertains to information involving the rationale for determinations regarding the alteration of parcels of land by the Sullivan County Real Property Tax Services. Further, your letter concludes with a request for an investigation for the purpose of requiring that the Sullivan County Real Property Tax Services provide access to the information in question.

It is noted at the outset that the Committee does not have the authority to investigate with respect to an alleged failure to comply with the Freedom of Information Law. Nevertheless, in my opinion, to the extent that the information that you are seeking is in possession of governmental officials, it is accessible pursuant to the Freedom of Information Law, §88(1)(i), when read in conjunction with either §51 of the General Municipal Law or §208 of the County Law. In addition, the legal authority of a governmental entity to relinquish custody of its records to a surveyor is in my view questionable. In general, a county clerk, for example, has the duty to maintain custody of all records in possession of his or her office. Consequently, if some of the information in question was transferred to a surveyor who is not employed by the County, such action may have been taken in violation of law.

I regret that I cannot be of further assistance. Should any further questions arise, please feel free to contact me.

Sincerely,

Robert J. Freeman

Robert J. Freeman
Executive Director

RJF:js
cc Sullivan County Real Property Tax Services

STATE OF NEW YORK
COMMITTEE ON PUBLIC ACCESS TO RECORDS FOIL-AO-662

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

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EXECUTIVE DIRECTOR
ROBERT J. FREEMAN

December 12, 1977

Mr. Robert J. Whalen
[redacted]

Dear Mr. Whalen:

Thank you for your interest in the Freedom of Information Law. Your inquiry pertains to numerous requests directed to the Board of Education of the Brentwood Union Free School District.

Although in my opinion a great deal of the information that you are seeking is accessible, it is important to note at the outset that the Freedom of Information Law neither requires that records be created in response to a request nor does it permit cross-examination of public officials. Therefore, if you requested information that does not exist in the form of a record or records, the agency in receipt of the request has no obligation to create or compile a record on your behalf.

I would now like to deal with rights of access to the records that you cited in a series of letters attached to your inquiry.

First, your letter of January 24, 1977 indicates that you requested payroll information from the school district. In this regard, the Freedom of Information Law, §88(1)(g), states that each agency must compile a payroll record consisting of the name, address, title and salary of all officers or employees of an agency. While the cited provision appears to provide access only to "bona fide members of the news media," the Committee has advised and its regulations, which have the force

and effect of law, state that the payroll record envisioned by §88(1)(g) is accessible to any person. This conclusion was reached pursuant to §88(10) of the Law, which states that nothing in the Law shall be construed to limit or abridge rights of access previously granted by other provisions of law or by means of judicial interpretation. In this regard, case law rendered prior to the enactment of the Freedom of Information Law held that payroll information is available to any person [Winston v. Mangan, 338 NYS 2nd 654, 662 (1972)]. Since rights of access of the public to the payroll record were established prior to the enactment of the Freedom of Information Law, those rights are preserved. Consequently, any person may gain access to the payroll record, whether or not he or she is a "bona fide member of the news media."

It is also noted that the amendments to the Freedom of Information Law, which will become effective January 1, 1978, state that each agency must compile a payroll record consisting of name, public office address, title and salary of every officer or employee of an agency [§87(3)(b)].

Second, your letter of July 12, 1977, pertains to a request for a report concerning security guards and documentation regarding a failure to administer the oath of office to a particular employee. In both instances, to the extent that such records exist, they are available. However, if the information sought does not exist in the form of a record or records, the school district is under no obligation to create a record in response to your request.

Third, a similar conclusion is reached with respect to your letter dated July 27, 1977, in which explanations are sought.

Fourth, your letter dated September 6, 1977 involves a request for photocopies of checks issued to two named individuals, records indicating the number of vacation days to which those individuals are entitled, the number of vacation days used, records reflective of payments made for unused vacation time, documentation

concerning miles driven, gasoline used, the cost of operation of a district-owned vehicle during a particular time period, and similar records reflective of bills submitted to the Board of Education regarding the expense accounts of particular individuals. Again, in my opinion, to the extent that the records sought exist, they are accessible. I believe that the information referred to constitutes "statistical or factual tabulations made by or for" the school district, which are accessible pursuant to §88(1)(d) of the Law. In addition, although the information in question relates to specific individuals, I do not believe that disclosure would result in an "unwarranted invasion of personal privacy." On the contrary, since the records relate to the performance of the official duties of public employees, disclosure would in my view constitute a permissible as opposed to an unwarranted invasion of personal privacy.

Included within the package sent to me is a letter by the school district attorneys in which it was argued that none of the information referred to in the preceding paragraph falls within the scope of §88(1) of the Freedom of Information Law. I respectfully disagree with that contention, since one of the categories of accessible records includes any other records made available by any other provision of law [§88(1)(i)]. One such provision of law is §2116 of the Education Law, which states that:

> "[T]he records, books and papers belonging or appertaining to the office of any officer of a school district are hereby declared to be the property of such district and shall be open for inspection by any qualified voter of the district at all reasonable hours, and any such voter may make copies thereof."

When the quoted provision of the Education Law is read in conjunction with the Freedom of Information Law, it would appear that virtually all records in possession of a school district are accessible.

And fifth, your letter of October 11, 1977 pertains to a request for a letter sent to the attorneys for the school district requesting that they investigate a "conspiracy." In my opinion, the letter in question need not be made available since it is subject to the attorney-client privilege and therefore may be deemed confidential by law.

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

Sincerely,

Robert J. Freeman

Robert J. Freeman
Executive Director

RJF:js

cc Board of Education
Brentwood Union Free School District

STATE OF NEW YORK
COMMITTEE ON PUBLIC ACCESS TO RECORDS FOIL-AO-663

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

December 14, 1977

Mr. Ronald Webster
Assistant Director
People's Fire House
125 Wythe Avenue
Brooklyn, New York 11211

Dear Mr. Webster:

Thank you for your continued interest in the Freedom of Information Law. Your inquiry pertains to your inability to gain access to records in possession of the New York City Fire Department and the Department's refusal to acknowledge your requests.

It is important to note at the outset that the Freedom of Information Law grants access to certain existing records. Therefore, if the information sought does not exist in the form of a record or records, an agency has no obligation to create a record on your behalf in response to a request.

Nevertheless, to the extent that the information that you have sought exists in the form of records, it is accessible to you. According to your letter, you have requested statistical information concerning the number of runs made by engine companies during specified years, the numbers of alarm boxes to which the engine company responded, the alarm boxes to which companies are assigned to respond on first, second and third alarm fires, the number of fire fighters injured, killed or later deceased as a result of accidents incurred while fighting fires, the number of civilians injured, killed or later deceased as a result of fires and monthly figures reflective of the number of men reporting sick and the length of time that such individuals remained on sick leave.

To the extent that the information sought exists, it is accessible pursuant to §88(1)(d) of the existing Freedom of Information Law, which provides access to

"statistical or factual tabulations made by or for the agency." The amended Freedom of Information Law, which will become effective January 1, 1978, will similarly provide access to "statistical or factual tabulations or data" [§87(2)(g)]. Consequently, the information sought will also be clearly accessible under the amended Law.

It is emphasized that while the current Freedom of Information Law contains no definition of "record," the amended Freedom of Information Law will define "record" to include "...any information kept, held, filed, produced or reproduced by, with or for an agency...in any physical form whatsoever..." [§86(4)]. As such, if the information is stored in a computer, for example, it will constitute a record under the amendments to the Law.

Your letter also cites a failure on the part of the Fire Department to compile a "subject matter list," which is required to be maintained and made available by the Department. The amendments in my opinion will clarify agencies' responsibilities with respect to the list, for the new law states that each agency shall maintain "a reasonably detailed current list by subject matter, of all records in the possession of the agency, whether or not available under the article" [§87(3)(c)].

In addition, the amendments to the Law will embody a shift in the burden of proof in a judicial proceeding. Under the existing law, a person denied access must demonstrate to a court that the denial was unreasonable. The amendments, however, will require an agency to prove that the records denied fall within one or more categories of deniable records listed in §87(2) [§89(4)(b)].

As you requested, copies of my response will be sent to the individuals designated in 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

Robert J. Freeman
Executive Director

RJF:js

cc Mayor Elect Edward Koch
Mayor Abraham Beame
Basil Paterson
State Senator Carol Bellamy
State Senator Thomas Bartosiewcz
Councilman Abraham Gerges
Jerome Seidel
Samuel Liebowitz
Congressman Fred Richmond
Commissioner John T. O'Hagan
Assemblyman Joseph Lentol

STATE OF NEW YORK
COMMITTEE ON PUBLIC ACCESS TO RECORDS FOIL-AO-664

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 14, 1977

Dr. Jon A. Lieberman
Chairman, Ad Hoc
Committee on "Sunshine Law"
Southeast Nassau Guidance Center, Inc.
2146 Jackson Avenue
Seaford, New York 11783

Dear Dr. Lieberman:

Thank you for your interest in the Freedom of Information Law. As I understand your letter, you are employed by the Southeast Nassau Guidance Center, Inc., which is a private, not-for-profit corporation that is not subject to the Freedom of Information Law, but which often transmits written communications to entities of government that are subject to the Freedom of Information Law. Your inquiry deals with rights of access to records sent by the Center to entities of government.

It is important to note at the outset that the Freedom of Information Law as originally enacted in 1974 has been substantially amended. The amendments, which will become effective January 1, 1978, and a memorandum entitled "Problems and Solutions" that highlights distinctions between the existing Law and the amendments, are attached for your consideration.

As a general matter, the Freedom of Information Law is applicable only to governmental entities. Therefore, any communications that are sent by your agency to a nongovernmental entity would not be subject to the Freedom of Information Law. However, information sent to government entities would fall within the definition of "record" [§86(4)] and therefore would be subject to rights of access granted by §87(2) of the Law. Section 87(2) states that all records in possession of an agency are accessible, except to the extent that the records contain information deemed deniable pursuant to one or more categories of deniable records listed in paragraphs (a) through (h) of the cited provision.

There may be several categories of deniable records that may be transmitted to agencies of government by your office. For example, §87(2)(a) states that an agency may deny access to records that are specifically exempt from disclosure by state or federal statute. In this regard, many records transmitted to school districts, for example, would fall within the purview of the "Family Educational Rights and Privacy Act" (20 U.S.C. 1232g), which is commonly known as the "Buckley Amendment." Under that provision of federal law, records identifiable to individual students are generally deemed confidential, except under specifically enumerated circumstances. In addition, §15.13 of the Mental Hygiene Law states that all records pertaining to patients in facilities under the aegis of the Department of Mental Hygiene are considered confidential, except as otherwise provided.

Section 87(2)(b) states that records may be denied if disclosure would constitute "an unwarranted invasion of personal privacy." Further §89(2)(b) lists examples of such invasions of privacy. Relevant to your inquiry, one of the examples pertains to "disclosure of employment, medical or credit history..."; another pertains to "disclosure of items involving the medical or personal records of a client or patient in a medical facility." Consequently, records that the Center transmits to agencies of government may in many cases be withheld on the ground that disclosure would result in an unwarranted invasion of personal privacy.

In sum, in my opinion records transmitted by the Center to an agency of government would be in many cases either exempt from disclosure by statute or deniable pursuant to the privacy provisions of the Freedom of Information Law.

Also enclosed is an index to advisory opinions rendered by the Committee which are identified by key phrase. If there are any opinions of particular interest to you, please designate them by number in writing, and I will be happy to send them 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:ph
Enc.

STATE OF NEW YORK
COMMITTEE ON PUBLIC ACCESS TO RECORDS FOIL-AO-665

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EXECUTIVE DIRECTOR
ROBERT J. FREEMAN

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

December 14, 1997

Ms. Beryl B. Berndt
Assistant Registrar
Junior College of Albany
140 Scotland Avenue
Albany, New York 12208

Dear Ms. Berndt:

Your inquiry concerns statutes pertaining to access to records of both public and private institutions of higher education.

In New York, there is a Freedom of Information Law which is applicable to all governmental entities in the state. As such, rights of access granted by that statute would pertain to records in possession of public institutions of higher education, such as the State University System or community colleges. There is no analagous access statute that is applicable to private institutions of higher education.

In addition, in 1974 Congress enacted the "Family Educational Rights and Privacy Act" which is commonly known as the "Buckley Amendment." The Buckley Amendment provides that all educational institutions in direct or indirect receipt of federal monies must comply with its provisions. In brief, it states that education records identifiable to specific students are confidential except with respect to the parents of a student under the age of 18 or a student who has attained the age of 18.

Enclosed for your consideration are copies of the New York Freedom of Information Law, the Family Educational Rights and Privacy Act and an article concerning that statute in which you may be interested.

I hope that I have been of some assistance.

Sincerely,

Robert J. Freeman

RJF:ph
Enc.

Robert J. Freeman
Executive Director

STATE OF NEW YORK
COMMITTEE ON PUBLIC ACCESS TO RECORDS FOIL-AO-666

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

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EXECUTIVE DIRECTOR
ROBERT J. FREEMAN

December 15, 1977

Mr. Isidore Gerber
Executive Director
Liberty Taxpayers Association
Liberty, New York 12754

Dear Mr. Gerber:

Thank you for your continued interest in the Freedom of Information Law. Your letter indicates that despite your numerous requests for records in possession of the Liberty Central School Board and the advisory opinions that I have written on your behalf the School Board has not responded to your requests.

As you are aware, the Committee does not have the authority to enforce compliance with the Law. Rather, the burden of enforcing the Law rests upon the public. Consequently, I regret that the Committee cannot compel the School Board to produce records or otherwise comply with the Freedom of Information Law.

Nevertheless, it is noted that the Freedom of Information Law has been substantially amended. The new Freedom of Information Law, a copy of which is attached, will become effective January 1, 1978. Also attached is a copy of a memorandum entitled "Problems and Solutions" which highlights distinctions between the existing Law and the amendments.

It is emphasized that the burden of proof in a judicial proceeding will be altered by the amendments. Under the existing Law, after having exhausted administrative remedies, including an appeal to the head of an agency, a person denied access has the burden of proving that the denial was unreasonable. Under the amendments, however, the agency will have the burden of proving that the records denied fall within one or more categories of deniable records.

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

RJF:ph
Att.

cc Liberty Central School Board

STATE OF NEW YORK
COMMITTEE ON PUBLIC ACCESS TO RECORDS FOIL-AO-667

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

December 19, 1977

Mr. Murray Schiffman
[redacted]

Dear Mr. Schiffman:

Thank you for your interest in the Freedom of Information Law. Your inquiry pertains to the legality of fees assessed for copies by the Town Clerk of the Town of Hempstead and the New York State Department of Audit and Control.

According to your letter, the Town of Hempstead has charged a dollar per photocopy and the Department of Audit and Control has charged twenty-five cents per photocopy. In my opinion, the fee assessed by the Town of Hempstead is illegal, while the fee assessed by the Department of Audit and Control complies with law.

The regulations promulgated by the Committee, which have the force and effect of law, state that the maximum that may be charged for photocopying is twenty-five cents per page, unless a different fee had been established by law prior to the effective date of the Freedom of Information Law, September 1, 1974 (see attached regulations §1401.8)

In addition, the amendments to the Freedom of Information Law, which will become effective January 1, 1978, similarly will state that the maximum that may be charged for photocopying is twenty-five cents per page, unless a different fee is prescribed by law [see attached amendments to the Freedom of Information Law, §87(1)(b)(iii)].

Therefore, if the Town of Hempstead had not established the fee of a dollar per page by law prior to September 1, 1974, its policy of charging

a dollar per page violates the law. The fee of twenty-five cents per page established by the Department of Audit and Control complies with 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

Robert J. Freeman
Executive Director

RJF:ph
Att.

cc Town Clerk
Town of Hempstead

Mr. Ronald L. Tarwater
Assistant Records Access Officer
Department of Audit and Control

STATE OF NEW YORK
COMMITTEE ON PUBLIC ACCESS TO RECORDS FOIL-AO-668

DEPARTMENT OF STATE, 162 WASHINGTON AVENUE, ALBANY, NEW YORK 12231
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EXECUTIVE DIRECTOR
ROBERT J. FREEMAN

December 20, 1977

Ms. Sandy McClure
[redacted]

Dear Ms. McClure:

Thank you for your letter of December 14. Your inquiry pertains to rights of access to records reflective of utility consumption by the Half Hollow Hills School District and the duties of a records access officer.

Following our conversation of December 14, I contacted Mr. Michael Maina, Assistant Superintendent for Business Affairs, to discuss the problems that you raised. Upon receipt of your letter, I contacted Mr. Maina once again to ascertain whether the School District had begun to respond to your requests. According to Mr. Maina, after a lengthy conversation with you, the problems appear to have been resolved. I also unsuccessfully attempted to contact you to determine whether you continue to seek my advice.

With respect to information sought, it is noted that the Freedom of Information Law grants access to certain existing records. Therefore, if information requested does not exist in the form of a record, the School District has no obligation to create a record on your behalf.

Assuming that the information sought does exist in the form of records or portions of records, it is in my view accessible, for it consists largely of what could be characterized as statistical or factual data.

First, the existing Freedom of Information Law grants access to "statistical or factual tabulations made by or for the agency" [§88(1)(d)]. Second, the amendments to the Freedom of Information Law, which will become effective January 1, 1978, will similarly provide access to "statistical or factual tabulations or data" [§87(2)(g)(i)]. And third, the Education Law, §2116, provides access to virtually all records "belonging or appertaining" to a school district. As such, the records sought are accessible.

The duties of records access officers are specified in §1401.2 of the regulations promulgated by the Committee, which have the force and effect of Law (see attached). Although the regulations will be amended after the effective date of the new Freedom of Information Law, I doubt that the provisions concerning the duties of records access officers will be significantly altered.

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

Sincerely,

Robert J. Freeman

Robert J. Freeman
Executive Director

RJF:js
Enc.

cc Mr. John Koutsantanou, et al.
Mr. Coleman Lyons
Mr. Michael Maina
John Gross, Esq.
Bernard Smith, Esq.

STATE OF NEW YORK
COMMITTEE ON PUBLIC ACCESS TO RECORDS FOIL-AO-669

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

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EXECUTIVE DIRECTOR
ROBERT J. FREEMAN

December 20, 1977

Mr. Edwin L. Spencer
[redacted]

Dear Mr. Spencer:

Thank you for your letter of December 8. Your inquiry pertains to your inability to gain access to records in possession of the Onondaga County Department of Social Services.

As a general matter, records identifiable to recipients of or applicants for public assistance are deemed confidential by statute. Nevertheless, the regulations adopted by the New York State Department of Social Services provide that in some instances records may be obtained by an applicant, recipient, persons acting in their behalf, and relatives of applicants and recipients.

A copy of the regulations that deal with the subject are enclosed for your review.

I hope that I have been of some assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:js
Enc.

STATE OF NEW YORK
COMMITTEE ON PUBLIC ACCESS TO RECORDS FOIL-AO-670

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

December 21, 1977

Mrs. Jean B. Green
[redacted]

Dear Mrs. Green:

Thank you for your letter dated December 2, which was received by this office on December 20. Your inquiry pertains to rights of access to school records identifiable to your son.

It is noted that rights of access to records of a student are not subject to the New York Freedom of Information Law, but rather fall within the scope of the federal Family Educational Rights and Privacy Act, which is commonly known as the "Buckley Amendment" (20 U.S.C. 1232g). In brief, the Buckley Amendment states that education records identifiable to students under the age of eighteen are confidential, except with respect to the parents of a student. In addition, when a student attains the age of eighteen, he or she attains the rights of his or her parents. Consequently, if your son is under the age of eighteen, you have a right to inspect records pertaining to him in possession of a school in which he has been in attendance. "Education records" includes records such as psychiatric evaluations of students under the age of eighteen.

Your letter also refers to a manual pertaining to handicapped individuals. If you would be willing to provide additional information concerning the manual and its contents perhaps I could provide you with more specific direction.

Enclosed for your consideration is a portion of the regulations adopted by the New York State Department of Health entitled "Patients' rights" which may be useful to you with respect to information concerning your son in possession of the Westchester County Medical Center (Grasslands Hospital).

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-671

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

December 29, 1977

Mr. Michael Guttman, PHM
Manager-Director
Newburgh Housing Authority
P.O. Box 89
150 Smith Street
Newburgh, New York 12550

Dear Mr. Guttman:

Thank you for your letter of December 27. Your inquiry concerns the status of the Newburgh Housing Authority under the New York Freedom of Information Law (see attached).

The Freedom of Information Law, §86(3), defines "agency" to include any public authority or other governmental entity performing a governmental function for any one or more municipalities in the state. As such, the Newburgh Housing Authority is clearly an "agency" as defined by the Law and therefore is subject to the provisions of the New York Freedom of Information Law.

The statement in the Federal Register to which you referred in a previous letter dealt with regulations adopted by the Library of Congress under the federal Freedom of Information Act. To reiterate my statement made during our telephone conversation of December 23, the federal statute is applicable to records in possession of federal agencies; the New York statute is applicable to records in possession of governmental entities in New York. Since the Newburgh Housing Authority was created by legislation enacted in New York, it is subject to New York Law. The fact that the Authority is funded in part by a federal department is in my view irrelevant.

I hope that I have been of some assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:ph
Att.

STATE OF NEW YORK
COMMITTEE ON PUBLIC ACCESS TO RECORDS FOIL-AO- 672

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

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EXECUTIVE DIRECTOR
ROBERT J. FREEMAN

December 29, 1977

Mr. Manuel Pissare
Maple Street Discount
88 Dix Avenue
Glens Falls, New York 12801

Dear Mr. Pissare:

Thank you for your continued interest in the Freedom of Information Law. Your question concerns the fees charged by the City of Glens Falls for copying records under the Freedom of Information Law.

According to your letter, the City currently charges one dollar per photocopy. In this regard, the regulations promulgated by the Committee, which have the force and effect of law, state that no more than twenty-five cents may be assessed per photocopy, unless a different fee had been established by law prior to September 1, 1974, the effective date of the Freedom of Information Law as originally enacted (see attached regulations, §1401.8). Consequently, if no provisions of law enacted prior to September 1, 1974 had established a fee of more than twenty-five cents per photocopy, the fee of a dollar per page constitutes a violation of law.

It is noted that the amendments to the Freedom of Information Law, effective January 1, 1978, embody virtually the same language as the regulations [see attached, amendments to the Freedom of Information Law, §87(1)(b)(iii)].

In terms of the ability to obtain a refund for the fees assessed in violation of law, it would appear that the only action (other than a discussion with the City Clerk) that could be taken would involve

the initiation of a lawsuit. Under the circumstances, you could commence an Article 78 proceeding. Under such a proceeding, the statute of limitations tolls four months from the date of the improper action by the City. Therefore, if you paid a dollar per page for the copies more than four months ago, it would appear that the statute of limitations has run and that no proceeding could be initiated.

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:ph
Att.

cc George Selleck, City Clerk
Glens Falls

STATE OF NEW YORK
COMMITTEE ON PUBLIC ACCESS TO RECORDS FOIL-AO-673

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

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EXECUTIVE DIRECTOR
ROBERT J. FREEMAN

December 29, 1977

Arthur J. Selkin, Esq.
Town Attorney
Town of Yorktown
363 Underhill Avenue
Yorktown Heights, New York 10598

Dear Mr. Selkin:

Thank you for your interest in complying with the Freedom of Information Law. Your inquiry pertains to requests for records regarding a rehabilitation program instituted by the Town of Yorktown.

Specifically, the information sought concerns the names of program participants, the nature of the rehabilitation project with respect to each participant, and whether participants received grants or loans. Grants may be awarded to families with net incomes of less than $10,000 depending upon the size of a family, and low interest loans may be awarded to families with net incomes between $10,000 and $20,000, depending upon the size of a family. In addition, the guidelines adopted by the Town for implementation of the program contain a promise of confidentiality to applicants.

First, it is important to note that case law has long held that a promise of confidentiality is all but meaningless. As stated in Langert v. Tenney, "[T]he concern ...is with the privilege of the public officer, the recipient of the communication, rather than with the maker of the communication" [5 A.D. 2d 586, 589 (1958); see also People v. Keating, 286 App. Div. 150 (1955), Cirale v. 80 Pine St. Corp., 35 N.Y. 2d 113 (1974)]. As such, in my view, there are only two instances in which records may be deemed confidential: first, when a statute requires confidentiality; and second, when a court determines that disclosure would on balance result in detriment to the public interest (see Cirale, supra). Therefore, I do not believe that the promise of confidentiality offered to applicants carries any legal weight.

Nevertheless, the Freedom of Information Law enables an agency to deny access to records or portions of records the disclosure of which would result in an unwarranted invasion of personal privacy [see attached, Freedom of Information Law, §87(2)(b)]. Under the circumstances, disclosure of some of the items sought would result in potential knowledge of the general income levels of recipients of grants or loans. In addition, a record reflective of the award of a grant would indicate that the income of the recipient is below specific amount.

While I believe that the Freedom of Information Law is intended to ensure that government is accountable to the people, the privacy aspect of the statute seeks to prevent disclosures concerning the personal details of individuals' lives. Therefore, the central question involves the extent to which disclosure would constitute an unwarranted as opposed to a permissible invasion of privacy.

With respect to income, the Tax Law contains provisions that require the confidentiality of any records reflective of the particulars of a person's income or payment of taxes [Tax Law, §384]. Consequently, it would appear that the Legislature felt that disclosure of records concerning income would constitute an improper or unwarranted invasion of privacy.

According to the materials attached to your letter, loans repayable at 8 1/2% interest are available regardless of income level. As such, two of three categories of information sought should in my opinion be made available. The names of program participants as well as the nature of the rehabilitation project of each participant should be accessible since that information contains no indication of income level. However, records indicating the receipt of a grant or a loan may be denied on the ground that disclosure of such records would indicate income levels and therefore would result in an unwarranted invasion of personal privacy.

It is emphasized in closing that my opinion is exactly that - an opinion. In dealing with privacy, an attempt to balance interests and subjective judgments must of necessity be made. Therefore, although I might believe that disclosure of particular information would result in a permissible invasion of privacy, another person might feel that disclosure of the same information would result in an unwarranted invasion of

privacy. As such, a final determination regarding these issues can in my opinion be finally rendered only by a 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

Robert J. Freeman
Executive Director

RJF:js
Enc.

STATE OF NEW YORK
COMMITTEE ON PUBLIC ACCESS TO RECORDS FOIL-AO-674

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

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EXECUTIVE DIRECTOR
ROBERT J. FREEMAN

December 29, 1977

Mr. Bart Brier
Field Representative
The Civil Service Employees
Association, Inc.
New York Region - 2
11 Park Place
New York, New York 10007

Dear Mr. Brier:

Thank you for your interest in the Freedom of Information Law. Your inquiry pertains to an unsuccessful attempt to gain access to information in possession of the Department of Mental Hygiene.

Specifically, you are seeking lists of agencies, foster homes, hostels and the like that have accepted Willowbrook class members, agencies providing six scheduled hours of program activities to class members, agencies providing work placement, legal services, recreation services, citizens advocacy, respite care, family planning services and education for class members placed in the community, as well as plans of the Department to develop and operate hostels, halfway houses, group homes, sheltered workshops and day care training programs for class members placed in the community.

It is noted at the outset that the Freedom of Information Law provides access to certain existing records. Therefore, if, for example, the lists that you are seeking do not exist, the Department has no obligation to compile a list or create a record on your behalf in response to a request.

Nevertheless, if the lists in question have indeed been compiled, they are in my view accessible. Although the Freedom of Information Law permits an agency to deny access to intra-agency materials, to the extent that such materials consist of statistical or factual tabulations or data, they are accessible

[see attached Freedom of Information Law, §87(2)(g)]. According to your letter, the first three categories of information sought consist of factual tabulations and as such would be accessible.

Although §15.13 of the Mental Hygiene Law requires that clinical records identifiable to patients treated in facilities under the aegis of the Department of Mental Hygiene be confidential, I do not believe that the tabulations sought could be appropriately classified as "clinical" records. Moreover, during our conversation this morning, you informed me that you have no interest in records identifying individual patients, but rather that you are seeking only statistical information.

With respect to plans for the development and operations of halfway houses, hostels and the like, assuming that such plans exist, they may to some extent be accessible. Again, under §87(2)(g) of the Freedom of Information Law, inter-agency or intra-agency materials are accessible to the extent that such materials consist of statistical or factual tabulations or data, instructions to staff that affect the public or final agency policy or determinations. Consequently, if, for example, the Department has adopted a policy regarding the development or operation of such facilities, the policy statement would be 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

RJF:js
Enc.

cc William A. Carnahan, Counsel

FOIL-AO-675
OML-AO-173

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 30, 1977

Mr. Leo P. Letourneau
Supervisor
Town of Champlain
18 Pratt Street
Rouses Point, New York 12979

Dear Mr. Letourneau:

As indicated to you by Murray Jaros, Counsel to the Association of Towns, the following consists of an opinion regarding the status of the Montgomery Hose, Hook and Ladder Company, a volunteer fire company.

According to your letter, the fire company in question is an entity separate and distinct from any political subdivision, and the only relationship between the company and a municipality is contractual in nature. Nevertheless, I believe that the thrust of the advice given in opinion No. 521, a copy which was sent to you by Mr. Jaros, must be reiterated with respect to the Montgomery Fire Company.

As stated in opinion No. 521, case law holds that a volunteer fire company performs what has traditionally been deemed a governmental function. As such, it was found that a volunteer fire company may in some circumstances be classified as a governmental entity. On the basis of the case law, the Committee has advised that volunteer fire companies, although separate and distinct from entities of government, are subject to some extent to the provisions of the Freedom of Information Law and the Open Meetings Law.

In my opinion, records and meetings that relate to the provision of fire protection fall within the scope of the Freedom of Information Law and the Open Meetings Law respectively. However, matters dealing with the corporate activities of the company or social activities, for example, would not be in my view subject to either 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

Robert J. Freeman
Executive Director

RJF:ph

cc Murray Jaros, Counsel
NYS Association of Towns