STATE OF NEW YORK
COMMITTEE ON PUBLIC ACCESS TO RECORDS FOIL-AO-676

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

January 3, 1978

[redacted]
Building 37
VAH
Canandaigua, New York 14424

Dear [redacted]:

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

The questions raised in your letter deal with records in possession of private hospitals, New York state medical facilities and Veterans' hospitals.

Private hospitals are not subject to the Freedom of Information Law, since the Law applies only to governmental entities. As such, a private hospital is under no obligation to furnish records upon request.

Hospitals run by government in New York are subject to §15.13 of the Mental Hygiene Law, which states that records in possession of any facility under the aegis of the Department of Mental Hygiene are confidential except under specified circumstances. One of the circumstances in which a person may inspect records pertaining to himself or herself would involve obtaining consent from the Commissioner of the Department (see attached, Mental Hygiene Law, §15.13). It is suggested that you might want to seek such consent from the Commissioner from the Department of Mental Hygiene.

With respect to Veterans' hospitals, such hospitals are federal facilities and as such are subject to the provisions of the federal Freedom of Information Act and the federal Privacy Act. Consequently, requests directed to a Veterans' hospital should be made under those statutes.

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- 677

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

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EXECUTIVE DIRECTOR
ROBERT J. FREEMAN

January 3, 1978

Mr. Lloyd T. Nurick
Executive Director
New York Association of Homes
for the Aging
111 Washington Avenue
Albany, New York 12210

Dear Mr. Nurick:

Thank you for your continued interest in the Freedom of Information Law. Your inquiry pertains to the status of preliminary audits compiled by the Department of Health and the Special Prosecutor. According to your letter, the audits in question are often issued before giving residential health care facilities an opportunity to offer comments in the nature of a rebuttal.

In my opinion, the amendments to the Freedom of Information Law contain only one ground for denial of access which could be appropriately invoked with respect to the records in question. Section 87(2)(g) of the Law permits an agency to deny access to records or portions thereof that:

> "(g) are inter-agency or intra-agency materials 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;..."

It would appear that preliminary audits are "intra-agency" materials. Therefore, such materials may be denied except to the extent that they consist of statistical or factual tabulations or data, instructions to staff that affect the public, or final agency policy or determinations.

Since the recommendations contained in a preliminary audit would constitute an intermediate rather than a final determination made by an agency, they are deniable. The remaining portions of the audit containing statistical or factual findings would nonetheless be accessible.

It is important to note, however, that the Freedom of Information Law does not require an agency to withhold records which may be deniable. On the contrary, the Law is permissive. As such, the Health Department may in its discretion disclose a preliminary audit prior to the inclusion of rebuttal comments, notwithstanding the provisions 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:ph

cc Ambrose Donovan, Esq.
Department of Health

STATE OF NEW YORK
COMMITTEE ON PUBLIC ACCESS TO RECORDS FOIL-AO-678

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

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EXECUTIVE DIRECTOR
ROBERT J. FREEMAN

January 3, 1978

Ms. Sandy McClure
[redacted]

Dear Ms. McClure:

Thank you for your letter of December 27. Your question pertains to what constitutes a reasonable time for response to a request.

In this regard, both the new Freedom of Information Law and the existing regulations promulgated by the Committee, which will shortly be amended, speak to the issue. Section 89(3) of the Law states that:

> "[E]ach entity subject to the provisions of this article, within five business days of the receipt of a written request for a record reasonably described, shall make such record available to the person requesting it, deny such requests in writing or furnish a written acknowledgment of the receipt of such request and a statement of the approximate date when such request will be granted or denied. Upon payment of, or offer to pay, the fee prescribed therefore, the entity shall provide a copy of such record and certify to the correctness of such copy if so requested, or as the case may be, shall certify that it does not have possession of such record or that such record cannot be found after diligent search."

Similarly, the regulations that have been in effect since November, 1974 state that:

> "(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." [§1401.6(b)]

As such, if more than five days is required to determine to provide access or deny, an approximate date must be given regarding when the production or denial of access to records will be forthcoming.

Although I can not conjecture as to the final language of the regulations to be promulgated by the Committee, I believe that there will also be a time limit that would enable an individual to appeal a constructive denial of access that has resulted from a failure to respond despite the acknowledgment described in §89(3) of 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:js

cc Mr. Michael Maina
Assistant Superintendent for
Business Affairs

STATE OF NEW YORK
COMMITTEE ON PUBLIC ACCESS TO RECORDS FOIL-AO-679

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

January 3, 1978

Ms. Francesca Kurnik
[redacted]

Dear Ms. Kurnik:

Thank you for your letter of December 20. Your inquiry concerns your ability to gain access to medical records in possession of the Buffalo Children's Hospital that pertain to your daughter.

It is important to note at the outset that the Freedom of Information Law applies only to governmental entities in New York State. It does not apply to private entities. Therefore, if Children's Hospital is a private hospital, the Freedom of Information Law is not applicable. If, on the other hand, Children's Hospital is a governmental entity, it is subject to provisions of law which may assist you in gaining access to information relative to your daughter.

The most relevant provision of law is contained in the regulations adopted by the New York State Department of Health. Enclosed for your review and consideration is a copy of the portion of the regulations entitled "Patients' Rights." Although medical records are generally deemed confidential, if Children's Hospital is a governmental entity, I believe that the attached regulations will 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

RJF:js
Enc.

STATE OF NEW YORK
COMMITTEE ON PUBLIC ACCESS TO RECORDS FOIL-AO-680

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

January 6, 1978

Ms. Mary [illegible]
Legal Staff
Division of Criminal Justice Services
80 Centre Street
New York, New York 10013

Dear Ms. [illegible]:

Thank you for your continued interest in complying with the Freedom of Information Law. Your inquiry pertains to the status of criminal history records in possession of the Division of Criminal Justice Services under the recently amended Freedom of Information Law (Chapter 933, Laws of 1977).

It is important to note at the outset that the thrust of the statute as amended represents a reversal from that of the Law as originally enacted. The Freedom of Information Law initially granted access to limited categories of records to the exclusion of all others. As such, unless records were specifically classified as accessible, they were presumed to be deniable. The amendments to the Law, however, reverse the presumption by stating that all records or portions thereof are accessible except to the extent that they fall within enumerated categories of deniable records.

Relevant to your inquiry, there are three grounds for denial that might be offered. In my opinion, only one of the three could possibly be asserted appropriately.

First, the Law states that an agency may deny access to records or portions thereof that are "inter-agency or intra-agency materials," except 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 [§87(2)(g)]. Since criminal history information consists of "factual tabulations or data," §87(2)(g) could not in my view be asserted as a justifiable ground for denial.

Second, the Law enables an agency to deny access to records or portions thereof that:

> "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" [§87(2)(e)].

The language quoted above is directed to the effects of disclosure. Since the information contained in criminal history records merely summarizes arrests and convictions in a factual manner, I do not believe that any of the grounds for denial set forth in §87(2)(e) could be properly raised.

And third, §87(2)(b) of the Law states that an agency may deny access to records the disclosure of which would result in an unwarranted invasion of personal privacy pursuant to the standards provided in §89(2)(b) of the Law. The cited provision states that an unwarranted invasion of personal privacy includes, but shall not be limited to:

> "i. disclosure of employment, medical or credit histories or personal references of applicants for employment;
>
> ii. disclosure of items involving the medical or personal records of a client or patient in a medical facility;
>
> iii. sale or release of lists of names and addresses if such lists would be used for commercial or fund-raising purposes;

iv. disclosure of information of a personal nature when disclosure would result in economic or personal hardship to the subject party and such information is not relevant to the work of the agency requesting or maintaining it; or

v. disclosure of information of a personal nature reported in confidence to an agency and not relevant to the ordinary work of such agency."

In my view, the most appropriate ground for denial would be based upon exception (iv.), which states that information may be withheld when disclosure would result in "economic or personal hardship" and the information is not "relevant" to the work of the agency in possession of the information. Under the circumstances, although disclosure might in some cases result in economic or personal hardship to the subject of the record, the information is unquestionably relevant to the performance of the duties of the Division of Criminal Justice Services. Nevertheless, the examples appearing in §89(2)(b) merely represent five among conceivable dozens of unwarranted invasions of personal privacy. Consequently, while none of the examples listed in the Law may be applicable, there may be situations in which records could nonetheless be denied on the ground that disclosure would constitute an unwarranted invasion of personal privacy.

As stated previously, the information contained in criminal history records summarizes arrests and convictions of named individuals. Virtually the same information is accessible from other sources. For example, a record of an arrest may be found in a police blotter or a booking record. Both items were accessible pursuant to §88(1)(f) of the Freedom of Information Law as originally enacted, and long before the enactment of the Freedom of Information Law both items were held to be accessible by means of case law. Since §89(5) of the amendments preserves existing rights of access granted by other provisions of law or by judicial determination, police blotters and booking records continue to be accessible under the amendments to the Freedom of Information Law. Similarly, records of convictions could be located by an industrious individual by means of perusing court records, which are accessible pursuant to §255 of the Judiciary Law and §2019-a of the Uniform Justice Court Act. Consequently, criminal

history records in possession of the Division of Criminal Justice Services are reflective of information that is available pursuant to the Freedom of Information Law or other access statutes. Therefore, it would appear that since the equivalent of the criminal history information is available pursuant to one or more provisions of law, disclosure of criminal history records would not constitute an unwarranted invasion of personal privacy under the Freedom of Information Law.

While disclosures of single or isolated incidents of arrest or conviction would not in my view result in an unwarranted invasion of personal privacy, it is questionable whether the same conclusion could be reached when a history of arrests and convictions is contained in a single record. Based upon numerous discussions with you and other representatives of the Division, I understand that you contend that disclosure of criminal history records should be based upon a need to know rather than mere curiosity of a neighbor, a prospective in-law or employer, for example. Without questioning the motives of a person making a request for criminal history information, it is impossible to know whether disclosure would indeed result in economic or personal hardship to the subject of the record. Nevertheless, in my opinion, it would be difficult to justify a denial based upon the privacy provisions of the Freedom of Information Law when the equivalent information is clearly accessible from other sources.

It is noted that one of the basic principles underlying the Freedom of Information Law involves the notion that the nature of records determines whether or not they are accessible. Consequently, the status or interest of the person requesting records should be of no relevance.

In view of existing rights of access to analogous information coupled with the "any person" concept (see attached resolution of the Committee on Public Access to Records), criminal history records are in my opinion accessible under the amendments to the Freedom of Information Law. The only ground for denial of access that I can envision would involve a judicial finding that, although records of particular events would individually be accessible, the combination of events into a "history" could if disclosed in composite form result in an unwarranted invasion of personal privacy due to potential "economic or personal hardship" to the subject of the record.

In sum, while I believe that criminal history records in possession of the Division are accessible, a final determination concerning rights of access could at this juncture be reached only by judicial means.

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-681

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

January 10, 1978

Ms. Jane Lord Dellinger
S.U.C. Potsdam
Draime 204
Potsdam, New York 13576

Dear Ms. Dellinger:

Thank you for your interest in the Freedom of Information Law. Your inquiry pertains to an unsuccessful attempt to gain access to an audit regarding the Wilderness Workshop at Potsdam State College.

In my opinion, the audit is clearly available. Under the original Freedom of Information Law, rights of access were specifically provided with respect to "internal or external audits." The amended Freedom of Information Law, which became effective January 1, 1978, states that all records are accessible except to the extent that they fall within specified categories of deniable information [see attached, Freedom of Information Law, §87(2)]. Although an agency may deny access to inter-agency or intra-agency materials, such materials must be made available to the extent that they consist of statistical or factual tabulations or data, instructions to staff that affect the public, or final agency policy or determinations [§87(2)(g)]. Under the circumstances, I believe that the audit is accessible since it constitutes "statistical or factual tabulations or data" and because it is reflective of an agency determination. Moreover, §89(5) of the Law states that nothing in the Law shall be construed to limit or abridge rights of access granted by other provisions of law or by means of judicial determination. Since case law held that audits were accessible prior to the enactment of the Freedom of Information Law, audits continue to be accessible [see e.g., Winston v. Mangan, 338 N.Y.S. 2d 654 (1972)].

In addition, §87(3)(b) states that each agency must maintain a payroll record consisting of the name, public office address, title and salary of all officers or employees of the agency. As such, you have a right to inspect payroll information in possession of the College.

According to your letter, the audit was denied on the ground that it does not constitute "public information." In my view, such an assertion has no meaning in terms of law. The Freedom of Information Law defines "record" to include any information "in any physical form whatsoever" in possession of an agency, such as Potsdam State College [§86(4)]. Consequently, the audit is a record that is subject to rights of access granted by the Freedom of Information Law.

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:ph
Att.

cc Business Office
Potsdam State College

STATE OF NEW YORK
COMMITTEE ON PUBLIC ACCESS TO RECORDS FOIL-AO-682

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ROBERT J. FREEMAN

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

January 17, 1978

Robert C. Morris, Esq.
City of Glens Falls
Department of Law
City Hall
Glens Falls, New York

Dear Mr. Morris:

Thank you for your interest in complying with the Freedom of Information Law. Your inquiry deals with the ability of a city to establish a fee for photocopying higher than twenty-five cents per page.

In my opinion, the language of §87(1)(b) of the Freedom of Information Law clearly seeks to prohibit the establishment of a fee for copies higher than twenty-five cents. I believe, however, that the use of the phrase "prescribed by law" was unfortunate, since a municipality, for example, apparently has the ability to enact a local law prescribing a higher fee. It is questionable whether in view of the clear intent of the statute a local law could go beyond the twenty-five cent fee established by the Freedom of Information Law.

Your letter indicated that your actual cost of reproduction may be higher than twenty-five cents per copy. Based upon a survey conducted by the Committee some three years ago, it was found the average actual copying cost is something in excess of six cents per page. Unlike other areas, copying costs have decreased since that time. It is also noted that the maximum fee of twenty-five cents was established in consideration of search time, which cannot be charged.

With respect to regulations, the Committee last week adopted regulations conerning the procedural aspects of the Law that are in the process of being printed and mailed to all units of government in the state. Nevertheless, I have attached an advance copy for your perusal.

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-683

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

January 17, 1978

Mr. Murray Schiffman
[redacted]

Dear Mr. Schiffman:

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

According to your letter, the Town Clerk of the Town of Hempstead has failed to respond to your request for reimbursement of fees assessed for copies in excess of twenty-five cents per page.

I regret to state that it appears that your only course of action (other than attempts to convince) would involve the initiation of a special proceeding pursuant to Article 78 of the Civil Practice Law and Rules. In such a proceeding, it would be argued that the fee assessed by the Town of Hempstead violates the regulations promulgated by the Committee on Public Access to Records as well as §87(1)(b) of the recently amended Freedom of Information Law.

It is also noted that the statute of limitations in an Article 78 proceeding is four months. Consequently, if the fees were assessed more than four months ago, it would appear that the statute of limitations has expired and that there may be no cause of action.

I regret that I cannot be of further assistance.

Sincerely,

Robert J. Freeman

Robert J. Freeman
Executive Director

RJF:ph

STATE OF NEW YORK
COMMITTEE ON PUBLIC ACCESS TO RECORDS FOIL-AO-684

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

January 18, 1978

Mr. George Williams
Secretary
Connecticut Society of Genealogists, Inc.
P.O. Box 435
Glastonbury, Connecticut 06033

Dear Mr. Williams:

I apologize for the delay in responding to your letter. Your inquiry pertains to rights of access to vital records in New York. The Freedom of Information Law, a statute of general application, does not pertain to rights of access to vital records. On the contrary, several special statutes deal specifically with records of birth, death and marriages.

Sections 4173 and 4174 of the Public Health Law pertain to access to birth and death records. Section 19 of the Domestic Relations Law pertains to access to marriage records. In each instance, the statutes provide that the records may be made available if the applicant can show that he or she is seeking the records for a "proper purpose." Unfortunately, the phrase "proper purpose" is undefined.

Nevertheless, I believe that the Bureau of Vital Records, which operates within the State Health Department and maintains custody of the original documents, does indeed respond to requests for genealogical searches. Although local registrars have duplicate copies of the records in possession of the Health Department, they have been instructed by the Health Department to refer requests for genealogical searches to that Department.

I have attached copies of the regulations promulgated by the State Health Department regarding access to vital records as well as the fees for searching and copying the records. Requests for vital records should

be addressed to:

Joseph Sterzinger, Director
Bureau of Vital Records
Department of Health
Tower Building
Empire State Plaza
Albany, New York 12237

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-685

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

January 18, 1978

Ms. Mary Ann Poust
The Daily Argus
147 Gramatan Avenue
Mount Vernon, New York 10550

Dear Ms. Poust:

Thank you for your continued interest in the Freedom of Information Law. Your inquiry concerns rights of access to a transcript of a hearing that followed the issuance of disciplinary charges made by a school board against a teacher.

According to your letter, the subject of the hearing was charged with conduct unbecoming a teacher. After holding a hearing closed at the teacher's request, a determination was rendered and the charge was sustained.

In my opinion, the transcript is accessible. As you are aware, the Freedom of Information Law was recently amended. Under the amendments to the Law, all records are available except records or portions thereof that fall within one or more categories of deniable information. Under the circumstances, it would appear that there are no grounds for denial. Since a determination has been rendered, disclosure of the transcript would not in any way interfere with the hearing or the rights of the accused. In addition, although the privacy of a specific teacher is involved, disclosure of the transcript would in my opinion constitute a permissible as opposed to an unwarranted invasion of personal privacy. The transcript relates to the performance of the official duties of the teacher and as such is relevant to both his official duties and the duties of the school district. Consequently, I agree with Mr. Longo of the State Education Department who, according to your letter, advised that the transcript became an accessible record when the Board reached a determination concerning the controversy.

You mentioned in your letter that the charges involved a questionnaire given by the teacher to junior high school students. If the transcript contains witness statements made by students, their names in my view could be denied on the ground that disclosure would constitute a violation of the federal Family Educational Rights and Privacy Act (20 U.S.C. 1232g).

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 Board of Education
City of Mount Vernon

STATE OF NEW YORK
COMMITTEE ON PUBLIC ACCESS TO RECORDS FOIL-AO-686

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

January 18, 1978

Mr. Nathan L. H. Bennett
Town Clerk
Town of Hempstead
Town Hall
Hempstead, New York 11550

Dear Mr. Bennett:

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

With regard to fees, the amended Freedom of Information Law as well as the regulations promulgated by the Committee prohibit a fee in excess of twenty-five cents per page, unless otherwise prescribed by law. Therefore, the fee provisions of the statute and the regulations are applicable to units of government which had not officially established fees by law, rule or regulation before the effective date of the Freedom of Information Law.

Town Law provides that the clerk "shall have the custody of the records, books and papers of the town" [Section 30(1)], and that he shall have whatever additional powers and duties conferred or imposed upon him by law [Section 30(11)]. Although the clerk is obliged to make copies of records under both Section 51 of the General Municipal Law and the Freedom of Information Law, the Town Law does not require that a specific fee be charged for copies.

Prior to September 1, 1974, Section 66 of the Public Officers Law, which was repealed by enactment of the Freedom of Information Law [Public Officers Law, Section 85-89], enabled public officers to charge "at the rate allowed to a county clerk for similar services" if no fees were expressly allowed by law. However, in my view, since Section 66 has been repealed, if a public officer had not charged pursuant to law, rule or regulation, he may no longer charge at the rate allowed by a county clerk; he must now charge at a rate consistent with the Freedom of Information Law and regulations.

Since the fee of one dollar per page established by the Town is merely reflective of custom, rather than law, the fees prescribed by the Freedom of Information Law are controlling. Consequently, the fee of one dollar per page in my opinion constitutes a 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:ph

cc Mr. Murray Schiffman

STATE OF NEW YORK
COMMITTEE ON PUBLIC ACCESS TO RECORDS FOIL-AO-687

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

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EXECUTIVE DIRECTOR
ROBERT J. FREEMAN

January 24, 1978

Mr. James B. Hume
[redacted]

Dear Mr. Hume:

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 Freedom of Information Law.

Your inquiry involves the disclosure of information regarding the Family Caretaker Program that is being implemented by the Chenango-Otsego Regional Center. First, you asked whether the names of family caretakers and the guests are accessible, and second, whether the Department of State has received complaints suggesting that the Family Caretaker Program should be curtailed or eliminated.

In response to your first question, in my opinion, the names of the family caretakers should have been provided to you without delay. The Freedom of Information Law provides access to statistical or factual tabulations or data [§87(2)(g)(i)], and as such a list of the names of caretakers is accessible. The names of guests, however, may in my opinion likely be denied. Section 15.13 of the Mental Hygiene Law states that records that identify patients in facilities under the supervision of the Department of Mental Hygiene are confidential. Nevertheless, while the names may be withheld, I believe that any statistical information concerning the number of guests or the amount of money expended for their care would be accessible since the information constitutes "statistical or factual tabulations." With respect to your second question dealing with complaints regarding the Family Caretaker Program, I would conjecture that this Department has received few, for it has no direct responsibility concerning the program. I would suggest that information of that nature may be obtained by contacting Mr. Robert Spoor, Public Relations Director of the Department of Mental Hygiene. The Department of Mental Hygiene is located at 44 Holland Avenue, Albany, New York 12229.

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-688

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

January 25, 1978

Mr. John R. MacDonald
[redacted]

Dear Mr. MacDonald:

Thank you for your letter of January 13. Your inquiry concerns the means by which you may obtain copies of records in possession of various licensing bureaus in the Department of Education.

Attached for your consideration are several documents that may be helpful to you including the new Freedom of Information Law, regulations promulgated by the Committee which govern the procedural aspects of the statute and a pamphlet entitled "The New Freedom of Information Law and How to Use It."

It is suggested that you reasonably describe the records sought in writing and address your request to the Executive Secretaries of the Boards of Examiners from which you are seeking the records and offer to pay the established fee for photocopying the records. The Executive Secretaries that you should contact are as follows:

Dental Hygiene and Dentistry - Donald F. Wallace;
Opthalmic Dispensing and Optometry - Kenneth Stringer;
Pharmacy - Albert J. Sica.

Each of the three are located at the Twin Towers, 99 Washington Avenue, Albany, New York 12230.

I hope that I have been of some 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-689

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

January 25, 1978

Mr. Vito C. Severino
[redacted]

Dear Mr. Severino:

I apologize for the delay in responding to your letter. Your inquiry concerns unsuccessful attempts to gain access to records concerning yourself in possession of the Triborough Bridge and Tunnel Authority.

First, the Authority is subject to the provisions of the Freedom of Information Law, which defines "agency" to include public authorities [see attached, Freedom of Information Law, §86(3)]. Consequently, the Authority must designate a records access officer to accept requests. The records access officer must provide written reasons for denial and apprise you of your right to appeal to the head of the Authority or the person designated to hear appeals when a denial of access is rendered. Enclosed for your consideration are copies of the regulations promulgated by the Committee, which govern the procedural aspects of the Freedom of Information Law and with which each agency in the state, including the Triborough Bridge and Tunnel Authority, must comply, and a pamphlet entitled "The New Freedom of Information Law and How to Use It."

As a general matter, the new Freedom of Information Law, effective January 1, 1978, states that all records are accessible except to the extent that they fall within specified categories of deniable records [§87(2)]. One of the grounds for denial concerns a disclosure that would result in an unwarranted invasion of personal privacy [§87(2)(b)]. In addition, §89(2)(b) of the Law provides examples of unwarranted invasions of personal privacy, including the disclosure of items involving the medical records of patients in a medical facility and disclosure of

medical histories. As such, the Authority has the legal ability to deny access to medical records pertaining to you when they are requested by the public generally. However, I believe that the Authority must release medical records pertaining to you to a physician seeking the records after having received a written release from you stating that the records should be made available to your physician who requires them to perform his 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
Enc.

cc Triborough Bridge and Tunnel Authority
Randalls Island
New York, New York 10035

STATE OF NEW YORK
COMMITTEE ON PUBLIC ACCESS TO RECORDS FOIL-AO-690

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

January 25, 1978

Mr. John J. Mooney
Administrative Director
New York State Department of Civil Service
The State Office Building Campus
Albany, NY 12239

Dear Mr. Mooney:

I recently received a letter from John Park of the Corporation Counsel's office in the City of Binghamton. According to his letter and an attached letter of the denial dated July 15, 1977, which you authored, insurance experience data has been denied, despite the determination rendered by the Supreme Court, Albany County (City School District of the City of Binghamton v. Civil Service Commission of the New York State Department of Civil Service).

It appears that the denial of access made with respect to Mr. Park's request is based upon the notion that the determination in the Binghamton City School District case is to be applied only with respect to the specific situation that arose in that controversy. I do not understand this conclusion, however, since the nature of records determines whether or not they are accessible and since the City of Binghamton made its request under circumstances analogous to those under which the Binghamton City School District sought the records in question. From my perspective, it would appear that unnecessary litigation is being encouraged.

In addition, as you are aware, the Freedom of Information Law as originally enacted was recently repealed and replaced by a new Freedom of Information Law. Under the former, rights of access were granted only with respect to specified categories of accessible records listed in the statute to the exclusion of all others. The latter reverses the logic of the former by stating that all records are accessible except to the extent that they fall within specific enumerated categories of deniable records [see attached, Freedom of Information Law, §87(2)].

Based upon a review of the grounds for denial, it is my opinion that none of the grounds could likely be appropriately asserted to deny access to the records sought under the new statute. It was established in the Binghamton City School District case that the records in question were neither trade secrets, nor maintained by the Department of Civil Service for the regulation of commercial enterprise.

In sum, I believe that the experience data sought by Mr. Park is likely accessible under the new Freedom of Information Law.

I would appreciate your comments on the matter.

Sincerely,

Robert J. Freeman

Robert J. Freeman
Executive Director

RJF:ph
Att.

cc John Park
Second Deputy Corporation Counsel
City of Binghamton

STATE OF NEW YORK
COMMITTEE ON PUBLIC ACCESS TO RECORDS FOIL-AO-691

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

January 27, 1978

Ms. Rosemary S. Pooler
Chairwoman and Executive Director
State Consumer Protection Board
99 Washington Avenue
Albany, New York 12210

Dear Ms. Pooler:

Thank you for your continued interest in compliance with the Freedom of Information Law and the Open Meetings Law. Your inquiry pertains to meetings of the Public Service Commission and access to records to which the Commission refers at its meetings.

As you wrote, the Open Meetings Law permits the public to attend and listen to the deliberations and decisions of public bodies. According to your letter, however, although the Public Service Commission apparently complies with the Open Meetings Law by deliberating in full view of the public, the deliberations are often clouded or incomprehensible due to continuous references to records that have been classified as unavailable to the public.

While the Open Meetings Law does not prescribe the means by which a meeting must be conducted, I believe the characterization of records to which the Commission refers at its meetings as inaccessible may be erroneous.

The statutory companion of the Open Meetings Law, the Freedom of Information Law, has recently been substantially amended. As originally enacted in 1974, the Freedom of Information Law granted access to specified categories of records to the exclusion of all others. The amendments to the Law, effective January 1, 1978, reverse the logic of the original statute and state that all records are available except to the extent that records or portions thereof fall within one or more categories of deniable records [see attached, Freedom of Information Law, §87(2)]. The majority of the

exceptions to the presumption of access are written in terms of the effects of disclosure. In addition, although "intra-agency" materials are deniable, portions of such materials must be made available to the extent that they consist of statistical or factual tabulations or data, instructions to staff that affect the public, and final agency policy or determinations. Consequently, statistics and facts upon which the Commission relies in arriving at a decision or carrying out its duties are accessible.

It is also noted that case law appears to indicate that statistical tabulations reflective of advice or a projection, for example, rather than fact are accessible [see Dunlea v. Goldmark, 54 AD 2d 446, aff'd____ NY 2d____]. Consequently, advice presented in the form of tabulations is likely accessible.

Finally and perhaps most important with respect to your inquiry, Section 89(5) of the Freedom of Information Law, which is analogous to §88(10) of the original statute, states that:

> "[N]othing in this article shall be construed to limit or abridge any other wise available right of access at law or in equity of any party to records."

Stated differently, the provisions of the Freedom of Information Law cannot be interpreted to restrict rights of access granted by other provisions of law or by means of judicial determination.

In this regard, one such provision of law is §16(1) of the Public Service Law which states that:

> "[A]ll proceedings of the commission and all documents and records in its possession shall be public records."

My attempts to review the legislative history and intent and the bill jacket of the quoted provision have not resulted in any indication that the language does not mean what it says. In addition, I am unaware of any judicial construction of §16(1) that limits the scope of its language.

If §16(1) indeed grants public access to all records in possession of the Public Service Commission, the records to which the Commission cryptically refers during its meetings are accessible. If that is the case, you among others would not likely face the task of attempting to decipher the sense of the references and perhaps the Commission would end its practice of withholding records that it discusses.

In sum, although the Open Meetings Law does not fully regulate the conduct of meetings, access statutes appear to provide the capability to obtain the records discussed at the meetings of the Public Service Commission.

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 Peter H. Schiff
General Counsel
Public Service Commission

STATE OF NEW YORK
COMMITTEE ON PUBLIC ACCESS TO RECORDS FOIL-AO-692

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

January 30, 1978

Mr. Michael Kennedy
[redacted]

Dear Mr. Kennedy:

Thank you for your interest in the Freedom of Information Law. Your inquiry pertains to records relative to two areas, the first of which concerns a denial of tenure by the New York State Maritime College, and the second to city and state police surveillance of the Religious Society of Friends (Quakers) during the early 1970's.

It is important to note at the outset that the Freedom of Information Law has been recently altered. The statute as originally enacted in 1974 grants access only to specified categories of records. Rather than listing accessible records, the amendments to the Law state that all records are available except to the extent that they are specifically listed as deniable [see attached, Freedom of Information Law, §87(2)].

With respect to records surrounding the denial of tenure, the only relevant exception to rights of access in my opinion is §87(2)(g), which states that an agency may deny access to records or portions thereof that:

> "are inter-agency or intra-agency materials 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..."

Stated differently, although an agency may withhold inter-agency and intra-agency materials, it may do so except to the extent that the materials consist of statistical or factual data, instructions to staff that affect the public, or are reflective of the agency's policies or determinations. As such, it is likely that significant portions of the records involving your denial of tenure are accessible to you.

The second area of inquiry concerns records relative to police surveillance of the Society of Friends. If an investigation or the surveillance has been concluded, it would appear that much of the information is accessible. Section 87(2)(e) of the Law states that an agency may deny access to records that:

> "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 and procedures..."

The provision quoted above relates largely to the effects of disclosure. Consequently, unless disclosure would in some manner impede law enforcement agencies from carrying out their duties, identify a confidential source or deprive a person of an impartial hearing or trial, the records are accessible.

Another exception that may be relevant in some circumstances concerning law enforcement is §87(2)(f), which enables an agency to deny access when disclosure would "endanger the life or safety of any person."

It is also noted that, on request, an agency must certify "that it does not have possession" of records sought "or that such record cannot be found after diligent search" [§89(3)].

In response to your procedural questions, I do not believe that an attorney is required for the purpose of drafting a request. Under the Law, a person need only "reasonably describe" the records sought. With respect to procedures, attached are copies of a pamphlet entitled "The New Freedom of Information Law and How to Use It" and the regulations promulgated by the Committee, which have the force and effect of law and with which each agency subject to the Law must comply.

If you would like to transmit copies of your request to this office, you may do so. However, I do not believe that receipt of your initial request is necessary, for if access is denied and an appeal is taken, copies of your appeal as well as the agency's determinations thereon must be transmitted to the Committee [see §89(4)(a)].

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-693

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

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EXECUTIVE DIRECTOR
ROBERT J. FREEMAN

January 30, 1978

Mr. Wesley Marsh
Field Representative
New York State United Teachers
Rochester Service Center
1653 Main Street, East
Rochester, New York 14609

Dear Mr. Marsh:

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

Your inquiry pertains to a situation in which your organization sought copies of records from a particular school district. According to your letter, you were told that fees for copies were required to be paid in advance, and in addition, blank sheets with no information contained thereon were furnished after having been charged the maximum rate for photocopying plus labor. Further, a request for a copy of the school district's rules for obtaining records was also denied.

First, according to the regulations promulgated by the Committee, with which all agencies must comply, copies of records must be made available "upon payment or offer to pay established fees..." [see attached, regulations, §1401.2(b)(4)]. As such, in my opinion, fees need not be paid in advance if a request is accompanied by an offer to pay established fees. Second, the regulations specifically provide that no fee may be assessed for search or for the labor involved in locating and producing records (see regulations, §1401.8). Second, rules adopted by the district reflective of its procedures pertaining to the procedural aspects of the Freedom of Information Law are clearly available, for they represent the policy of the district.

Attached for your consideration are copies of the Freedom of Information Law, the regulations and an explanatory pamphlet on the subject.

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 Stanley Ruger, Supervising Principal
Livonia Central School

STATE OF NEW YORK
COMMITTEE ON PUBLIC ACCESS TO RECORDS FOIL-AO-694

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

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EXECUTIVE DIRECTOR
ROBERT J. FREEMAN

January 30, 1978

Mr. Joseph Paunetto
77-A-3493
Box B
Dannemora, New York 12929

Dear Mr. Paunetto:

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.

It is noted at the outset that your letter makes reference to both the federal Freedom of Information and Privacy Acts. Neither of those statutes is applicable with respect to records in possession of government in New York. Rather, access to such records is governed by various provisions of law, including the New York Freedom of Information Law (see attached Freedom of Information Law and explanatory pamphlet on the subject).

With respect to your inquiry, §390.50 of the Criminal Procedure Law states that presentence reports are available by a court to a defendant. In relevant part, the cited statute states:

> "2. Presentence report; disclosure; general principles. The 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 not 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."

In view of the foregoing, it is suggested that you direct your request to the court in possession of the report.

I hope that I have been of some assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:js
Enc.

cc Patrick J. Fish, Counsel
State of New York
Department of Correctional Services
The State Office Building Campus
Albany, New York 12226

STATE OF NEW YORK
COMMITTEE ON PUBLIC ACCESS TO RECORDS FOIL-AO-695

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

January 31, 1978

Mr. Daniel J. Lipsman
[redacted]

Dear Mr. Lipsman:

Your letter of January 14 raises two questions. First, whether the Committee has received copies of determinations by the Board of Higher Education, and second, whether the Board may assess a fee of twenty-five cents per photocopy.

In response to your first question, according to my records, the Committee has not received copies of any determinations rendered on appeal by the Board of Higher Education. In response to the second, both the Freedom of Information Law [§87(1)(b)(iii) and the regulations promulgated by the Committee [see attached regulations, §1401.8] permit an agency to charge up to twenty-five cents per page for photocopying. Nevertheless, the same provision in the regulations states that there shall be no fee assessed for inspection of records. Consequently, you may inspect accessible records free of charge.

I hope that I have been of some assistance.

Sincerely,

Robert J. Freeman

Robert J. Freeman
Executive Director

RJF:ph
Att

cc Mary P. Bass
General Counsel and Vice Chancellor
for Legal Affairs

STATE OF NEW YORK
COMMITTEE ON PUBLIC ACCESS TO RECORDS

FOIL-AO-696

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

February 3, 1978

Mr. William J. Livingston
[redacted]

Dear Mr. Livingston:

Thank you for your interest in the Freedom of Information Law. Your inquiry concerns your ability to know the amount of overtime worked by three individuals in positions similar to your own.

The Freedom of Information Law requires each agency to compile a payroll record consisting of the name, public office address, title and salary of all officers or employees of an agency [see attached Freedom of Information Law, §87(3)(b)]. In addition, the Law provides access to statistical or factual tabulations or data in the possession of an agency. Since amounts of overtime worked constitute factual tabulations or data, it would appear that portions of records reflective of such information should be made available.

Enclosed for your review is a pamphlet entitled "The New Freedom of Information Law and How to Use It." I believe that it would 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

RJF:ph
Enc.

Under the circumstances, if no individual has been charged with the commission of a crime and a police department has compiled only the name of a suspect or suspects, it would appear that deletion on the name of a suspect was proper. Viewing the situation from the perspective of a police department, public disclosure of suspects' names could result in evasion of effective law enforcement by law breakers and as such could "interfere with law enforcement investigations."

If, however, an individual has been indicted, it is suggested that you obtain a copy of the indictment, which would identify the suspect as well as the charges.

Enclosed for your review are copies of the Freedom of Information Law and an explanatory pamphlet on the subject.

I hope that I have been of some assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:js
Enc.

cc Stephen Mindell, Esq.
Department of Law
Two World Trade Center
New York, New York 10047

STATE OF NEW YORK

COMMITTEE ON PUBLIC ACCESS TO RECORDS FOIL-AO-698

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

February 8, 1978

Mr. Robert S. Barhite
[redacted]

Dear Mr. Barhite:

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

Your inquiry concerns a situation in which the Division of State Police has sought to delay response to a request made under the Freedom of Information Law until its adoption of regulations governing the procedural aspects of the statute. According to the correspondence from the Division of State Police attached to your inquiry, response to requests will not be given until approximately March 30, 1978.

In my opinion, the proposed delay in response offered by the Division of State Police fails to comply with the Freedom of Information Law. First, although the Freedom of Information Law as originally enacted in 1974 has been substantially amended, rights of access continue to exist notwithstanding the amendment or lack thereof of an agency's procedural rules. Presumably the Division of State Police adopted regulations under the original statute which continue to be in effect until they are amended or repealed and replaced by a new set of rules. Second, §87(1)(b) of the Law states that agencies must adopt rules within 60 days after the effective date of the statute, January 1, 1978. As such, the Division of State Police is obligated to adopt rules no later than March 1, 1978. And third, despite any lack of the existence of rules, the statute itself states that an agency must respond to a request within five business days of its receipt of the request. Although your request was acknowledged, I doubt that the language of the original regulations promulgated by the Committee could be effectively cited as a ground for delay. Those regulations

stated that an agency could delay response to a request if "extraordinary circumstances" could be demonstrated. The regulations recently adopted by the Committee, with which all agencies must comply, state that a response to a request may be delayed following an acknowledgement of its receipt for a period of up to 10 business days. If there is neither a grant nor a denial of access within that period, the request is considered a denial that may be appealed.

Enclosed for your review are copies of the new Freedom of Information Law, an explanatory pamphlet on the subject and the regulations recently 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:js
Enc.

cc Charles J. LaBelle, Esq.
New York State Police
State Campus
Albany, New York 12226

STATE OF NEW YORK
COMMITTEE ON PUBLIC ACCESS TO RECORDS

FOIL-AO-699
OML-AO-181

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

February 9, 1978

Mr. Isidore Gerber
Executive Director
Liberty Taxpayers' Association
Liberty, New York

Dear Mr. Gerber:

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

According to your letter of January 31, it appears that the Liberty Central School District has sought to comply with your most recent requests. Consequently, I do not believe that you are in need of advice at this juncture with respect to the correspondence attached to your letter concerning requests directed to the District.

The second area of inquiry, however, pertains to the ability to tape record meetings of the Town Board as well as your right to make copies of tape recordings made by the Board. First, it is important to note that the Open Meetings Law is silent with regard to the ability of the public to tape record meetings of public bodies. To date, there has been one judicial decision dealing with the subject. In Davidson v. Common Council of the City of White Plains [244 NYS 2d 385 (1963)], it was held that a public body has the authority to adopt reasonable rules to govern its own proceedings. Under the circumstances of that case, the court found that the presence of a tape recorder would detract from the deliberative processes of the Common Council. As such, the Court held that the rule prohibiting the use of tape recorders at the meeting was reasonable.

Nevertheless, the circumstances described in your letter appear to be somewhat different from those presented in the Davidson case. It appears that the Town Board itself uses a tape recorder at its meetings to record its

proceedings. In my opinion, if the presence of its tape recorder does not detract from the deliberative process, the presence of a tape recorder in the possession of a member of the public or the news media could not be found to detract from the deliberative process. I believe that a rule prohibiting the use of tape recorders must be consistent in its application. Therefore, if, for example, the Town Board precluded its own members from using a tape recorder at a meeting, as was the case in Davidson, such a rule could be applied to members of the public as well. Here, however, the use of tape recording equipment by the Board in my opinion precludes the Board from prohibiting members of the public from using similar equipment to record the proceedings.

Moreover, the definition of "record" in the Freedom of Information Law includes tape recordings [§86(4)]. Consequently, the tape recording in possession of the Town Supervisor is a record subject to rights of access granted by the Freedom of Information Law. Consequently, so long as the Town Supervisor or any other town official maintains possession of a tape recording of a meeting, it 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
Executive Director

RJF:ph

cc Peter Gozza, Supervisor
Town of Liberty

Thomas A. Stroup
Business Administrator
Liberty Central School

STATE OF NEW YORK
COMMITTEE ON PUBLIC ACCESS TO RECORDS FOIL-AO-700

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EXECUTIVE DIRECTOR
ROBERT J. FREEMAN

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

February 8, 1978

Ms. Dolores Chechek - Trustee
Wappingers Central School District
Miller Hill Road
Hopewell Junction, New York 12533

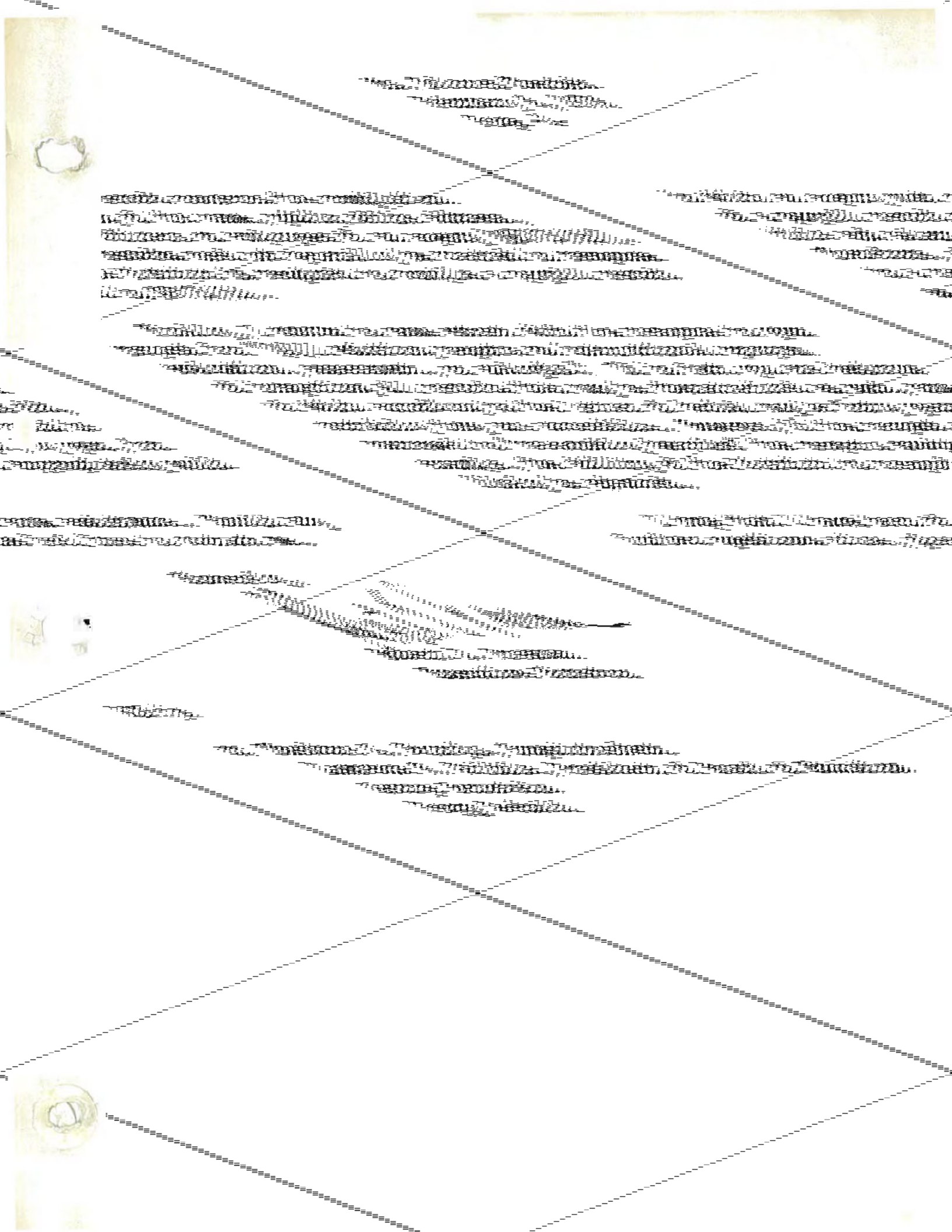
Dear Ms. Chechek:

Thank you for your interest in the Freedom of Information Law. Your inquiry concerns a request for information in possession of the Wappingers Central School District. According to the correspondence attached to your letter, nine categories of information have been sought, but the District has produced records with respect only to two of the categories.

It is important to note at the outset that the Freedom of Information Law provides access to existing records and §89(3) of the Law specifies that an agency need not "prepare" a record in response to a request, except in the three instances set forth in §87(3) of the Law. Consequently, an agency is not required to compile a record in response to a request for information that may be contained in a multitude of records. Nevertheless, to the extent that the information sought exists in the form of a record or records, it is in my opinion accessible.

The memorandum written in response to your appeal appears to state that much of the information requested exists in a variety of records. As I interpret the memorandum, although there may be no individual records in existence that are specifically reflective of the items sought, the District apparently has offered to permit you to peruse groups of records which together contain the information that you are seeking. Since the District has no obligation to create records on your behalf, it is suggested that you review the information offered, cull from the information those portions that are relevant and combine them to form your own record and conclusions.

In addition, one of the items sought involves a request for "the name, address, title and salary" of all officers or employees of the District (Item 2). In this regard, one of the few instances



STATE OF NEW YORK
COMMITTEE ON PUBLIC ACCESS TO RECORDS FOIL-AO-701

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

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

February 10, 1978

Peter L. Danziger, Esq.
O'Connell and Aronowitz, P.C.
100 State Street
Albany, New York 12207

Dear Mr. Danziger:

Thank you for your interest in the Freedom of Information Law. Your inquiry raises several questions concerning rights of access to records identifiable to persons from 16 to 18 years of age prior to designation of such persons as youthful offenders.

As we have discussed previously, rights of access to records pertaining to youthful offenders may in some instances involve anomalous results. While records are accessible during the initial stages of a proceeding, the same records become confidential in the ensuing stages. Despite specific statutory pronouncements on the subject, there appear to be some conflicts with respect to consistency and rationale.

First, you asked whether the police may refuse to answer inquiries from the news media at the time of arrest regarding the identity of a person from 16 to 18 years of age. In my opinion, the booking record, the record of arrest compiled by the arresting agency, is accessible as soon as it is created, regardless of the age of the subject of the record. I believe that the arrest record remains accessible until a person is adjudicated a youthful offender pursuant to §720.35(2), which 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."

The second question, which deals with access to police blotters and booking records created at the time of an arrest, requires a similar response. Both the police blotter and the booking record remain accessible until they are sealed pursuant to the statute quoted above.

And third, you inquired whether a court can order all records sealed prior to the adjudication of a defendent as a youthful offender. A court may order that an accusatory instrument be sealed when it is filed with the court pursuant to §720.15 of the Criminal Procedure Law. Nevertheless, other records pertaining to a controversy identifiable to a potential youthful offender cannot be in my view deemed confidential until a person is adjudicated a youthful offender upon a conviction.

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-702
DEPARTMENT OF STATE, 162 WASHINGTON AVENUE, ALBANY, NEW YORK 12231
(518) 474-2518, 2791

February 15, 1978

Robert J. Kafin, Esq.
115 Maple Street
Glens Falls, New York 12801

Dear Mr. Kafin:

Thank you for your interest in the Freedom of Information Law. Your letter indicates that you have been charged twenty-five dollars for a single copy of an accessible record.

In my opinion, the fee assessed by the Village of Arcade clearly violates both the Freedom of Information Law and the regulations promulgated by the Committee. Section 87(1)(b) of the Freedom of Information Law permits an agency to charge no more than twenty-five cents per photocopy unless a different fee is specifically prescribed by law. Section 1401.8 of the regulations, which have the force and effect of law, reiterate that the maximum that may be charged for copies is twenty-five cents per page.

Under the circumstances, it appears that you have two possible courses of action. First, you could initiate an Article 78 proceeding to compel the Village of Arcade to comply with §87(1)(b) of the Freedom of Information Law and the regulations promulgated thereunder. Second, you could attempt to reason with village officials and demonstrate to them that the fee is unconscionable and represents a violation of law.

Enclosed are copies of both the Freedom of Information Law and 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:ph
Enc.

cc John F. Bailey, Mayor
Village of Arcade

Howard Payne
Superintendent of Public Works

STATE OF NEW YORK
COMMITTEE ON PUBLIC ACCESS TO RECORDS FOIL-AO-703

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EXECUTIVE DIRECTOR
ROBERT J. FREEMAN

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

February 15, 1978

O. Bernard Leibman, Ph.D.
Professor & Coordinator
Graduate Program in School Psychology
Queens College
Flushing, New York 11367

Dear Professor Liebman:

Thank you for your letter of February 9. Your inquiry involves the right of a student to inspect records upon which a professor relied in arriving at a decision concerning the student's performance in a course.

It is noted at the outset that rights of access to student records are not governed by the New York Freedom of Information Law, but rather by an Act of Congress, the Family Educational Rights and Privacy Act, which is commonly known as the "Buckley Amendment."

In brief, the Buckley Amendment states that education records in possession of educational institutions that are identifiable to students are confidential, unless they are requested by the parents of students under the age of eighteen or by students who have attained the age of eighteen.

While "education records" are generally available to students over the age of eighteen, the term does not include:

> "records of instructional, supervisory, and administrative personnel and educational personnel ancillary thereto which are in the sole possession of the maker thereof and which are not accessible or revealed to any other person except a substitute" [20 USC §1232g(a)(4)(b)(i)].

In view of the exception within the definition of "education records," if the records in question could be

classified as instructional and are in the sole possession of the maker thereof, I believe that they are deniable pursuant to the Buckley Amendment.

Enclosed for your consideration are copies of the Buckley Amendment, New York's recently amended Freedom of Information Law, the regulations governing the procedural aspects of the Law and an explanatory pamphlet on the subject.

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-704

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

February 16, 1978

Richard A. Aliano, Ph. D.
[redacted]

Dear Professor Aliano:

Thank you for your interest in the Freedom of Information Law. Your letter indicates that you have been denied access to records in possession of Queens College regarding a denial of tenure. Seven questions concerning specific aspects of the denial and the interpretation of the Freedom of Information Law have been raised. I will attempt to answer each of them.

First, can a provision in a collective bargaining agreement stating that a separate administrative file be confidential remain in effect in view of the provisions of the Freedom of Information Law? In my opinion, a statute, such as the Freedom of Information Law, prevails over any contractual agreement which diminishes either rights granted by statute or duties that the statute imposes upon government. To the extent that the contract is more restrictive than the Freedom of Information Law, it is in my view invalid and of no effect. As such, I concur with the implication in your letter that contractual provisions requiring confidentiality are contrary to the spirit and intent of the Freedom of Information Law.

Second, can a statutory privilege be waived by union contract and, do you, as a "non-member" of the union waive your statutory privilege by virtue of your employment and classification within a particular bargaining unit? This question requires a response similar to that given regarding the initial question. It is important to note that the Freedom of Information Law does not grant a privilege but rather provides a right. A privilege is based upon the notion that a benefit is granted despite the absence of a legal right. The Freedom of Information Law is not based upon the notion of a privilege, for it grants rights of access

to records to "any person." In my opinion, a statutory right, such as that granted by the Freedom of Information Law, cannot be waived or diminished by means of a union contract. I do not believe that membership or non-membership in a union is of any relevance. As advised in the preceding paragraph, to the extent that the contractual provision violates or detracts from rights of access rendered by the Law, it is void.

Third, are the by-laws of the Board of Higher Education and the "Max-Kahn" policy, which holds that records and minutes of committees deciding tenure are confidential, contrary to the policy of the Freedom of Information Law? The word "confidential" has in my view been greatly overused. It has specific legal meanings, none of which would be applicable under the circumstances described. Records may be deemed confidential in but two instances. First, records are confidential if a statute specifically so states. A policy adopted by a public body, such as the Board of Higher Education, cannot be construed to have the effect of a statute. Second, case law has long held that there is a governmental privilege which is based upon the notion that government may deny access to records if in the opinion of a court disclosure would on balance be detrimental to the public interest. The leading decision concerning the scope of the governmental privilege is Cirale v. 80 Pine Street Corp., 35 NY 2nd 113 (1974). In discussing the privilege, the Court of Appeals stated that:

> "[S]uch a privilege attaches to 'confidential communications between public officers, and to public officers, in the performance of their duties, where the public interest requires that such confidential communications or the sources should not be divulged'... The hallmark of this privilege is that it is applicable when the public interest would be harmed if the material were to lose its cloak of confidentiality...
>
> "Public interest encompasses not only the needs of the government, but also the societal interests in redressing private wrongs and arriving at a just result in private litigation. Thus, the balancing that is required goes to the determination of the harm to the overall public interest. Once it is shown that disclosure would be more harmful to the interests of government

> than the interests of the party seeking the information, the overall public interest on balance would be better served by nondisclosure...
>
> "By our decision today, we do not hold that all governmental information is privileged or that such information may be withheld by a mere assertion of privilege. There must be specific support for the claim of privilege. Public interest is a flexible term and what constitutes sufficient potential harm to the public interest so as to render the privilege operable must of necessity be determined on the facts of each case. Such a determination is a judicial one and requires that the governmental agency come forward and show that the public interest would indeed be jeopardized by a disclosure of the information. Otherwise, the privilege could be easily abused, serving as a cloak for official misconduct."

In view of the language in the Cirale decision, it is clear that a mere assertion or policy statement that records are confidential is all but meaningless. While it would be inappropriate to impose my judgment in lieu of that of a court, it is also clear that the Board of Higher Education would be required to demonstrate to a court that disclosure of the records in question would indeed be detrimental to the public interest if its claim regarding the denial is based upon an assertion that the records are "confidential."

I agree with your contention that the decision cited by the Board of Higher Education has no relevance to the controversy [Matter of Professional Staff Congress, City University v. Board of Higher Education of the City of New York, 39 NY 2d 319 (1976)]. Although the decision alludes to the "Max-Kahn" policy of confidentiality, the decision did not deal with the legality of the policy, but rather with the powers of an arbitrator.

Fourth, can parties agree to enter into a contract which effectively circumvents the Freedom of Information Law when §87(1)(b) of the Law states that an agency must adopt rules consistent with the statute? Again, parties to a contract cannot in my view enforce a provision of an agreement which is inconsistent with statutory provisions. With respect to rules, the Board has limited discretion. As you stated, §87(1)(b) of the Freedom of Information Law

requires each agency subject to the Law to adopt rules concerning the procedural implementation of the Law. Moreover, §89(1)(b)(iii) requires this Committee to promulgate general regulations. The Committee's regulations govern the procedural aspects of the Freedom of Information Law, have the force and effect of law, and each agency in the state must adopt regulations no more restrictive than those promulgated by the Committee.

Fifth, what is meant by inter-agency or intra-agency records with respect to the exception appearing in §87(2)(g) of the Freedom of Information Law? Assemblyman Mark Siegel, the prime sponsor of the bill that became law has written with regard to the intent behind the provision in question. In a letter addressed to me dated July 21, 1977, Mr. Siegel wrote:

> "The 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. State[d] 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.
>
> "It has been suggested that the phrase 'intra-agency materials' within paragraph (g) might include all materials in the possession of an agency. This is not the intent of the phrase. Such a construction would severely detract from existing rights of access and would be absurd when read within the context of §87(2) taken as a whole. Moreover, to reiterate, the intent is to permit an agency to deny

> access to the purely advisory communications by officials within an agency or between agencies under the circumstances described above."

In view of the foregoing, it is likely that some of the records and all of the minutes of tenure committees are accessible. It is important to note that the introductory language in §87(2) states that an agency may deny access to specified records "or portions thereof." Under the circumstances, portions of records that are solely advisory in nature may be withheld while the remaining statistical or factual data, instructions to staff that affect the public or final agency policy or determinations are accessible. Further, minutes compiled by a public body, such as a committee, in my view represent a final determination by an agency. As such, they are available.

Sixth, what constitutes a final agency policy or determination under §87(2)(g)? Webster's Standard New World Dictionary defines "final" as "last, conclusive, definitive." In contrast, Black's Law Dictionary (pg. 757) states that "final" means: "not interlocutory" (Johnson v. New York, 48 Hun. 620, 1 NYS 254, 1888). Bouvier's Law Dictionary (pg. 1220) defines "final" as "something which puts an end to the immediate proceedings; that which determines a substantive or adjective point or matter." This approach has been followed by the New York courts (In Re Bailey, 291 NY 534, 40 NYS 2d 726, 50 N.E. 2d 653, 1943).

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

In this instance, using the common and ordinary meaning of "final" would produce an unreasonable result. A simple example illustrates this conclusion. Many state and municipal agencies use multi-level administrative procedures. The common meaning of "final" in this context

would deny access to all opinions, determinations and orders except those made in connection with the highest agency determination. In addition, Section 89(5) expressly intends to preserve existing rights of access. Clearly, the use of the common meaning of "final" would produce an unreasonable result.

If the legal definition of "final" is used, a more sensible result is produced. Usage of this definition allows access to determinations made at each stage of a process. To construe the language in any other way would frustrate the overall purpose of the Freedom of Information Law.

And seventh, assuming that records and minutes are inter-agency or intra-agency materials, would the decision of the departmental, divisional or college personnel and budget committees be considered final determinations as to the issue of tenure? Section 87(2)(g), which deals with inter-agency and intra-agency materials, contains what in effect is a double negative. Although records created within a particular agency may be considered as "intra-agency" materials, to the extent that those materials consist of statistical or factual tabulations or data, instructions to staff, or statements of agency policy or determinations, they are accessible. The word "decision" is in my opinion crucial. If a decision has some binding effect, even if it is made by an advisory body and transmitted to a governing body or an executive, it is in my view a final determination made by an agency which is accessible. It is noted that the definition of "agency" appearing in §86(3) of the Law does not include only a governing body or the executive head of an instrumentality of government. Rather, "agency" is defined as:

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

In view of the definition, the committees to which you alluded in your letter are agencies in terms of the Law. This finding, I believe, bolsters the earlier contention that committees' determinations are "final" agency determinations.

In a similar vein, I would also like to point out that there is in addition to the Freedom of Information Law an Open Meetings Law. In brief, the Open Meetings Law states that meetings of all public bodies shall be open to the public. Although executive sessions closed to the public may be held, action taken during both open meetings and executive sessions must be recorded in the form of minutes. However, the definition of "public body" is subject to conflicting interpretations and it is unclear whether the definition is applicable to advisory bodies or committees. According to the Assembly sponsor of the bill that became the Open Meetings Law, it was intended that "committees, subcommittees and other subgroups" fall within the definition of "public body" and therefore should be subject to the Open Meetings Law (Transcript of Assembly proceedings, May 20, 1976, pp. 6268-6270). To date, there have been two decisions dealing with the status of advisory bodies, one of which pertains to the Queens College Committee on Faculty and Budget. In Bigman v. Siegel, Supreme Court, Queens County, NYLJ, September 29, 1977, it was held that the Open Meetings Law "does not encompass the innumerable groups which are organized and meet for the purpose of collecting information, making recommendations and rendering advice but which have no authority to make governmental decisions and act for the state." In essence, the decision stated that advisory bodies do not transact public business and as such are outside the law. A more recent decision, however, held that the Medical Advisory Committee, whose sole function is to advise the State Commission of Social Services, is indeed a public body subject to the Open Meetings Law (Matter of MFY Legal Services, Inc., Supreme Court, New York County, NYLJ, January 17, 1978). In determining that an advisory committee is a public body subject to the law, the court cited the advice of this Committee, which was based upon the definition of "quorum" that appears in §41 of the General Construction Law. In short, the court found that advisory committees, such as those to which you refer in your letter, are required to act by means of a quorum pursuant to §41 of the General Construction Law, and as such are public bodies subject to the Open Meetings Law that must compile minutes.

In a related matter, the Appellate Division, Second Department, recently held that the phrase "transact public business" appearing in the definitions of "meeting" and "public body" in the Open Meetings Law (see attached Open Meetings Law, §97) should not be construed to encompass

only those situations in which final action is intended. On the contrary, the Court stated that the term "transact" merely means "to carry on business." Therefore, it is my contention that an advisory committee is subject to the Open Meetings Law, since it transacts public business and represents a portion of the decision-making process.

If my contention that advisory committees are indeed public bodies subject to the Open Meetings Law is correct, the committees mentioned in your letter must create minutes reflective of action taken at their meetings and compile a record of votes identifiable to each member in every instance in which he or she votes [see Freedom of Information Law, §87(3)(a)]. The minutes and records of votes would clearly be available under the Freedom of Information Law.

It is also emphasized that the "privacy" provisions of the Freedom of Information Law express the intent that individuals be granted access to records pertaining to them. Although records may be denied if disclosure would constitute an unwarranted invasion of personal privacy, §89(2)(c)(iii) states that no such invasion results "when upon presenting reasonable proof of identity, a person seeks access to records pertaining to him." With respect to disclosure of the names of public employees whose names appear in records, as a general proposition, the Committee has advised and the courts have upheld the notion that disclosure of records relevant to the performance of the official duties of public employees constitutes a permissible invasion of privacy. Contrarily, records not relevant to the performance of official duties may be withheld on the ground that disclosure would constitute an unwarranted invasion of personal privacy [see e.g., Farrell v. Village Board of Trustees, 372 NYS 2d 905 (1975); Matter of Wool, Supreme Court, Nassau County, N.Y.L.J., Nov. 22, 1977]. Consequently, although the records sought might include names of certain public employees, disclosure would in my view constitute a permissible as opposed to an unwarranted invasion of personal privacy.

In sum, it appears that the broad denials of access by the Board of Higher Education are unwarranted. While some of the information sought, such as solely advisory matter found in records may be withheld, the remainder in my opinion is 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:ph
Att.

cc Mary P. Bass
General Counsel and Vice Chancellor
for Legal Affairs
New York City Board of Higher Education

Mario M. Cuomo
Secretary of State

STATE OF NEW YORK

COMMITTEE ON PUBLIC ACCESS TO RECORDS FOIL-AO-705

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

February 17, 1978

Ms. Alice Bennett
[redacted]

Dear Ms. Bennett:

Thank you for your interest in the Freedom of Information Law. Your inquiry involves a denial of access to a report concerning vandalism submitted by the Business Manager of the Little Falls Central School District to the Board of Education. The denial was based upon the notion that the Board has not yet approved the report.

The Freedom of Information Law as recently amended is based upon the presumption that all records in possession of an agency, such as a school district, are accessible except to the extent that records or portions thereof fall within one or more categories of deniable information [see attached, Freedom of Information Law, §87(2)]. Relevant to your inquiry, §87(2)(g) states that an agency may deny access to records or portions thereof that are "inter-agency or intra-agency materials" except 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. As such, to the extent that the report, which may be characterized as an "intra-agency" document, consists of statistical or factual tabulations or data, instructions to staff that affect the public or final agency policy or determinations, it is 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 H. Neil Hellman
Business Manager & Access Officer

School Board
Little Falls

STATE OF NEW YORK
COMMITTEE ON PUBLIC ACCESS TO RECORDS FOIL-AO-706

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 17, 1978

Mr. Vincent A. D'Aprile
[redacted]

Dear Mr. D'Aprile:

Thank you for your interest in the Freedom of Information Law. Your inquiry concerns a denial of access by the State Insurance Department to records surrounding a complaint that you submitted to the Department.

According to the correspondence attached to your letter, your initial request was made under the Freedom of Information Law as originally enacted and denied pursuant to §88(7)(b) and (d). Section 88(7)(b) permitted an agency to deny access to information "confidentially disclosed to an agency and compiled and maintained for the regulation of commercial enterprise, including trade secrets, or for the grant or review of a license to do business and if openly disclosed would permit an unfair advantage to competitors of the subject enterprise..." Section 88(7)(d) permitted an agency to deny access to "part of investigatory files compiled for law enforcement purposes." Despite the enactment of a substantially amended Freedom of Information Law, effective January 1, 1978, the Department again denied access, and the records access officer, Mr. Silletti, wrote that "the changes would not warrant a conclusion different from the one previously reached..."

I disagree with the contention of Mr. Silletti. Under the original law, rights of access were granted only with respect to specified categories of records listed in the Law. The amendments, however, reverse the logic by stating that all records are accessible except those records or portions of records falling within specified categories of deniable information [see attached, Freedom of Information Law, §87(2)]. Moreover, the majority of the exceptions to the presumption that records are accessible are written in terms of the effects of disclosure.

The exception analogous to §88(7)(b) of the original law states that an agency may deny access to records or portions thereof that "are trade secrets or are maintained for the regulation of commercial enterprise which if disclosed would cause substantial injury to the competitive position of the subject enterprise." The records sought could not be characterized as "trade secrets." Further, although they may be maintained for the regulation of commercial enterprise, it is extremely doubtful that the Insurance Department could demonstrate that disclosure of records involving a single complaint could "cause substantial injury to the competitive position of the subject enterprise."

The "law enforcement purposes" exception that appeared in the original statute has also been significantly altered. Under §87(2)(e) of the new Freedom of Information Law, an agency may deny access to records or portions that:

> "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..."

Although the classification of records as "investigatory files compiled for law enforcement purposes" was sufficient to deny access under the original statute, the grounds for denial under the amended statute are specific and are based upon the effects of disclosure.

Among the four grounds for denial listed in §87(2)(e), only the first could possibly be offered to deny access in the instant controversy. However, it is unclear whether the Insurance Department compiled records for "law enforcement purposes" or engages in "law enforcement investigations." Further, in view of the fact that the complaint was filed several months ago, the extent to which disclosure would "interfere" with a law enforcement investigation, if it could be classified as such, is similarly unclear. In sum, records

or portions of records could in my opinion be withheld under §87(2)(e) only if it can be established that the records were compiled for law enforcement purposes, relate to a law enforcement investigation and if disclosed would effectively interfere with an investigation.

It is also noted that the burden of proof in a judicial proceeding in which a denial of access is challenged has been altered. Under the original statute, a person denied access had the burden of proving that the denial was unreasonable. Under the amendments, however, the agency has the burden of proving that the records denied fall within one or more categories of deniable records listed in §87(2) of the Law.

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:js

cc Nicholas C. Silletti, Records Access Officer
Morton Greenspan, Deputy Superintendent and General Counsel

STATE OF NEW YORK

COMMITTEE ON PUBLIC ACCESS TO RECORDS FOIL-AO-707

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

February 21, 1978

Mr. John D. Berwick
Brant Lake Arts Center
Brant Lake, New York 12815

Dear Mr. Berwick:

Thank you for your interest in the Freedom of Information Law. As requested, enclosed are copies of the new Freedom of Information Law, an explanatory pamphlet on the subject and a pocket card which outlines the Law.

The Freedom of Information Law does not alter statutory provisions regarding access to adoption records. One of the grounds for denial in the Law pertains to records that are "specifically exempted from disclosure by state or federal statute" [§87(2)(a)]. In this regard, §114 of the Domestic Relations Law states:

> "No person, including the attorney for the adoptive parents shall disclose the surname of the child directly or indirectly to the adoptive parents except upon order of the court. No person shall be allowed access to such sealed records and order and any index thereof except upon an order of a judge or surrogate of the court in which the order was made or of a justice of the supreme court. No order for disclosure or access and inspection shall be granted except on good cause shown and on due notice to the adoptive parents and to such additional persons as the court may direct."

Since records of adoption are "specifically exempted from disclosure," they remain confidential, notwithstanding the provisions of 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-708

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

February 21, 1978

Joseph Frederick Gazza, Esq.
[redacted]

Dear Mr. Gazza:

Thank you for your continued interest in the Freedom of Information Law. Your inquiry deals with access to assessment cards and the procedural implementation of the Law by the Assessor of the Town of Southhampton.

First, it is important to note that the Freedom of Information Law as originally enacted in 1974 has been substantially amended. The new Freedom of Information Law, which clarifies some of the procedural issues raised in your letter, became effective January 1, 1978. In addition, the regulations that govern the procedural aspects of the Law have also been recently amended. Attached are copies of the amended statute and regulations, as well as an explanatory pamphlet on the subject.

Second, rights of access to the assessment cards that you are seeking are clearly established in case law, as I mentioned in my letter to you of last year [see e.g., Sears, Roebuck & Co. v. Hoyt, 107 NYS 2d 756 (1951); Sanchez v. Papontas, 303 NYS 2d 711 (1969)].

Third, since the records are accessible, they must be made available to any person. The Assessor would appear to have no discretion in the matter.

Fourth, the rules appended to your letter indicate that the opportunity to request records is in some cases restricted in terms of time, and that requests must be made seven days in advance. The regulations promulgated by the Committee state that requests must be accepted during all regular business hours (§1401.4). Moreover, both the Law [§89(3)] and the regulations (§1401.5) state that an agency must respond to a request within five business days of its receipt.

Other provisions of the regulations set forth additional duties of the Town in relation to the Freedom of Information Law. For instance, a denial must be in writing and you must be apprised of the right to appeal and given the name of the person to whom an appeal may be directed. A copy of this response and the Freedom of Information Law and regulations will be sent to the Town Assessor.

I hope that I have been of some assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:js
Enc.

cc William D. Vernon, Assessor
Office of Supervisor

STATE OF NEW YORK

COMMITTEE ON PUBLIC ACCESS TO RECORDS FOIL-AO-709

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

February 21, 1978

Mr. Clifford M. Buck
[redacted]

Dear Mr. Buck:

Thank you for your letter of February 15. Your inquiry pertains to denials of access to genealogical information by a local registrar of vital records.

It is noted at the outset that access to the records in question is not governed by the Freedom of Information Law, but rather by the Public Health Law and the regulations adopted by the State Health Department. In brief, §4174 of the Public Health Law states that vital records are available only to those who can demonstrate that a request is reflective of a "proper purpose." Unfortunately, the phrase "proper purpose" is nowhere defined.

I am familiar with the directive issued by the Health Department, which prohibits local registrars from providing access to records sought for a genealogical search. In my opinion, the directive is arbitrary and represents a violation of law. Nevertheless, until the directive is challenged judicially or the Public Health Law is amended, it will undoubtedly remain in effect. Due to the problems surrounding access to vital records, I hope to propose to the Committee on Public Access to Records shortly that it should recommend that the Legislature enact remedial legislation on the subject.

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

STATE OF NEW YORK

COMMITTEE ON PUBLIC ACCESS TO RECORDS FOIL-AO-710

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

February 24, 1978

Mr. Wallace Nolen
President
S & W Process Service
12 Chase Street
White Plains, New York 10606

Dear Mr. Nolen:

Thank you for your continued interest in access to records.

It is noted at the outset that the Freedom of Information Law is not applicable to records in possession of the judiciary as defined by §86(1) of the amended Freedom of Information Law. Nevertheless, rights of access granted by the Judiciary Law remain in effect. In the instant controversy, it appears that you have been denied access to affidavits of service filed with the clerk of a court. Relevant to the request, §255 of the Judiciary Law provides that:

> "A clerk of a court must, upon request, and upon payment of, or offer to pay, the fees allowed by law, or, if no fees are expressly allowed by law, fees at the rate allowed to a county clerk for a similar service, diligently search the files, papers, records, and dockets in his office and either make one or more transcripts or certificates of change therefrom, and certify that a document or paper, of which the custody legally belongs to him, can not be found."

Since the affidavits of service are in possession of a court clerk, they are in my opinion accessible pursuant to the provision quoted 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

Robert J. Freeman
Executive Director

RJF:js

cc Honorable Frank M. Gagliardi
Honorable Milton Mollon

STATE OF NEW YORK

COMMITTEE ON PUBLIC ACCESS TO RECORDS FOIL-AO-711

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

February 24, 1978

Mr. Douglas Matousek
NYSUT Field Representative
7143 Henry Clay Boulevard
Liverpool, New York 13088

Dear Mr. Matousek:

Thank you for your interest in the Freedom of Information Law. Your inquiry pertains to the propriety of a fee of one dollar per page established by the Mexico Central School District.

Both the Freedom of Information Law [§87(1)(b)(iii)] and the regulations promulgated by the Committee [§1401.8], which have the force and effect of law, provide that unless a different fee is otherwise prescribed by law an agency may charge no more than twenty-five cents per photocopy. Since a "policy" adopted by a school district does not have the force of law, the fee of one dollar per copy assessed by the Mexico Central School District in my opinion represents a violation 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

RJF:js

STATE OF NEW YORK

COMMITTEE ON PUBLIC ACCESS TO RECORDS FOIL-AO-712

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

February 28, 1978

Mr. Lester J. Wright
[redacted]

Dear Mr. Wright:

Thank you for your interest in the Freedom of Information Law. Your inquiry pertains to the propriety of a resolution adopted prior to September 1, 1974 which set a fee of two dollars per copy for records.

In my opinion, a fee of two dollars assessed for photocopies established by resolution fails to comply with the provisions of the Freedom of Information Law [§87(1)(b)(iii)] and the regulations promulgated by the Committee (§1401.8), which have the force and effect of law. Although both the Law and the regulations state that no more than twenty-five cents per page may be charged unless there is a different fee prescribed by law, a resolution does not have the force of law. Consequently, the resolution insofar as it pertains to fees is in my opinion invalid.

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 Mrs. Piznak

STATE OF NEW YORK

COMMITTEE ON PUBLIC ACCESS TO RECORDS

FOIL-AO-713
OML-AO-186

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

March 2, 1978

Mr. Robert E. Link
[redacted]

Dear Mr. Link:

Thank you for your interest in the Freedom of Information Law and the Open Meetings Law. Your letter raises general questions concerning the interpretation of both statutes.

First, although an agency such as a school district, need not grant access to all information of a personal nature, records relevant to the performance of the official duties of public employees are generally available. With respect to a record reflective of the reasons for suspension of a classroom teacher, such a record would in my opinion be accessible. While the Law states that an agency may act to protect against an "unwarranted invasion of personal privacy," a determination by a school board or administrator to suspend a teacher would in my view be available since the determination is relevant to the performance of the duties of the school board, the administrator and the teacher. A judicial decision rendered regarding a similar situation held that a reprimand of a public official constituted an accessible record on the ground that disclosure would result in a permissible as opposed to an unwarranted invasion of personal privacy [Farrell v. Board of Trustees, 372 NYS 2d 905 (1975)].

Secondly, you asked whether it is within the rights of a resident to "ask questions" concerning salaries, contracts and similar matters. The Freedom of Information Law grants access to information of this nature. Specifically, §87(3)(b) of the Law requires each agency to compile a payroll record consisting of the names, public office addresses, titles and salaries of all employees of the agency. In addition, the

contract of a school district administrator is available, for it is reflective of the policy or a determination of a district.

Your third question deals with the amount of time spent by a school board in executive session. In this regard, the Open Meetings Law provides that all meetings of public bodies must be convened as open meetings and that executive sessions, which are portions of an open meeting, may be held to discuss one of eight subjects specified in the Law. Moreover, a public body must identify the general areas of discussion publicly prior to entry into executive session. Enclosed for your consideration are copies of several documents regarding both subjects, including the new Freedom of Information Law, the regulations promulgated by the Committee which govern the procedural aspects of the Law, an explanatory pamphlet regarding the Freedom of Information Law and a pocket outline of the statute. In addition, enclosed are copies of the Open Meetings Law and the Committee's second annual Report to the Legislature on the subject.

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 School Board
Union Free School District #6

STATE OF NEW YORK
COMMITTEE ON PUBLIC ACCESS TO RECORDS FOIL-AO-714

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

March 2, 1978

Mr. Richard E. Ogden
Assistant Superintendent
Canandaigua City School District
143 North Pearl Street
Canandaigua, New York 14424

Dear Mr. Ogden:

Thank you for your interest in complying with the Freedom of Information Law. Your inquiry concerns a request by a Welcome Wagon Agency to obtain a list of names and addresses of new residents in the school district.

As we discussed this morning, it appears that such a list may be denied. Section 87(2)(b) of the Freedom of Information Law states that an agency may withhold records the disclosure of which would result in an unwarranted invasion of personal privacy. In addition, §89(2)(b)(iii) states that an unwarranted invasion of personal privacy includes the "sale or release of lists of names and addresses if such lists would be used for commercial or fund-raising purposes." Since, according to our conversation, it appears that the Welcome Wagon Agency is seeking the list for what may be considered a commercial purpose, a denial could properly be asserted.

Nevertheless, the Freedom of Information Law is permissive. Although an agency may act to prevent against an unwarranted invasion of personal privacy, there is no obligation to do so. Moreover, the subject of privacy generally involves subjective judgements. For example, while I might consider that disclosure of a particular record would constitute an unwarranted invasion of personal privacy, you might feel that disclosure of the same record would result in permissible invasion of personal privacy.

In sum, although it appears that the school district has the legal ability to deny access to the list, it has no obligation 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:ph

STATE OF NEW YORK
COMMITTEE ON PUBLIC ACCESS TO RECORDS FOIL-AO-715

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

COMMITTEE MEMBERS
LIE ABEL - Chairman
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GILBERT P. SMITH
ROBERT W. SWEET
EXECUTIVE DIRECTOR
ROBERT J. FREEMAN

March 2, 1978

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

Dear Mr. Sheehan:

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

Your letter pertains to the propriety of the destruction of records by the City of Binghamton. Although the Freedom of Information Law deals with records, it does not pertain in any way to the retention or destruction of records. The statute concerning the destruction of records in possession of local government is §147 of the Education Law. Since the Freedom of Information Law is not relevant to the issue and the Committee has no authority concerning the retention or destruction of records, it would be inappropriate to comment with regard to the news article attached to your letter.

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-716

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

March 6, 1978

Mr. Daniel J. Barrett
[redacted]

Dear Mr. Barrett:

Thank you for your interest in the Freedom of Information Law. Your letter indicates that repeated attempts to gain access to a contract in possession of the Town of Manlius have been ignored.

First, a contract to which a town is a party is clearly accessible. The Freedom of Information Law as amended is based upon the presumption that records are accessible unless they fall within specific, enumerated categories of deniable records, [see attached Freedom of Information Law, §87(2)]. Under the circumstances, there is no applicable ground for denial that may be asserted. Second, as you stated in your letter, the Town has the responsibility to respond to requests within five business days after its receipt of a request. If no response is given within five business days, the request is considered a denial of access that may be appealed. Further, the Law states that an appeal may be directed to the head or governing body of an agency.

In sum, the contract that you requested is accessible and the Town is obligated to respond to your request by means of production of the record sought.

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

Sincerely,

Robert J. Freeman

Robert J. Freeman
Executive Director

RJF:js
Enc.
cc Keith Morgan, Town Supervisor

STATE OF NEW YORK
COMMITTEE ON PUBLIC ACCESS TO RECORDS FOIL-AO-717

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

March 6, 1978

Nathan S. Kline, M.D.
Director
State of New York
Department of Mental Hygiene
Rockland Research Institute
Orangeburg, New York 10962

Dear Dr. Kline:

Thank you for your interest in complying with the Freedom of Information Law. Your letter states that after having read the regulations promulgated by the Committee under the Freedom of Information Law, you are uncertain whether the regulations provide access to particular records. Please be advised that the regulations deal only with the procedural implementation of the Freedom of Information Law. They have little to do with the substance of the Law, i.e., the ability to grant or deny access.

It is suggested that you review the provisions of the Freedom of Information Law, §87(2) (see attached), which states that all records are available except to the extent that records or portions thereof contain information listed in the ensuing paragraphs as deniable. Relevant to your inquiry, internal memoranda that are solely advisory would be deniable pursuant to §87(2)(g), which permits an agency to withhold "intra-agency" materials. Similarly, correspondence dealing with evaluation of potential employees would likely pertain to employees histories and as such could be denied pursuant to §§87(2)(b) and 89(2)(b)(i). Both provisions state that an agency may withhold information the disclosure of which would result in an unwarranted invasion of privacy. The latter states that such an invasion includes disclosure of items such as an employment history.

In sum, the regulations deal with procedure rather than substance, and I suggest that you review the Freedom of Information Law for the purpose of clarification.

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- 718

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

March 6, 1978

Mr. Albert A. Sullivan, Chairman
Board of Water Commissioners
Water Department
City of Norwich
Norwich, New York 13815

Dear Mr. Sullivan:

I apologize for the delay in responding to your letter of February 13. I attempted to call you on several occasions, but I found either a busy signal or that you were absent due to illness.

Your inquiry pertains to the propriety of a denial of access to a list of the names and addresses of persons appearing in a report of delinquent accounts receivable. In this regard, case law rendered prior to the enactment of the Freedom of Information Law held that virtually all information concerning assessments is accessible. For example, the contents of an assessment roll are accessible, even if they include reference to those who are delinquent in paying their taxes. If the record sought is similar to the contents of an assessment roll, it is in my opinion accessible. The basis for my opinion is the case law, which by implication holds that disclosure of such items would constitute a permissible as opposed to an unwarranted invasion of personal privacy. Further, §87(2)(g)(i) of the Freedom of Information Law specifically grants access to "statistical or factual tabulations or data."

If, on the other hand, the record in question is not similar to the contents of an assessment roll, the list of names and addresses may be denied if it is sought for commercial or fund-raising purposes. Section 89(2)(b) of the Law lists five examples of unwarranted invasions of personal privacy, one of which pertains to the sale or release of lists of names and addresses that would be used for commercial or fund-raising purposes. If that exception to rights of access may appropriately be invoked in this situation, the record may properly 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

Robert J. Freeman
Executive Director

RJF:ph

STATE OF NEW YORK

COMMITTEE ON PUBLIC ACCESS TO RECORDS

OML-AO-188
FOIL-AO-719

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

March 6, 1978

Mr. Frederick T. Hover
Mrs. Arlene L. Hover
[redacted]

Dear Mr. and Mrs. Hover:

Thank you for your letter of February 28. Your inquiry raises questions concerning both the Freedom of Information Law and the Open Meetings Law.

First, your letter questions the propriety of a charge of two dollars assessed for copies of minutes of the Town of Tioga. In this regard, both the Freedom of Information Law [see attached, §87(1)(b)(iii)] and the regulations promulgated by the Committee (see attached, §1401.8), state that no more than twenty-five cents per photocopy may be assessed for copies up to 9" by 14".

Second, as we discussed, I believe that minutes are accessible to the public as soon as they are compiled, whether or not they are approved by the Town Board. In such circumstances, it has been suggested that the unapproved minutes be marked as "draft," "non-final," or "unapproved." By so doing, the public is given notice that the minutes are subject to change and the public body is also given a measure of protection.

Third, you asked whether the public may be excluded from a meeting absent a motion to go into executive session passed by the Board. Section 100(1) of the Open Meetings Law provides a specific procedure for entering into executive session. To comply with the Open Meetings Law, a motion must be made during an open meeting identifying the subject or subjects to be discussed in executive session, and the motion must be passed by a majority vote of the total membership of the public body. It is also important to note that the subjects appropriate for discussion in executive session are limited and specified by the Law [see attached, §100(1)(a) through (h)].

Fourth, you asked for advice concerning the jurisdiction of the Town Attorney with regard to the procedural obligations of the office of the Town Clerk. Since your question does not deal with either the Freedom of Information Law or the Open Meetings Law, it would be inappropriate to respond, for the question deals with matters outside the scope of the Committee's authority. To obtain legal advice regarding the duties of the Town Clerk, perhaps you should contact the Division of Community Affairs, Legal Bureau, in the Department of State.

And fifth, you asked for an explanation concerning the difference between a legal certification and the certification made upon request under the Freedom of Information Law. A legal certification, for which a fee may be assessed, involves a finding that the contents of a record are accurate. A certification made under the Freedom of Information Law, for which no charge may be assessed [see regulations, §1401.8], simply involves a finding that a copy is a true copy. It does not assert in any way that the contents of the record are accurate.

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 Shirley L. Mayer, Town Clerk
Charles Ayers

STATE OF NEW YORK
COMMITTEE ON PUBLIC ACCESS TO RECORDS FOIL-AO-720

COMMITTEE MEMBERS
ELIE ABEL - Chairman
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EXECUTIVE DIRECTOR
ROBERT J. FREEMAN

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

March 6, 1978

Mr. Edward N. Garno
Supervisor of Communications
and Personnel
Hudson City School District
Central Administration
401 State Street
Hudson, New York 12534

Dear Mr. Garno:

Thank you for transmitting a copy of the procedures adopted by the Hudson City School District for implementing the Freedom of Information Law.

Based upon a review of the procedures, I would like to make the following comments. First, Section IV concerning fees does not provide that a specific fee will be charged for copies. In this regard, §87(1)(b) of the Freedom of Information Law states that no more than twenty-five cents per photocopy up to 9 by 14 inches may be assessed. In addition, the regulations promulgated by the Committee, which have the force and effect of law, state that no fee may be charged for search (see regulations, §1401.8). If your reference to secretarial time is reflective of an intent to charge for search, it is invalid.

Second, Section V regarding the subject matter list is not reflective of the direction provided in the Freedom of Information Law. Section 87(3)(c) states that agencies must compile a list by subject matter, in reasonable detail, of all records in possession of the agency, whether or not the records are accessible. The list included within Section V appears to refer only to what the school district considers to be accessible records. In order to comply with the subject matter list requirement, it is suggested that you review the retention and disposal schedules issued by the State Department of Education. Its schedules are in my opinion much more detailed than the subject matter list must be, but may nonetheless be used as a guide.

Third, Section VII which pertains to the payroll record, states that payroll records are available only to bona fide members of the news media. In this regard, the new Freedom of Information Law, §87(3)(b), makes no reference to members of the news media. As such, it is clear that the payroll record required to be compiled by the Freedom of Information Law is accessible to any person.

Attached are copies of both the Freedom of Information Law and the Committee's regulations. It is suggested that you review the Committee's regulations, which I believe will be helpful to you in your efforts to comply with 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:ph
Enc.

STATE OF NEW YORK

COMMITTEE ON PUBLIC ACCESS TO RECORDS FOIL-AO-721

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

March 7, 1978

Mr. Alan W. Bachta
City Reporter
The Citizen
25 Dill Street
Auburn, New York 13021

Dear Mr. Bachta:

Thank you for your interest in the Freedom of Information Law. Your inquiry concerns rights of access to the names of corporations identified in code by the Auburn Industrial Development Authority.

Based upon the news article and correspondence appended to your letter, two corporations, both of which desire to remain unidentified, have expressed interest in locating new plants in Auburn. Denial of access is based upon the contentions that the Authority does not want to prejudice the ability of the corporations to purchase sites at reasonable prices due to premature disclosure and that the denial may have been proper since the information sought consists of a trade secret and would if disclosed result in an unwarranted invasion of personal privacy.

As you are aware, the Freedom of Information Law was recently amended. The original enactment provided access only to specified categories of records. The new Law reverses the logic of the old Law by stating that all records are available, except to the extent that they fall within one or more categories of deniable records [see enclosed, Freedom of Information Law, §87 (2)]. A review of the categories of deniable records indicates that, in my view, there is no applicable ground for denial. Although an agency need not disclose trade secrets, records merely identifying corporations by name could not in my opinion be characterized as trade secrets. Further, while the Law states that an agency may withhold records the disclosure of which would result in an unwarranted invasion of personal

privacy, I believe that the provision was intended to protect against disclosures pertaining to individuals rather than corporate entities.

It is noted, however, that there is a common law governmental privilege established in case law which may have relevance to the controversy. In brief, the governmental privilege may be successfully asserted if an agency can demonstrate to a court that disclosure would on balance result in detriment to the public interest [see e.g., Cirale v. 80 Pine Street Corp., 35 NY 2d 113 (1974)]. In addition, the Court of Appeals has indicated that the privilege continues to exist, notwithstanding rights of access granted by the Freedom of Information Law (id. at 117).

In sum, denial of access to records reflective of the names of the corporations could not in my view be properly asserted pursuant to the Freedom of Information Law. Nevertheless, if the Authority can prove that premature disclosure of the names would constitute detriment to the public interest, a court could conclude that the denial was proper based upon the assertion of the governmental privilege.

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 Paul W. Lattimore, Chairman
Auburn Industrial Development
Authority

STATE OF NEW YORK

COMMITTEE ON PUBLIC ACCESS TO RECORDS FOIL-AO-722

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

March 8, 1978

Hon. Edward M. Bartholomew, Jr.
Mayor
City of Glens Falls
Glens Falls, New York

Dear Mayor Bartholomew:

Thank you for your interest in complying with the Freedom of Information Law. You are seeking advice concerning the propriety of the designation of the City Clerk as Records Access Officer.

In my opinion, the City Clerk, who is the custodian of city records, is the most appropriate individual to be designated as records access officer. The designation of "another person" as appeals officer is also proper since the Committee's regulations specifically state that "[T]he records access officer shall not be the appeals officer" [§1401.7(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

STATE OF NEW YORK
COMMITTEE ON PUBLIC ACCESS TO RECORDS FOIL-AO-723

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

March 8, 1978

Mr. Ellis Mott, Director
Administration & Information Services
Board of Education of the City of New York
Office of Public Affairs
110 Livingston Street
Brooklyn, New York 11201

Dear Ellis:

Thank you for your letter and the attached subject matter list furnished to you by the State Education Department. Several questions were raised in your letter, and I will attempt to respond to each of them.

First, if as Mr. Moon suggested, the Education Department's list is reflective only of "records available under the Freedom of Information Law," the Department has failed to comply with the Law. The subject matter list is intended to make reference by category to all records in possession of an agency, "whether or not available" under the Law [§87(3)(c)]. The purpose of a subject matter list is to apprise the public of the nature of records maintained by an agency. Reference only to what the Department considers to be accessible records could have the effect of precluding the public from requesting records to which the list does not allude.

Second, as you intimated, one of the purposes of the list is to enhance the ability of the public to learn of the nature of records in possession of government and to facilitate the use of the Freedom of Information Law. Consequently, I agree that the covering memorandum should explain the contents of the list. In addition, the use of abbreviations or codes in my opinion makes cryptic what should be clear.

Third, with respect to fees, there is nothing in the Freedom of Information Law that prohibits an agency from charging another agency for photocopies. Although some agencies have not charged others for photocopies based upon comity, the Law does not generally require such

to waive a fee when records are sought by another agency. The only situation of which I am aware that pertains to a waiver of a fee would involve a request made by the head of a state agency for records of another state agency (State Finance Law, §15).

Fourth, you asked how the public "makes out" when requesting information from the State Education Department. In this regard, I have no statistics or other data to which I can direct you. Nevertheless, I have had a longstanding relationship with the Department's records access officers and the Office of Counsel, and I believe that the Department generally attempts to comply with the Law. Needless to say, there have been situations in which there have been differences of opinion regarding the interpretation of the Law. However, I do not believe that disagreements arise with respect to the Education Department any more often than they arise with respect to other agencies.

I hope that I have been of some assistance. Keep in touch.

Sincerely,

Robert J. Freeman

Robert J. Freeman
Executive Director

RJF:ph

STATE OF NEW YORK

COMMITTEE ON PUBLIC ACCESS TO RECORDS FOIL-AO-724

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

March 8, 1978

Mr. Anthony Bamond, Jr.
[redacted]

Dear Mr. Bamond:

Your letter addressed to Governor Carey 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 the letter, you are requesting "[A]ll records pertaining to accidents while employed by the State of New York..." The terms of the request do not make clear whether you are interested in obtaining documents concerning accidental disability generally or only those pertaining to yourself.

Nevertheless, I have contacted the Workmens' Compensation Board on your behalf and you will shortly receive the most recent statistical information regarding accident cases. If you are interested only in obtaining records concerning yourself, it is suggested that you write to:

Ms. Valerie Lucznikowska, Director
Office of Public Information
Workmen's Compensation Board
2 World Trade Center
New York, New York 10047

In addition, enclosed is an explanatory pamphlet entitled "The New Freedom of Information Law and How to Use It" which may be helpful to you. 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-725

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

March 9, 1978

James W. Conboy, Esq.
Town Attorney
Town of St. Johnsville
One East Main Street
St. Johnsville, New York 13452

Dear Mr. Conboy:

Thank you for your interest in complying with the Freedom of Information Law (see attached) and for transmitting a copy of the Ordinance adopted by the Town of Johnsville regarding the procedural implementation of the Law. Based upon a review of the Ordinance, I offer the following comments.

First, Section 2 states that the Town Supervisor and the Superintendent of Highways are responsible for insuring compliance. Please not that §87(1)(a) of the Freedom of Information Law states that the governing body of a public corporation, in this case the Town Board, shall promulgate rules. Consequently, the Committee's regulations (see attached) provide that the governing body is responsible for insuring compliance [§1401.2(a)].

Second, Section 3 refers to the designation of a fiscal officer. The original Freedom of Information Law referred to a fiscal officer as did the original regulations. The amended statute, however, makes no reference to a fiscal officer. Consequently, the reference to the fiscal officer that appeared in the old regulations has been excised from the new regulations. Therefore, although Section 3 of the Ordinance may remain in effect, it is unnecessary. Further, Section 3 cites provisions of the original Freedom of Information Law regarding access to the payroll record. The applicable provision in the amended statute is §87(3)(b).

Third, Section 6 (c) states that a request "should be sufficiently detailed to identify the records." While the public was required to identify the records sought under the old law [§88(6)], the new law merely requires the public to "reasonably describe" the record sought [§89(3)]. Similarly, Section 6 (d) pertaining to the subject matter list refers to the old Law, which stated that the list must categorize records in possession of an agency since September 1, 1974. The amendments, however, provide that the subject matter list should categorize all records in possession of an agency, whether or not they are accessible [§87(3)(c)].

Fourth, Section 8 concerning fees does not make reference to a specific fee. Please note that both the Law [§87(1)(b)(iii)] and the Committee's regulations (§1401.8) provide that no more than twenty-five cents may be charged per photocopy.

Finally, although the regulations need not contain the equivalent of such a provision, the Law requires agencies to transmit to the Committee copies of appeals and the determinations thereon [§89(4)(a)].

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-726

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

March 9, 1978

Ms. Vivian M. Joynt
[redacted]

Dear Ms. Joynt:

I apologize for the delay in responding to your letter. Your letter raises questions concerning procedures adopted pursuant to the Freedom of Information Law.

First, the State Education Department did not send regulations to the Lackawanna School Board or Mr. Balen, the Superintendent, because that Department has no responsibility concerning the issuance of regulations. On the contrary, the Freedom of Information Law requires the Committee on Public Access to Records to "promulgate rules and regulations" regarding the procedureal implementation of the statute [see attached, Freedom of Information Law, §89(1)(b)(iii)]. The governing body of a public corporation, such as a school board, which is the governing body of a school district, is in turn required to adopt regulations consistent with the regulations promulgated by the Committee [§87(1)(a)]. Therefore, each agency including a school district, is required to adopt rules and regulations, no more restrictive than those adopted by the Committee (see attached regulations).

Second, the only regulations that have been adopted by the State Education Department under the Freedom of Information Law pertain to procedures for gaining access to Department records. Its regulations do not include school districts, but rather deal only with the operation of the Education Department. Moreover, while the Freedom of Information Law provides the Committee on Public Access to Records with the authority to give advice concerning the interpretation of the Freedom of Information Law [§89(1)(b)(ii)], the Education Department has no similar authority.

Third, the Committee's ability to promulgate regulations does not infer a grant of authority to enforce the Freedom of Information Law. Nevertheless, the Committee's regulations have the force and effect of law. In addition, when a person is denied access to a record and appeals to the head or governing body of an agency, the agency is obligated to transmit to the Committee copies of the appeals and the determinations that ensue. By means of this mechanism, the Committee has some capability to monitor compliance with the Law. For example, when an appeal is sent to this office and I feel that it was improper, I will contact the agency and attempt to persuade the appeals officer that the decision to deny should be reversed.

Fourth, what course of action can you take? Assuming that you are denied access to records on appeal, you may initiate a judicial proceeding to challenge the denial. In such a proceeding, the agency has the burden of proving that the records denied fall within one or more of the categories of deniable records listed in the Freedom of Information Law [§87(2)].

And fifth, the news article attached to your letter indicates that you were denied access to a tape recording of an open meeting. While there is no statute that requires a public body to tape record its proceedings, if a tape recording is created, it is a record that is subject to rights of access. Further, although the Freedom of Information Law as originally enacted failed to define the term "record," the amendments to the Law define "record" to include "any information, kept, held, filed, produced or reproduced by, with or for an agency...in any physical form whatsoever..." Therefore, since the tape recording is a record and none of the grounds for denial [§87(2)] could be appropriately asserted, the denial 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

RJF:js
Enc.

cc Board of Education
Mark L. Balen, Superintendent

STATE OF NEW YORK

COMMITTEE ON PUBLIC ACCESS TO RECORDS FOIL-AO-727

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

March 13, 1978

Donald E. Keinz, Esq.
County Attorney-Oneida County
Department of Law
County Office Building
800 Park Avenue
Utica, New York 13501

Dear Mr. Keinz:

Thank you for your interest in complying with the Freedom of Information Law (see attached) and for transmitting a copy of the legislation adopted by Oneida County regarding the procedural implementation of the Law. Based upon a review of the legislation, I offer the following comments.

First, Section 2 states that the County Executive is responsible for insuring compliance. Please note that §87(1)(a) of the Freedom of Information Law states that the governing body of a public corporation, in this case the County Legislature, shall promulgate rules. Consequently, the Committee's regulations (see attached) provide that the governing body is responsible for insuring compliance [§1401.2(a)].

Second, Section 3 refers to the designation of a fiscal officer. The original Freedom of Information Law referred to a fiscal officer as did the original regulations. The amended statute, however, makes no reference to a fiscal officer. Consequently, the reference to the fiscal officer that appeared in the old regulations has been excised from the new regulations. Therefore, although Section 3 of the legislation may remain in effect, it is unnecessary. Further, Section 3 cites provisions of the original Freedom of Information Law regarding access to the payroll record. The applicable provision in the amended statute is §87(3)(b).

Third, Section 6(b) is in my opinion incomplete. While the five day rule remains and is reiterated in the statute [§89(3)], there should also be a provision stating that, once a request is acknowledged, a response must be given within ten business days of the acknowledgement [see regulations, §1401.5(d)]. Further, Section 6(c) states that a request "should be sufficiently detailed to identify the records." While the public was required to identify the records sought under the old law [§88(6)], the new law merely requires the public to "reasonably describe" the record sought [§89(3)]. Similarly, Section 6(d) pertaining to the subject matter list refers to the old Law, which stated that the list must categorize records in possession of an agency since September 1, 1974. The amendments, however, provide that the subject matter list should categorize all records in possession of an agency, whether or not they are accessible [§87(3)(c)].

Fourth, Section 8 concerning fees does not make reference to a specific fee. Please note that both the Law [§87(1)(b)(iii)] and the Committee's regulations (§1401.8) provide that no more than twenty-five cents may be charged per photocopy.

Finally, although the regulations need not contain the equivalent of such a provision, the Law requires agencies to transmit to the Committee copies of appeals and the determinations thereon [§89(4)(a)].

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-728

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

March 13, 1978

Mr. Frank Brieaddy
[redacted]

Dear Mr. Brieaddy:

Thank you for your letter of February 28. Your inquiry concerns a denial of access to records used to compile tabulations of expenditures by the Office of the Special Prosecutor of Onondaga County. Further, attached to your letter are several handwritten tabulations consisting of breakdowns of expenditures for specific items. According to our telephone conversation of March 7, you are seeking the records used in compiling the handwritten tabulations as well as any other records or vouchers that would reflect each expenditure of public monies by the Office of the Special Prosecutor.

It is important to note at the outset that the Freedom of Information Law has been substantially amended. The original statute granted access only to those records specifically listed as available. The amendments, however, reverse the logic of the original enactment by stating that all records are available, except to the extent that records or portions thereof fall within one or more categories of deniable records [§87(2)]. Moreover, the majority of the exceptions to the presumption of access are based upon the effects of disclosure. In addition, burden of proof in a judicial proceeding has been altered. A person seeking judicial review under the original statute had the burden of proving that a denial was unreasonable. The amendments contrarily provide that the agency must prove that the records withheld fall within one or more of the categories of deniable records. Finally, although the term "record" was undefined by the original statute, the amendments 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)]. Consequently, all records in possession of government are subject to rights of access granted by the Law.

With respect to your request, there are three grounds for denial that may be offered, two of which may in part be appropriate.

First, §87(2)(g) of the Law states that "inter-agency or intra-agency materials" may be withheld, except to the extent that they consist of statistical or factual tabulations or data, instructions to staff that affect the public, or final agency policy or determinations. Although the records of expenditures constitute "intra-agency materials," all of the records sought consist of "statistical or factual tabulations or data." Therefore, §87(2)(g) cannot in my view be offered as an appropriate ground for denial.

Second, §87(2)(e) of the Law provides that an agency may deny access to records or portions thereof that:

> "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..."

The initial question that must be raised with respect to the quoted provision is the extent to which the records in question were "compiled for law enforcement purposes." It could be argued that all records in possession of the Office of the Special Prosecutor are compiled for law enforcement purposes. Nevertheless, it may also be argued that many of the records are compiled in the ordinary course of business and as such would fall outside of the exception. It is noted that case law implicitly, if not specifically, indicates that all records compiled by law enforcement agencies may not have been compiled for law enforcement purposes, (see Westchester Rockland Newspapers v. Mosczydolowski 58 AD 2d 234; Sheehan v. City of

Binghamton, 59 AD 2d 808), but rather in the ordinary course of business. In this regard, perhaps a distinction can be made between records reflective of the purchase of office supplies and equipment (records compiled in the ordinary course of business) and those reflective of the expenditure of public monies that relate directly to the performance of a law enforcement function, such as an investigation.

Next, to the extent that the records may be characterized as records compiled for law enforcement purposes, which records or portions thereof would if disclosed interfere with an investigation, deprive a person of a right to a fair trial, identify a confidential source, disclose confidential information relating to a criminal investigation or reveal non-routine investigative techniques or procedures? These inquiries may be answered only by means of a review of the records sought on an individual basis. For example, disclosure of a voucher indicating expenses incurred for travel, lodging, meals, and nothing more for an excursion from Syracuse to New York City might have no effect upon an investigation. However, another voucher reflective of expenses incurred for travel to an unusual location for the purpose of conferring with law enforcement officials there might interfere with an investigation or reveal confidential information relating to an investigation if disclosed. Disclosure of some records might conceivably reveal techniques or procedures relative to the investigation of organized crime. In sum, in cases in which the "law enforcement purposes" exception may be raised, determinations regarding access must in my view be made on a case by case basis and dependent upon the effects of disclosure.

And third, §87(2)(f) states that an agency may withhold records or portions of records the disclosure of which "would endanger the life or safety of any person." This exception might be applicable, for example, with respect to a voucher identifying a confidential informant or investigator.

It is emphasized that the introductory language of §87(2) states that records "or portions thereof" may be withheld under the circumstances specified in the provisions that ensue [paragraphs (a) through (h)]. As such, there is a mechanism whereby portions of records could be made available, while the remainder could be deleted due to the potentially harmful effects of disclosure discussed in the preceding paragraphs. For instance, an informant's name or information concerning his whereabouts

could be deleted from a voucher, while the remaining portion indicating monies expended would be accessible. Similarly, as in the situation of travel to an "unusual" locale, the identifying details could be deleted, while the remainder, a figure indicating the cost of the excursion, could be made available. In sum, portions of records could be denied when segregated from the remainder of the records and such segregation can be accomplished without prejudicing or impairing the ability of the Special Prosecutor to carry out his duties without undue hindrance resulting from disclosure.

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 Peter D. Andreoli, Special Prosecutor
Donald Hirschorn, Assistant Attorney General

STATE OF NEW YORK

COMMITTEE ON PUBLIC ACCESS TO RECORDS FOIL-AO-729

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

March 13, 1978

W. Douglas Call, Esq.
East Morganville Road
Stafford, New York 14143

Dear Mr. Call:

Thank you for your interest in complying with the Freedom of Information Law. Your inquiry deals with the status of a volunteer fire company under the Law.

In my opinion, a volunteer fire company is subject to the Freedom of Information Law to the extent that its records deal with the performance of its official duties. Conversely, records related to social activities, for example, likely fall outside the scope of the Law.

Enclosed is an advisory opinion on the subject which is responsive to your question and clarifies the extent to which volunteer fire companies must comply with the statute. If questions continue to arise after having read the opinion, please feel free to contact me.

I hope that I have been of some 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-730

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

March 13, 1978

Mr. Dan D. Kohane
Law Clerk
Hurwitz & Fine, P.C.
1410 Liberty Bank Building
Buffalo, New York 14202

Dear Mr. Kohane:

Thank you for your interest in the Freedom of Information Law. Your inquiry pertains to a final denial of access by Kearney L. Jones, Assistant Commissioner and Records Access Appeals Officer of the Department of Health.

In response to a request for records in possession of the Department regarding an investigation directed against Dr. Myron Marshall pursuant to §230 of the Public Health Law, the records were denied pursuant to §87(2)(e)(i) and (g) of the Freedom of Information Law.

Without greater knowledge of the contents of the records sought, I cannot conjecture as to the propriety of the denial. With respect to the grounds for denial, §87(2)(e)(i) states than an agency may deny access to records or portions thereof that:

> "are compiled for law enforcement purposes and which, if disclosed, would:
>
> i. interfere with law enforcement investigations or judicial proceedings."

Section 87(2)(g) provides that an agency may deny access to "inter-agency or intra-agency materials" except to the extent that such materials consist of statistical or factual tabulations or data, instructions to staff that affect the public or agency policy or determinations. If all of the records in possession of the Health Department pertaining to the investigation of Dr. Marshall fall within either of the two bases for denial offered by the Department, the denial was proper.

Conversely, if, for example, some of the records were compiled for law enforcement purposes, but disclosure would not interfere with the investigation, they would in my view be accessible.

Mr. Jones' denial also states that records and proceedings of committees operating pursuant to §230 of the Public Health Law "are made immune from disclosure by that statute." The "immunity" to which the denial makes reference likely pertains to a prohibition against the use of discovery proceedings initiated pursuant to Article 31 of the Civil Practice Law and Rules [§230(9)]. Despite this direction in the Law, there is no analogous prohibition regarding rights of access that may exist under the Freedom of Information Law. Consequently, although rights of access under the Freedom of Information Law with respect to records compiled pursuant to §230 of the Public Health Law are uncertain, a distinction may be made between the prohibition against discovery and the potential to deny access 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:js

cc Kearney Jones, Assistant Commissioner

STATE OF NEW YORK

COMMITTEE ON PUBLIC ACCESS TO RECORDS FOIL-AO- 731

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

March 13, 1978

Mr. Martin Lansky
[redacted]

Dear Mr. Lansky:

Thank you for your interest in the Freedom of Information Law. Your inquiry deals with the maintenance and indexing of examination materials by colleges and universities and the legislative history behind §87(2)(h) of the Freedom of Information Law.

With respect to written legislative history, there is little, if any. There was virtually no debate in either the Assembly or the Senate regarding the bills that became law. There may be some relevant material in the bill jacket, which contains comments by state agencies and others that are sent to the Governor prior to the signature or veto of a bill. The bill jacket may be obtained from the Legislative Reference Library, Education Building, Washington Avenue, Albany, New York 12234. The bills that passed were A. 6571-a and S. 16-a.

I recall, however, that the exception regarding examination questions and answers was precipitated by a request by the Department of Civil Service. Since that Department in some instances uses questions and answers repeatedly for a series of examinations, it was argued that access to questions that would be repeated would wreak havoc upon its examination process.

In terms of interpretation, I believe that both the intent and the language are clear. Very simply, examination questions and answers sought prior to the final use of the questions are deniable.

To discover whether state and city colleges and universities maintain indices or inventories of examination materials, I suggest that you request such materials under the Freedom of Information Law.

Enclosed are copies of a pamphlet entitled "The New Freedom of Information Law and How to Use It" and the regulations promulgated by the Committee, which govern the procedural aspects of the Law, both of which will likely 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

RJF:js
Enc.

STATE OF NEW YORK
COMMITTEE ON PUBLIC ACCESS TO RECORDS FOIL-AO-732

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

March 14, 1978

Mr. Richard Karp
Roslyn Teachers Association
Roslyn High School
Roslyn, New York 11576

Dear Mr. Karp:

Thank you for your interest in the Freedom of Information Law. Your inquiry raises both general and specific questions concerning records in possession of a school district.

The first question pertains to the ability of a school district to remove records from a personnel file when the file is requested by a teacher. It is important to note that the Freedom of Information Law pertains to all records in possession of a school district, regardless of their place of filing. Consequently, upon request for records "reasonably described" [see Freedom of Information Law, §89(3)], the school district must respond, whether the records are located in a personnel file or elsewhere. With respect to the right of a school district to remove records from a personnel file, it is suggested that you review your collective bargaining agreement, which might contain specific provisions regarding rights of access by teachers to personnel records.

Second, if a school district maintains records concerning employees other than those kept in a personnel file, must the district publish a list of the types of records it maintains? Although a school district need not publish a list identifying every record in its possession, §87(3)(c) of the Freedom of Information 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 this article."

In view of the quoted provision, the school district must create a list of categories of records in its possession. Further, upon request, an agency must certify that it does not have possession of records sought or that the records cannot be found after diligent search [§89(3)].

As requested, enclosed are copies of the Freedom of Information Law, regulations promulgated by the Committee, which govern the procedural aspects of the statute and have the force of law, a pamphlet entitled "The New Freedom of Information Law and How to Use It" and a pocket card that outlines 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
Enc.

STATE OF NEW YORK

COMMITTEE ON PUBLIC ACCESS TO RECORDS FOIL-AO-733

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

March 14, 1978

Mr. W. Melvin Street
Executive Director
NYS Publishers Association, Inc.
Newhouse Communications Center
Syracuse University
Syracuse, New York 13210

Dear Mel:

This is to confirm our discussion this morning regarding A. 7550, which pertains to access to records relative to matrimonial proceedings.

As a general matter, §235 of the Domestic Relations Law prohibits public disclosure of any records pertaining to a matrimonial proceeding with the exception of a "certificate of disposition." The certificate of disposition, which is issued on request by a county clerk, merely states that "A" was divorced from "B", and that the divorce became effective on a given date. The contents of the certificate do not include any of the information that the bill apparently seeks to protect ("findings of fact, conclusions of law or judgment of dissolution"). In my view, which was bolstered by a conversation with the Albany County Clerk, the legislation would have no effect upon the minimal rights of access that currently exist.

If you are familiar with practices that differ from my interpretation of §235, please apprise me. I would be curious to know whether all county clerks follow the same procedure.

Keep in touch. If I can be of assistance, I am at your service.

Sincerely,

Robert J. Freeman
Executive Director

RJF:js

STATE OF NEW YORK
COMMITTEE ON PUBLIC ACCESS TO RECORDS FOIL-AO-734

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EXECUTIVE DIRECTOR
ROBERT J. FREEMAN

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

March 14, 1978

Ms. Gladys Walker
Supervisor
Community Development
C.A.C.H.E.
10 Church Street
Liberty, New York 12754

Dear Ms. Walker:

Thank you for your interest in the Freedom of Information Law. Your inquiry pertains to a request for information regarding a Federal Housing Administration Project that has been ignored.

Upon review of your letters requesting the information, it appears that you are seeking statistical or factual data. In this regard, §87(2)(g)(i) of the Freedom of Information Law specifically states that an agency must provide access to records or portions thereof consisting of "statistical or factual tabulations or data." As such, to the extent that records exist that are reflective of the information sought, they are accessible. However, it is noted that the agency has no obligation to create a record in response to a request. Therefore, if, for example, there is no record containing a breakdown of the number of bedrooms in vacant housing units, the agency is not required to compile a breakdown or otherwise create a record.

Further, §89(3) of the Law states that a response to a written request must be given within five business days of receipt of the request. If no response is given within the stated time limit, the request is considered a denial of access that may be appealed to the head or governing body of an agency [see Freedom of Information Law, §89(4)(a)].

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 of law, a pamphlet entitled "The New Freedom of Information Law and How to Use It" and a pocket card that outlines 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:js
Enc.

cc: Ms. Sharon Kazansky

STATE OF NEW YORK

COMMITTEE ON PUBLIC ACCESS TO RECORDS FOIL-AO-735

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

March 15, 1978

Mr. Milton Rothfeld
[redacted]

Dear Mr. Rothfeld:

Thank you for your interest in the Freedom of Information Law. Your inquiry concerns a denial of access to the results of aptitude tests given by the Office of Vocational Rehabilitation.

As a general matter, Section 1007 of the Education Law states that all records identifiable to clients of the Office of Vocational Rehabilitation are confidential. Consequently, rights of access of an individual are unclear. Nevertheless, I have contacted the Office of the Assistant Commissioner for Vocational Rehabilitation at the State Department of Education on your behalf in order to gain insight regarding the problem. I was informed that while some records are kept confidential "in the best interests of a client," a client may have the ability to inspect some of the records pertaining to him. It was suggested that you direct a second inquiry to the supervisor in the local Office of Vocational Rehabilitation. If the records are once again denied, please feel free to contact me or the Assistant Commissioner for Vocational Rehabilitation.

As requested, enclosed are copies of the Freedom of Information Law, the regulations promulgated by the Committee which deal with the procedural aspects of the Law and a pamphlet entitled "The New Freedom of Information Law and How to Use It."

I hope that I have been of some 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-736

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

March 16, 1978

[redacted]

Dear [redacted]:

Thank you for your interest in the Freedom of Information Law. Your inquiry raises several questions concerning rights of access.

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

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

> "(1) The case record shall not ordinarily be made available for examination by the applicant or recipient, since it contains information secured from outside sources. However, particular extracts shall be furnished him, or furnished to a person whom he designates, when the provision of such information would be beneficial to him. The case record, or any part of it, admitted as evidence in the hearing on an appeal shall be open to him and his representative.
>
> (2) Information may be released to a person, a public official, or another social agency from whom the applicant or recipient has requested a particular

> service when it may properly be assumed that the client has requested the inquirer to act in his behalf and when such information is related to the particular service requested."

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

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

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

Second, are records generally and psychiatric records in particular identifiable to your child, who has been placed at a residential treatment center by order of the Family Court accessible to you? Since the Summit School is subject to the Family Educational Rights and Privacy Act, education records identifiable to a student are accessible to the parent of the student, such as yourself.

Third, do you have the right to inspect your own and your children's psychiatric evaluations in possession of a hospital, private doctor, clinic or school? In this regard, it is noted that the Freedom of Information Law is applicable only to governmental entities. Therefore, records in possession of a private doctor or hospital, for example, are not subject to rights of access. Further, psychiatric records in possession of facilities under the control of the Department of Mental Hygiene are confidential pursuant to §33.13 of the Mental

[redacted]
March 16, 1978
Page -3-

Hygiene Law, except under specified conditions.

And finally, with respect to the means by which records may be requested, the Freedom of Information Law states that a written request must reasonably describe records sought [§89(3)]. Although many agencies have adopted forms for making requests, a failure to use a prescribed form cannot be cited as a valid ground for denial of access. Any request made in writing that reasonably describes the records sought should suffice.

Enclosed are copies of the Law and a pamphlet entitled "The New 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:neb
Encs.

STATE OF NEW YORK
COMMITTEE ON PUBLIC ACCESS TO RECORDS FOIL-AO-737

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

March 16, 1978

Mr. Mark D. Morris
Legal Associate
Hospital Association
of New York State, Inc.
15 Computer Drive West
Albany, New York 12205

Dear Mr. Morris:

I am in receipt of a copy of your appeal directed to Mr. Peter M. Wynn, Deputy Commissioner of the Department of Social Services. The appeal is based upon a denial of access to a contract into which the Department of Social Services and the law firm of Covington and Burling entered, as well as the bills submitted by Covington and Burling for services rendered pursuant to the contract.

In my opinion, the records sought are available. While rights of access to the records in question may have been questionable under the Freedom of Information Law as originally enacted, they are clearly accessible under the amended Freedom of Information Law, effective January 1, 1978. The original statute was based upon the notion that rights of access were granted only with respect to categories of accessible records listed in the Law [§88(1)]. The amendments, however, reverse the logic of the original enactment by stating that all records are accessible except to the extent that they fall within one or more categories of deniable records listed in §87(2)(a) through (h)(see attached).

With respect to the contract, there is no appropriate ground for denial appearing in §87(2). Similarly, bills and related documents transmitted from Covington and Burling to the Department fail to fall within any of the categories of

deniable records. Moreover, the contract may be considered the policy of the Department with regard to a particular area of its duties. In addition, the bills may be classified as factual tabulations or data, which are accessible.

I agree with your contention that §4503 of the Civil Practice Law and Rules, which pertains to the attorney-client privilege, is inapplicable. As stated in your letter, there is ample precedent supportive of your contention that records related to retainer and compensation fall outside the attorney-client privilege and therefore cannot be considered confidential.

In sum, both the contract and the bills submitted by the law firm to the Department are in my view accessible, for there is no ground for denial that may be appropriately asserted.

I hope that I have been of some assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:js
Enc.

cc: Mr. Peter M. Wynn
Mr. Stephen J. Morello

STATE OF NEW YORK

COMMITTEE ON PUBLIC ACCESS TO RECORDS FOIL-AO-738

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

March 17, 1978

Mr. John J. Sheehan
[redacted]

Dear Mr. Sheehan:

Thank you for your continued interest in the Freedom of Information Law. Your inquiry makes reference to two denials of access on appeal by Mayor Libous and a press release issued by this office concerning "time limitations for public officials to answer."

First, the Committee has not issued any press release specifically dealing with the amount of time during which a public official must respond to a request made under the Freedom of Information Law. Nevertheless, the pamphlet prepared by the Committee entitled "The New Freedom of Information Law and How to Use It," which was disseminated by means of a news release, indeed makes reference to the appropriate time limits for response by public officials. It is emphasized that the limitations for responding to a request and for a determination following an appeal of a denial of access concern inquiries made under the Freedom of Information Law. However, it is unclear from your letter whether you are referring to a failure to respond to a telephone call or a request made under the Freedom of Information Law. If the question deals with the responsibility of a public official to respond to a telephone inquiry as opposed to a request made under the Freedom of Information Law, neither the Freedom of Information Law nor the regulations would be applicable. On the other hand, if you are referring to a request made under the Freedom of Information Law, it appears that the correspondence attached to your letter indicates that final denials of access on appeal were rendered by the Mayor. Since final denials of access were apparently rendered, your only course of action would involve a judicial challenge to a final denial of access.

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-739

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

March 17, 1978

Ms. Maryjane Parry
Town Clerk
Town of Wilton
Wilton, New York 12866

Dear Ms. Parry:

Thank you for your interest in complying with the Freedom of Information Law. Your inquiry deals with whether the Committee has a "master list" of subject matter that should be referenced in the subject matter list required to be compiled under §87(3)(c) of the Freedom of Information Law.

The Committee has not compiled a "master list" of this nature. Very simply, the Committee does not have the capacity to be aware of the nature of all records in possession of particular units of government. Similarly, there is no better authority concerning the nature of records in possession of a town, for example, than the custodian of records, such as yourself.

It is suggested, however, that you review the records retention and disposal schedules issued by the State Department of Education. Although the schedules are in my opinion more detailed than a subject matter list must be, I believe that they can be used as a guide for preparation of a subject matter list.

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

Sincerely,

Robert J. Freeman

Robert J. Freeman
Executive Director

RJF:js

STATE OF NEW YORK
COMMITTEE ON PUBLIC ACCESS TO RECORDS FOIL-AO-740

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

March 20, 1978

Mayor Edward M. Bartholomew, Jr.
City Hall
Glens Falls, New York 12801

Dear Mayor Bartholomew:

Thank you for your continued interest in complying with the Freedom of Information Law. Your inquiry concerns provisions regarding the compilation of records pursuant to §87(3).

First, with respect to the requirement that a record of votes be compiled, it would in my opinion be sufficient to maintain minutes of meetings that included the vote by each member regarding each resolution that is dealt with by the Common Council. Second, a computer printout reflective of salaries of city employees may be sufficient to comply with §87(3)(b), if it contains the information required to be included by the cited provision. The payroll record required to be maintained must include the names, public office addresses, titles, and salaries of all officials or employees of the City of Glens Falls. If the printout includes each of the four categories of information required, it is sufficient. In some cases, computer printouts may include additional information, such as social security numbers, the number of deductions claimed or other similar information which has no relevance to the performance of duties to public employees. If information of this nature is included on the printout, it may in my view be deleted on the ground that disclosure would constitute an unwarranted invasion of privacy.

Finally, you asked whether this office could provide you with examples of the records required to be compiled by §87(3). Models of the three records have not been compiled. The requirements regarding the first two are self-explanatory. The nature and scope of the subject matter list must be determined by City officials, for the custodians of records are most familiar with the records in possession of a given agency. Nevertheless, it

might be helpful to review the records retention and disposal schedules issued by the State Department of Education. Although the schedules are in my opinion more detailed than a subject matter must be, they may be helpful to you in terms of guidance.

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:neb

STATE OF NEW YORK
COMMITTEE ON PUBLIC ACCESS TO RECORDS FOIL-AO-741

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

March 21, 1978

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

Dear Ms. Zeller:

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

As requested, attached are copies of an advisory opinion regarding the attorney-client privilege and an index to advisory opinions rendered under the Freedom of Information Law. The opinions to which the index makes reference are identified by key phrase. If there are any opinions of particular interest, please identify them by number in writing and I will be happy to send them to you.

The information that you received regarding court records is correct. The definition of "agency" in the Freedom of Information Law [§86(3)] specifically excludes the courts. As a consequence, a town justice, for example, need not compile a subject matter list pursuant to §87(3)(c) of the Law. It is emphasized that the exemption of the courts from the Freedom of Information Law does not mean that court records are confidential. On the contrary, as a general rule, court records are accessible (see Judiciary Law, §255). Moreover, §2019-a of the Uniform Justice Court Act grants access to virtually all records in possession of a town or village justice.

With respect to records of former justices, §107 of the Uniform Justice Court Act states that

> "...in any county or part of a county where the district court system has been duly adopted, all the dockets of

> the town justices then on file or required to be filed, in the office of the town clerk, shall be transferred to the office of the clerk of the district court and there kept and maintained in the same manner as other official records of the district court and responsibility for such records on the part of the town shall cease."

In view of the quoted provision, it is suggested that you seek to determine whether the Town of Deerpark has joined the district court system.

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- 742

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

March 21, 1978

Ms. Patricia Williams
Town Clerk
Town of Hinsdale
Box 273, 3759 Main Street
Hinsdale, New York 14743

Dear Ms. Williams:

Thank you for your interest in complying with the Freedom of Information Law. Your inquiry concerns the intent of the Town of Hinsdale to adopt regulations specifying the records that may be denied.

In this regard, it is suggested that any regulations adopted by the Town deal only with the procedural implementation of the Freedom of Information Law. Please note that the attached regulations promulgated by the Committee do not deal with substance, i.e., what is available and what is not, but rather with the means by which the public may seek access and the responsibility of government in complying with the procedural aspects of the Law. In addition, the Law itself provides specific guidance concerning which records or portions thereof that may be denied [see attached Freedom of Information Law, §87(2)]. Therefore, rules concerning rights of access would redundant, since the same subject matter is dealt with in the Law.

Rights of access to vital records are not governed by the Freedom of Information Law, but rather by other provisions of law. Access to marriage records is governed by Article 2 of the Domestic Relations Law. Access to birth and death records is governed by §4173 and §4174 of the Public Health Law. Rights of access to vital records generally are based upon the notion that records may be made available if a request is reflective of a "proper purpose." Unfortunately, the quoted phrase is not defined

by any of the statutes earlier cited. Nevertheless, the State Health Department is the custodian of the original records in question and has issued rules and regulations concerning their maintenance and dissemination. It is suggested that you contact the Bureau of Vital Records in the State Health Department to obtain additional information on the subject.

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-743

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

March 21, 1978

Mr. Arthur J. Brewster
[redacted]

Dear Mr. Brewster:

Thank you for your continued interest in the Freedom of Information Law. Your inquiry concerns rights of access to bills submitted by a law firm to the Little Falls School District.

In my opinion, to the extent that bills exist, they are accessible. Further, I believe that the response given to you by H. Neal Hellman, Access Officer for the District, is erroneous. According to Mr. Hellman, "[T]he itemization of each statement is considered to be priviledged [sic] information between client and attorney and is not accessible." First, it is well established in case law that information concerning the amounts that a law firm has billed and received for services rendered to a client is not privileged [see e.g., People v. Cook, 372 NYS 2nd 10 (1975)]. Second, the bills are reflective of factual data and as such are clearly available 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:nb
Enc.

cc: H. Neal Hellman
Raymond G. Kuntz

STATE OF NEW YORK

COMMITTEE ON PUBLIC ACCESS TO RECORDS FOIL-AO-744

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

March 21, 1978

Mr. Robert J. Whalen
[redacted]

Dear Mr. Whalen:

Thank you for your continued interest in the Freedom of Information Law. Your inquiry concerns a series of events during which you have faced opposition from the Brentwood School District concerning rights of access to records.

It is noted at the outset that the Freedom on Information Law grants access to existing records. Therefore, an agency need not create or compile a record in response to a request. For example, if there is no record in existence reflective of the number of total miles used to operate a School District vehicle, the District is not obligated to tabulate mileage from a number of records in order to reach a total of miles driven. Nevertheless, to the extent that the records sought exist, they are in my view accessible.

According to your letter, your requests deal with statistical or factual information regarding expenditures of the School District in several areas, including the operation of School District vehicles, travel by School District officials and a breakdown of expenses incurred by the District in conjunction with attorney fees. Again, all of the information that you are seeking consists of "factual data," which is clearly accessible pursuant to §87(2)(g)(i) of the Freedom of Information Law.

With respect to bills incurred by the District for legal services, such bills would not in my opinion be subject to the attorney-client privilege. It is well established in case law that records regarding retainer and compensation, such as bills for services rendered for a client, fall outside the scope of the privilege [see e.g., People v. Cook, 372 NYS 2nd 10(1975)].

In addition, the School District has the burden of locating records and supplying you with portions of records that you are seeking. It is emphasized that the Law states that all records in possession of an agency are accessible, except that an agency may deny access to "records or portions thereof" that are listed as deniable [see §87(2)]. Further, although the original Freedom of Information Law required the public to "identify" records sought, the new Freedom of Information Law merely requires that the public "reasonably describe" records sought [§89(3)]. Consequently, the School District must in response to a request for records make available the records, documents or portions thereof that are accessible.

With regard to the refusal of the District to honor your requests until you have paid twenty-five dollars, which according to the District, is the fee for records copied some time ago, it does not appear that the circumstances warrant such refusal. As I understand the facts surrounding the controversy, you offered to pay a sum of twenty-five dollars in advance and in good faith with the anticipation of receipt of copies of the records that you requested. If you had been furnished with the requested information, the School District would in my opinion be justified in refusing to honor ensuing requests until the fee was paid. However, it appears that a fee was accepted for the production of records that were not sought. Therefore, if your account of the matter is accurate, the error was made by the School District rather than yourself. As such, your rights under the Freedom of Information Law should not be diminished due to the error made by the District.

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

Sincerely,

Robert J. Freeman

Robert J. Freeman
Executive Director

RJF:neb
Encs.

cc: Mr. Di Pietro
Mr. Mauro

STATE OF NEW YORK

COMMITTEE ON PUBLIC ACCESS TO RECORDS FOIL-AO-745

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

March 22, 1978

Mr. Albert A. Sullivan
Chairman
Board of Water Commissioners
Norwich, New York 13815

Dear Mr. Sullivan:

Thank you for your letter of March 15. Again, your inquiry deals with the propriety of revealing the names and addresses of persons delinquent in the payment of taxes to the Board of Water Commissioners of the City of Norwich.

I have been unable to locate any judicial determinations that deal with the issue that you have raised. In essence, I believe that a subjective judgment must be made in order to reach a conclusion concerning disclosure of the names and addresses of delinquent taxpayers. Nevertheless, the provisions in the Freedom of Information Law can be used to provide guidance. Specifically, §89(2)(b) lists five instances of what the Legislature considered to be unwarranted invasions of personal privacy. It is emphasized that the situations appearing in the Law are merely reflective of five among conceivable dozens of unwarranted invasions of privacy. Most relevant to your inquiry is the fourth example, which states that an unwarranted invasion of privacy includes "disclosure of information of a personal nature when disclosure would result in economic or personal hardship to the subject party and such information is not relevant to the work of the agency requesting or maintaining it". Although the names of delinquent taxpayers are relevant to the performance of your duties, it appears that the quoted provision is intended to protect against disclosures that would be embarrassing personally or damaging economically. As such, it may be permissible to disclose the factual tabulations regarding delinquent taxpayers after having deleted the identifying details, such as the names and addresses.

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:nb

STATE OF NEW YORK
COMMITTEE ON PUBLIC ACCESS TO RECORDS FOIL-AO-746

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

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EXECUTIVE DIRECTOR
ROBERT J. FREEMAN

March 22, 1978

Mr. Peter Paonessa
Counsel to the Niagara Falls
Police Department
Public Safety Building
Pine Avenue
Niagara Falls, New York 14305

Dear Mr. Paonessa:

Mr. Allen Brown, Supervising Licensing Investigator for the Department of State in Buffalo, has asked that this office write to you in conjunction with denials of access to police blotters and booking records.

According to Mr. Brown, the Police Department has not designated a records access officer for the purpose of responding to requests made under the Freedom of Information Law, nor has the Department compiled a subject matter list as required by §87(3)(c) of the Freedom of Information Law (see attached). In addition, upon request for police blotters and booking records in possession of the Department, the records were denied apparently due to a lack of a release from the subjects of the records.

First, police blotters and booking records are in my opinion clearly available under the Freedom of Information Law. Although there is no legal definition of the term "police blotter," a recent decision of the Appellate Division clarifies the scope of information intended to be kept in a police blotter and held that the information is available. Specifically, in Sheehan v. City of Binghamton, 59 AD 2nd 808, the court cited the advice of this Committee and based its opinion thereon (see attached). In discussing the contents

of a police blotter, the court held that "a blotter is in the nature of a log or diary in which any event reported by or to a police department is recorded. It contains no investigative information but merely summarizes an occurence" (id. at 809). Since the Freedom of Information Law as originally enacted specifically granted access to police blotters, the information described by the court as the contents of a police blotter is accessible.

Further, case law rendered long before the enactment of the Freedom of Information Law held that booking records, the records of arrest made by the arresting agency, are accessible to the public.

The amended Freedom of Information Law broadens and clarifies rights of access. Although the Law enables agencies to deny access to records compiled for law enforcement purposes under specified circumstances [see §87(2)(e)], police blotters and booking records would in my view fall outside of the exception and continue to be accessible. Further, Mr. Brown informed me that you stated that booking records are accessible to the public for approximately 30 days and are considered "private records" thereafter. If the records are accessible during the 30 day period, they should remain accessible notwithstanding their limited utility to the Department in the ensuing period. As a general matter, rights of access under the Freedom of Information Law are based upon possession of records and the effects of disclosure. Consequently, if disclosure of a police blotter or booking record would not be harmful shortly after their creation, presumably the effects of disclosure would be similarly innocuous at a later date.

With respect to a "records access officer," the regulations promulgated by the Committee, which have the force and effect of law, require that the governing body of the City of Niagara Falls designate one or more records access officers to deal with requests made under the Freedom of Information Law (see attached regulations, §1401.2).

Finally, §87(3)(c) of the Law requires each agency to maintain a list by category of all records in its possession, whether or not 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

Robert J. Freeman
Executive Director

RJF:js
cc: Allen Brown

STATE OF NEW YORK

COMMITTEE ON PUBLIC ACCESS TO RECORDS FOIL-AO-747

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

March 22, 1978

Ms. Michelle Powers
Councilwoman
Town of Southeast
Brewster, New York 10509

Dear Ms. Powers:

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

The Committee has not prepared guidelines concerning the compilation of subject matter lists, since the nature of records differs from one agency to the next and because the custodians of records are most familiar with them. It is suggested, however, that you obtain and review the records retention and disposal schedules issued by the State Department of Education. Although the schedules are in my view more detailed than a subject matter list must be, I believe that they may be used as a guide.

With respect to voting records, §87(3)(a) of the Freedom of Information Law requires that each agency maintain "a record of the final vote of each member in every agency proceeding in which the member votes." As such, voting records must be compiled identifiable to each member in every instance in which he or she votes. If the voting records are tabulated and contained within minutes of meetings, a separate record need not in my view be compiled. However, if the minutes merely reflect the vote taken on a particular issue without citing the manner in which individual members voted, a separate voting record must be maintained.

With regard to vital statistics, I believe that the Town Clerk has a dual role, insofar as he or she acts as custodian of records for the Town as well as custodian of vital records on behalf of the State Department of Health. To determine the scope of the responsibilities of the Town Clerk concerning vital

records, perhaps you should review the regulations promulgated by the Department of Health, which delineates the duties of the clerk in this area. It is also important to note that access to vital records is not governed by the Freedom of Information Law, but rather by Article 2 of the Domestic Relations Law (marriage records) and Sections 4173 and 4174 of the Public Health Law (birth and death 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 FOIL-AO-748

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

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EXECUTIVE DIRECTOR
ROBERT J. FREEMAN

March 22, 1978

Louis N. Kash, Esq.
Corporation Counsel
City of Rochester
Department of Law
City Hall
30 West Broad Street
Rochester, New York 14614

Dear Mr. Kash:

Thank you for your interest in complying with the Freedom of Information Law. As requested, the ensuing opinion will be confined to responses to your questions and will not recommend specific courses of action.

It is important to emphasize at the outset, as you suggested, that the Freedom of Information Law is permissive. Therefore, although an agency may act to prevent against unwarranted invasions of personal privacy, it need not. Further, although §89(2)(b) of the Law list five instances of unwarranted invasions of personal privacy, those instances are in my view merely illustrative. The situations described as unwarranted invasions of personal privacy represent five among conceivable dozens of unwarranted invasions.

Your first question is whether the phrase "personal references of applicants for employment" is intended to apply only to the names or only to the contents of such references, or both. In this regard, I concur with your contention that the phrase in question was intended to be applicable to both names and the contents of personal references.

Your second question regarding personal references deals with whether the privacy of the applicant for employment as well as the individual listed as a reference are sought to

be protected. Again, I agree with your contention that the names of both the applicant and the person writing the reference are intended to fall within the protection envisioned by §89(2)(b).

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:js

STATE OF NEW YORK

COMMITTEE ON PUBLIC ACCESS TO RECORDS FOIL-AO-749

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

March 28, 1978

Ms. Marian McEvoy
[redacted]

Dear Ms. McEvoy:

Thank you for your interest in the Freedom of Information Law. Your inquiry pertains to rights of access to a tentative budget in possession of the Little Falls Board of Education.

According to your letter, you have been denied access by the Board to its tentative budget on the ground that it is "confidential." In my opinion, the contents of the tentative budget are in great measure accessible.

The amended Freedom of Information Law is based upon a presumption of access. The Law states that all records are accessible unless records or portions thereof fall within one or more specific categories of deniable records [§87(2)]. One of the exceptions to rights of access concerns "inter-agency or intra-agency materials," except to the extent that such materials consist of statistical or factual tabulations or data, instructions to the staff that affect the public or final agency policy or determinations [§87(2)(g)]. Although the tentative budget may be classified as an "intra-agency" document, its contents consist largely of "statistical or factual tabulations or data." Therefore, to the extent that the tentative budget consists of statistical or factual data, it is accessible.

While the statistical or factual data appearing in the tentative budget may be reflective of advice appearing in the form of numbers, it has been held that such records are accessible. In determining rights of access in a similar situation, the courts have held that statistical tabulations of this nature are accessible even if they are reflective only of advice [see Dunlea v. Goldmark, 54 A.D. 2d 446; Affirmed 43 NY 2d

754(1977)]. In view of the judicial interpretation of the Freedom of Information Law rendered by State's highest court, I believe that the "statistical or factual tabulations or data" within the tentative budget 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

Robert J. Freeman
Executive Director

RJF:nb

STATE OF NEW YORK
COMMITTEE ON PUBLIC ACCESS TO RECORDS FOIL-AO-750

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

March 28, 1978

Ms. Debbie Gump
Gannett Rochester Newspapers
55 Exchange Street
Rochester, New York 14614

Dear Ms. Gump:

Thank you for your continued interest in the Freedom of Information Law. Your inquiry pertains to the propriety of assessing more than twenty-five cents per photocopy under the Freedom of Information Law. According to your letter, several municipalities in the vicinity of Rochester have adopted practices whereby they charge as much as five dollars for copies of reports.

In my opinion, an agency, which includes a municipality, may charge no more than twenty-five cents per photocopy, unless a different fee is prescribed by law. My contention is based upon the specific direction provided by §87(1)(b)(iii) of the Freedom of Information Law, which specifies the maximum fee to be charged for copies except in cases where existing provisions of law prescribe a different fee. Although the provision regarding fees in the amended Freedom of Information Law has been in existence for approximately three months, a maximum fee of twenty-five cents per photocopy was established in November of 1974 in regulations promulgated by the Committee under the Freedom of Information Law as originally enacted. Therefore, although the original Freedom of Information Law did not specify a maximum fee to be charged for photocopies, the regulations promulgated by the Committee, which had and continue to have the force and effect of law, established a maximum fee for copies consistent with the fee prescribed by the amended statute. Consequently, under the original statute, an agency had no authority to charge more than twenty-five cents per photocopy unless a higher fee had been established by law prior to September 1, 1974, the effective date of the original Law.

I am aware of the fact that many police departments charge in excess of twenty-five cents per photocopy for accident reports. In all likelihood, the higher fees are based on §202 of the Vehicle and Traffic Law. The cited provision permits the State Department of Motor Vehicles to charge in excess of twenty-five cents for photocopies and for searching records. Nevertheless, it is emphasized that the provision in the Vehicle and Traffic Law enables only the Department of Motor Vehicles to assess the fees envisioned in that statute. As such, although municipalities may have established policies based upon §202 of the Vehicle and Traffic Law, those policies cannot be considered to have the effect of law.

In sum, municipalities may charge a maximum of twenty-five cents per photocopy and may not charge for a search, unless different fees had been established by law prior to September 1, 1974.

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

Sincerely,

Robert J. Freeman

RJF:nb

cc: Donald Riley, Supervisor
Town of Greece

Donald Deming, Supervisor
Town of Irondequoit

STATE OF NEW YORK
COMMITTEE ON PUBLIC ACCESS TO RECORDS FOIL-AO-751

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 28, 1978

Mr. Donald J. Gott
[redacted]

Dear Mr. Gott:

I am in receipt of your latest letter. Having discussed the matter with the Village Clerk of the Village of Warsaw, Ms. Clarabelle Eccleston, I believe that I am now aware of the problem.

As I understand the situation, the controversy pertains to the construction of a bridge. Although an application for a building permit was completed, the construction of a bridge does not require the submission of a building permit. Consequently, the application to which you referred in your request is of no relevance. Further, the filing of the application did not result in a determination based upon its contents.

Nevertheless, if the permit application remains in the possession of a village official, it is accessible under the Freedom of Information Law. It is suggested that you request a copy of the application from the official who maintains custody of the permit application.

I hope that I have been of some assistance.

Sincerely,

Robert J. Freeman

Robert J. Freeman

RJF:nb

cc: Ms. Clarabelle Eccleston,
Village Clerk

STATE OF NEW YORK

COMMITTEE ON PUBLIC ACCESS TO RECORDS FOIL-AO-752

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

March 29, 1978

Mr. Michael Solomon
Village of Freeport
46 North Ocean Avenue
P.O. Box 3020
Long Island, New York 11520

Dear Mr. Solomon:

Thank you for your interest in complying with the Freedom of Information Law. Your inquiry concerns the capacity of a village to adopt a fee by means of resolution higher than twenty-five cents per photocopy.

According to your letter, the Village of Freeport has the authority to adopt by ordinance or by resolution what it may adopt by local law. Consequently, your assertion is that if the Village established a fee schedule by resolution prior to September 1, 1974, the effective date of the original Freedom of Information Law, the higher fee would continue to remain in effect.

I believe that your contention without more is erroneous. A close review of the case law indicates that not all resolutions adopted by a village may be considered to have the force of an ordinance or a local law. In my view, a resolution may have such effect only if it is adopted in the same manner as an ordinance. Specifically, in Jewett v. Luau-Nyack Corp. (31 NY 2d 928, 338 NYS 2d 874, 291 N.E. 2d 123), the Court of Appeals held that a resolution may have the force of an ordinance if its adoption was preceded by a public hearing, publication, and proper posting. Only if those conditions precedent are met can a resolution in my opinion be given the force of law. Therefore, if the conditions precedent to which the Court of Appeals referred were met with regard to a resolution adopted prior to September 1, 1974, a fee higher than twenty-five cents per photocopy may remain in effect. Conversely, if the conditions were not met, I believe that the maximum that may be charged is twenty-five cents per photocopy.

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-753

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

March 29, 1978

Mrs. Dolores Chechek
[redacted]

Dear Mrs. Chechek:

I am in receipt of your latest communication dated March 22, 1978. The central question involves whether you are requesting records from the Wappingers Board of Education as a member of the Board of Education or as a member of the public. If you are considered a member of the Board with respect to the requests, presumably you should be granted free access. On the other hand, if you are considered a member of the public, you should be treated as such and may be required to pay for copies in accordance with the rules adopted by the District concerning the procedural implementation of the Freedom of Information Law.

To determine your status as a member of the Board of Education, it is important to review the status of boards of education generally. In this regard, §2(14) of the Education Law states that:

> "[T]he term 'board of education' shall include by whatever name known the governing body charged with the general control, management and responsibility of the schools of a union free shcool district, central school district, or of a city school district."

Based upon the definition it is clear that a school board is a governing body whose membership must function in a collective manner. In addition, a board of education acts as the corporate board of directors for a public corporation, a school district. In terms of the authority of a board of education as opposed to the powers of a single member thereof,

direction may be provided by §41 of the General Construction Law, which defines "quorum." The cited provision states:

> "[W]henever three or more public officers are given any power or authority, or three or more persons are charged with any public duty to be performed or exercised by them jointly or as a board or similar body, a majority of the whole number of such persons or officers, at a meeting duly held at a time fixed by law, or by any by-law duly adopted by such board or body, or at any duly adjourned meeting of such meeting, or at any meeting duly held upon reasonable notice to all of them, shall constitute a quorum and not less than a majority of the whole number may perform and exercise such power, authority or duty. For the purpose of this provision the words "whole number" shall be construed to mean the total number which the board, commission, body or other group of persons or officers would have were there no vacancies and were none of the persons or officers disqualified from acting."

In view of the quoted definition, it appears that a member of a school board cannot act individually on behalf of a board unless a majority of the total number of the board has conferred such authority upon an individual member or members. According to the memorandum dated March 20 written by Dr. Sturgis, Superintendent of Schools, the Board has determined that you are not acting as its representative with regard to the requests that you have made under the Freedom of Information Law. Consequently, it would appear that your requests cannot be considered as part of the performance of your duties as a member of the Board, but rather as a member of the public.

Further Dr. Sturgis' memorandum indicates that District officials are willing to cooperate with you. The information sought pursuant to your letter of January 12, 1978, is being provided to you for inspection in each instance. If you wish to have copies of the records made, I believe that a fee may be assessed pursuant to the rules concerning fees adopted by the District under the Freedom of Information Law. It is

emphasized that although a fee may be assessed for copies, no fee may be charged for inspection of records or for the search time involved in locating the records. As such, I disagree with Dr. Sturgis' contention that the "actual costs" of reproduction include clerical time spent in locating records. The only fee that may be assessed would involve a request for copies.

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

Sincerely,

Robert J. Freeman

RJF:nb

cc: Dr. Sturgis

STATE OF NEW YORK

COMMITTEE ON PUBLIC ACCESS TO RECORDS FOIL-AO-754

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

March 29, 1978

Mr. Paul Feiner
Coordinator
Ad Hoc Committee for Budgetary
Reform in Westchester County
15 Parkfield Road
Scarsdale, New York 10583

Dear Mr. Feiner:

Thank you for your continued interest in the Freedom of Information Law. Your inquiry pertains to rights of access to departmental budget requests that are presented to the Westchester County Executive.

As you indicated in your letter, a lawsuit was initiated in 1977 concerning access to the records in question. The determination, which has been appealed, held that the budget requests were deniable under the Freedom of Information Law as originally enacted [see Delaney v. Del Bello, Supreme Court Westchester County, October 24, 1977]. Since the decision has been appealed, it is difficult to conjecture at this juncture as to the determination that may be reached by the Appellate Division. Nevertheless, I believe that the budget requests may in great measure be accessible under the amended Freedom of Information Law.

The amended Law is based upon a presumption of access and states that all records are accessible unless records or portions thereof fall within one or more specific categories of deniable records [§87(2)]. One of the exceptions to rights of access concerns "inter-agency or intra-agency materials," except to the extent that such materials consist of statistical or factual tabulations or data, instructions to the staff that affect the public or final agency policy or determinations [§87(2)(g)]. Although preliminary budget materials may be classified as "intra-agency" documents, their contents likely

consist largely of "statistical or factual tabulations or data." Therefore, to the extent that the materials consist of statistical or factual data, they are in my view accessible.

While the statistical or factual data appearing in preliminary budget materials may be reflective of advice appearing in the form of numbers, it has been held that similar records are accessible. In determining rights of access in an analogous situation, the courts have held that statistical tabulations are accessible even if they are reflective only of advice [see Dunlea v. Goldmark, 54 A.D. 2d 446; affirmed 43 NY 2d 754 (1977)]. In view of the judicial interpretation of the Freedom of Information Law rendered by the State's highest court, I believe that the "statistical or factual tabulations or data" within the preliminary budget material are accessible.

I am aware of the fact that County Charter may appear to preclude access prior to the adoption of the budget. However, to the extent that the Charter is more restrictive than the Freedom of Information Law, it is in my opinion of no effect. In a similar situation in which rights of access granted by the New York City Charter were narrower than those granted by the Freedom of Information Law, it was held that the Freedom of Information Law superseded the more restrictive provisions of the Charter (see Matter of Elisofon, Supreme Court, Kings County, NYLJ, July 3, 1975).

In sum, I believe that much of the information sought is accessible. However, it is emphasized that my opinion is reflective only of advice and that the Appellate Division will likely render a decision shortly regarding the records 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

Robert J. Freeman
Executive Director

RJF:js

cc: Alfred Del Bello, County Executive

STATE OF NEW YORK
COMMITTEE ON PUBLIC ACCESS TO RECORDS FOIL-AO-755

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

March 23, 1978

Mr. Wallace Nolen
President
S & W Process Service
12 Chase Street
White Plains, New York 10606

Dear Mr. Nolen:

Mr. Jonathan Lovett, Deputy Westchester County Attorney, has transmitted to me a copy of your "purported appeal" and the correspondence leading to the appeal. Upon review of the materials, it appears that the controversy pertains not to rights of access per se, but rather to the extent to which records in possession of the Westchester County Clerk must be made available on a daily basis to you.

In terms of background, you are seeking to inspect "all current and closed New York State Supreme Court cases currently on file with the County Clerk's office with exception of Matrimonial and Family Court matters...", which are exempt from disclosure by statute. Rights of access to the records in question are not at issue, for there are a number of statutes that grant access. It is understood that the County Clerk performs a dual function, in that he acts as custodian of County records as well as those of the Westchester County Supreme Court. If the Clerk is acting as an agent of county government, he would be acting on behalf of an "agency" as defined by §86(3) of the Freedom of Information Law. If, however, the clerk is acting as an agent of the Court, the records in his possession would remain accessible pursuant to §255 of the Judiciary Law. In addition, the records are accessible pursuant to §208(4) of the County Law.

Based upon the foregoing, it is clear that the records sought are accessible, whether or not the request may be appropriately made under the Freedom of Information Law. Therefore, if you are requesting more records than

the Clerk is willing to provide, the question is whether the Clerk's limitation upon the number of cases provided for inspection on a daily basis is reasonable.

In this regard, there are no rules or specific guidelines that may be cited to determine what is "reasonable." However, it has been held that "[M]ere inconvenience resulting from inspection cannot be equated with public detriment, nor be construed as inimical to the public welfare, or against public policy" (New York Post Corp. v. Moses, 12 A.D. 2nd 243, 210 NYS 2d 88, 100). Despite the direction given by case law, what constitutes "mere inconvenience" as opposed to harassment, for example, can be established only by means of a review of circumstances on a case by case basis.

You have orally asserted that the number of cases sought is less than the number sought regularly by others. In addition, as you have described the situation, while others have requested and obtained upwards of one hundred non-consecutive case files, which may require extensive search time to produce, you are seeking case folders filed consecutively by index number, thereby easing the burden of searching the records. Assuming that your assertions are accurate, it would appear that the clerk considers a search of one hundred files "reasonable" for some, but a search of twenty-five files "reasonable" for you. If that is the case, the limitation imposed regarding your daily requests may be unreasonable and a constructive denial of access.

In an attempt to mediate, I have also discussed the matter with Mr. Lovett. Based upon our conversation, I believe that an accommodation can be reached and I suggest that you contact his office.

I hope that I have been of some assistance.

Sincerely,

Robert J. Freeman

Robert J. Freeman
Executive Director

RJF:js

cc: Jonathan Lovett

STATE OF NEW YORK
COMMITTEE ON PUBLIC ACCESS TO RECORDS FOIL-AO-756

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

March 23, 1978

Paul J. Taddune, Esq.
Deputy Corporation Counsel
Office of the Corporation
Counsel
City of Schenectady
City Hall
Schenectady, New York 12305

Dear Mr. Taddune:

Thank you for your interest in complying with the Freedom if Information Law. Your request concerns the availability of police records involving juveniles intended to be used for a State University research project.

As we discussed, §784 of the Family Court Act appears to preclude disclosure of the records in question. The statute cited 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".

In view of the quoted provision, the records may be made available "upon good cause shown" to specific individuals having a relationship with the subjects of the records to the

exclusion of all others.

Although a study of the records by the State University might serve the public interest, it appears that §784 does not permit a disclosure under the circumstances with respect to police records identifiable to juveniles.

Moreover, since §784 is reflective of a statutory exemption from disclosure, the exemption remains in effect pursuant to §87(2)(a) of the Freedom of Information Law.

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:nb

STATE OF NEW YORK
COMMITTEE ON PUBLIC ACCESS TO RECORDS FOIL-AO-757

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

March 30, 1978

Eugene Blanc, Jr., Esq.
516 Fifth Avenue
New York, New York 10036

Dear Mr. Blanc:

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

According to your letter and our conversation, you are interested in obtaining information concerning the composition of the Committee and the means by which rules, regulations and procedures may be obtained from the New York City Police Department's Civilian Complaint Review Board and Internal Affairs Division.

The Committee is composed of ten members, including four members of the public appointed by the Governor, four ex officio State officials and two additional members of the public, one each appointed by the Speaker of the Assembly and the Temporary President of the Senate. The Governor's appointees are Elie Abel, Chairman of the Committee and Dean of the Columbia School of Journalism, T. Elmer Bogardus, Editor of the Eagle Bulletin in Fayetteville, New York, Gilbert Smith, Executive Editor of the Utica Observer-Dispatch and Robert Sweet, a New York City attorney. The four ex officio members are Secretary of State Cuomo, Lieutenant Governor Krupsak, Howard Miller, Director of the Budget, and James O'Shea, the Commissioner of General Services. The legislative leaders have not yet designated their appointees to the Committee.

With respect to the information sought, I believe that the rules and regulations adopted by the Civilian Complaint Board and the Internal Affairs Division of the Police Department are in great measure accessible. Relevant to the records in question, §87(2)(e) permits agencies to withhold records compiled

for law enforcement purposes which if disclosed would reveal criminal investigative techniques or procedures "except routine techniques and procedures." In my opinion, if the rules and regulations adopted by the two agencies may be classified as "routine," they are accessible. Moreover, the procedures adopted by the Civilian Complaint Review Board could not in my view be classified as records "compiled for law enforcement purposes" and therefore would not in any way be subject to the exception appearing in §87(2)(e) of the Law. Finally, §87(2)(g)(iii) specifically grants access to agency policy. Since the procedures adopted by the agencies in question constitute the working law of those agencies, I believe that they are accessible.

It is suggested that you direct a written request reasonably describing records sought to William Johnson, Executive Director of the Civilian Complaint Review Board, which is located at 200 Park Avenue South, New York City. A similar request regarding procedures of the Internal Affairs Division should be sent to the Office of Public Information, New York City Police Department, One Police Plaza, New York City.

Enclosed for your consideration are copies of the Freedom of Information Law, the regulations promulgated by the Committee, which govern the procedural aspects of the Law and with which all agencies must comply, and a pamphlet entitled "The New 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:nb
Encs.

cc: Mario M. Cuomo
Secretary of State

STATE OF NEW YORK
COMMITTEE ON PUBLIC ACCESS TO RECORDS

FOIL-AO-758
OML-AO-204

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

March 30, 1978

Elaine R. Silliman, Ph.D.
People Care of Lakeland
4 Evergreen Road
Peekskill, New York 10566

Dear Dr. Silliman:

Thank you for your interest in the Freedom of Information Law and the Open Meetings Law. Your inquiry raises questions concerning the interpretation of both statutes in conjunction with the practices of the Lakeland School District.

According to your letter, a request for records containing "statistical data underlying the Superintendent's public report on the educational assessment of the effects of the 42 day Lakeland Teacher's Strike" was denied on the ground that the records constitute "intra-agency material." Although the statistical data used by the Superintendent in the formulation of the report does indeed constitute "intra-agency material," the exception in the Freedom of Information Law pertaining to denial of such materials contains what in effect is a double negative. Specifically, §87(2)(g) states that an agency may deny access to records or portions thereof that:

> "are inter-agency or intra-agency materials 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..."

Therefore, to the extent that the materials contain "statistical or factual tabulations or data," they are accessible.

In addition, you mentioned that you were permitted to inspect some of the materials but that your request to make copies was refused. In this regard, case law rendered before the enactment of the Freedom of Information Law held that the right to copy is concomitant with the right to inspect. Consequently, I believe that a refusal by the District to permit you to copy the materials constituted a violation of law.

What effect, if any, is there when a school district fails to adopt rules for the procedural implementation of the Freedom of Information Law? While the Law states that the governing body of a public corporation, such as a school district, must adopt such rules within 60 days after the effective date of the amended Freedom of Information Law, there is no immediate penalty for failure to comply with this aspect of the Law. Nevertheless, if an agency fails to adopt regulations, an Article 78 proceeding in the nature of mandamus could be initiated to compel a school board to perform a duty required to be performed by law.

What responsibility does a school district have to appoint a records access officer who is available during regular business hours? According to your letter, the designated records access officer is a part time employee who is not available to respond to requests in all instances. In my opinion, the records access officer must be a full time employee. The regulations promulgated by the Committee, which have the force and effect of law, specifically describe the duties of a records access officer [see attached regulations, §1401.2(b)]. The major function of the records access officer is to respond to requests. The regulations further provide that agencies must accept requests for public access to records during all hours they are regularly open for business [§1401.4(a)]. Since requests must be accepted during regular business hours, the records access officer must in my view be available to respond to requests during those hours.

Your statement infers that forms must be filed in order to process requests. If this is the case, I believe that the procedure is contrary to the Law. Although an agency may require that a request be made in writing, the failure to complete a form prescribed by an agency cannot be asserted as a valid ground for denial of access. The Committee has consistently advised that any request in writing that reasonably describes the records sought should suffice.

Next, according to the Central Administration, meetings of committees appointed by the School Board need not be open to the public. In this regard, committees are in my view public bodies that fall within the scope of the Open Meetings Law (see attached). 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..." [§97(2)].

By separating the quoted definition into its elements, one can conclude that a committee is a public body subject to the Law.

First, a committee is an entity for which a quorum is required. Although there may neither be a statutory provision nor a by-law that requires the presence of a quorum, §41 of the General Construction Law states in relevant part that:

> "[W]henever...three or more persons are charged with any public duty to be performed or exercised by them jointly or as a board or similar body, a majority of the whole number of such persons...at any meeting duly held upon reasonable notice to all of them, shall constitute a quorum and not less than a majority of the whole number may perform and exercise such...duty."

Therefore, although committees may not be specifically required to act by means of a quorum, §41 of the General Construction Law mandates that all public bodies act only by means of a statutory quorum.

Second, does a committee "transact public business?" While it has been argued that committees do not take final action and therefore do not transact public business, this Committee has consistently advised that the term "transact" does not necessarily imply that action is to be taken. Rather, according to an ordinary dictionary definition, "transact" means merely "to discuss" or "to carry on business." This opinion has been ratified by a recent decision of the Appellate Division, Second Department (Orange County Publications v. Council of City of Newburgh, NYLJ, January 12, 1978, p. 1; 401 NYS 2d 84).

Third, the committees in question perform a governmental function for a public corporation, the Lakeland School District.

Fourth, the debate in the Assembly regarding the bill that later became the Open Meetings Law clearly indicates that it was the sponsor's intent to include "committees, subcommittees, and other subgroups" within the scope of "public body" (see transcript of Assembly debate, May 20, 1976, pages 6268 to 6270).

And fifth, two recent judicial decisions cited this Committee's contention that committees and advisory bodies are indeed public bodies subject to the Open Meetings Law in all respects (see Matter of NFY Legal Services, Supreme Court, New York County, NYLJ, January 17, 1978; Pissare v. City of Glens Falls, Supreme Court, Warren County, March 7, 1978).

Finally, must minutes be taken of executive, special and public work sessions, even though no formal vote may be taken? Section 101 of the Open Meetings Law prescribes the required contents of minutes for both open meetings and executive sessions. With respect to open meetings, §101(1) states that:

> "Minutes shall be taken at all open meetings of a public body which shall consist of a record or summary of all motions, proposals, resolutions and any other matter formally voted upon and the vote thereon."

Therefore, a record or summary of motions and proposals must be contained in minutes of open meetings, even if there is no action taken thereon.

With respect to minutes of executive sessions, although public bodies may generally vote during a properly convened executive session, school boards may not vote during executive session except in the case of a tenure proceeding brought pursuant to §3020-a of the Education Law. The Open Meetings Law states that any less restrictive provisions of law remain in effect [§105(2)]. Since §1708(3) of the Education Law has been judicially interpreted to require public voting by school boards, boards of education are generally precluded from voting during executive session [see Kursch et al v. Board of Education, 7 A.D. 2d 922 (1959); United Teachers of Northport v. Northport Union Free School District, 50 A.D. 2d 897 (1975)]. Further, §101(2)

states that minutes of executive sessions need only contain a summary of action taken, and since no action may be taken, presumably minutes of executive session need not be compiled.

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: Lakeland Board of Education
Dr. Leon Bock

STATE OF NEW YORK
COMMITTEE ON PUBLIC ACCESS TO RECORDS

FOIL-AO-759

DEPARTMENT OF STATE, 162 WASHINGTON AVENUE, ALBANY, NEW YORK 12231
(618) 474-2518, 2791

April 3, 1978

Mr. Norman Kadin
[redacted]

Dear Mr. Kadin:

Thank you for your interest in the Freedom of Information Law. Your inquiry concerns a denial of access to lesson plans prepared by a New York City school teacher.

According to your letter, it appears that the denial is based upon the notion that a lesson plan is a teacher's private property. However, your letter further states that copies of lesson plans drawn by teachers must be submitted to the principal of the school in which a teacher is employed on a weekly basis.

In my opinion, the lesson plan is accessible, for it contains information upon which a teacher and principal rely in carrying out their official duties.

First, a lesson plan could not in my view be characterized as "private property." On the contrary, it would appear that a lesson plan is created by a teacher to assist him in the performance of his duties and to apprise his supervisor, the principal, that the policies of the School Board with respect to curriculum requirements are being followed. In addition, the Freedom of Information Law defines "record" to include "...any information kept, held, filed, produced or reproduced by, with or for an agency...in any physical form whatsoever..."[see attached, Freedom of Information Law, §86(4)]. Consequently, a lesson plan is clearly a "record" subject to rights of access granted by the Law.

Second, the Freedom of Information Law is based upon the presumption that records are accessible, unless they fall within one or more categories of deniable information. Relevant to your inquiry, §87(2)(g) states that an agency may deny access to records or portions thereof that:

school district must "prepare the content of each course of study authorized by the board of education." The provision further states that:

> "[T]he content of each course shall be submitted to the board of education for its approval and, when thus approved, the superintendent shall cause such courses of study to be used in the grades, classes and schools for which they are authorized."

In view of the direction in the quoted provision of the Education Law, it appears that a lesson plan is reflective of a factual accounting of the course of action taken by a teacher during a given week and that its contents must be consistent with the policy adopted by the Board. As such, it may in my opinion be considered as factual data or policy and therefore 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:nb
Enc.

cc: Ellis Mott

> "are inter-agency or intra-agency materials 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..."

Under the quoted provision, although the lesson plan may be characterized as "intra-agency" material, it is in my opinion accessible, for it constitutes "factual data," i.e. the framework upon which a week's teaching is based, and is the policy of the agency with regard to the operation of a particular class for a given week.

Moreover, the legislative intent tends to bolster my contention. In a letter addressed to me by Assemblyman Mark Seigel, the sponsor of the bill that became the Freedom of Information Law, it was stated that:

> "[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."

Since the teacher and principal rely upon the lesson plan in carrying out their respective duties, it appears that the Legislature intended that a record of this nature be made available.

And third, the provisions of the Education Law indirectly indicate that a lesson plan is reflective of the policy of a school board. Specifically, §2566(4) of the Education Law states that the superintendent of a city

STATE OF NEW YORK
COMMITTEE ON PUBLIC ACCESS TO RECORDS

FOIL-AO-760

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

April 4, 1978

Mr. Kenneth C. Arnold
[redacted]

Dear Mr. Arnold:

Thank you for your interest in the Freedom of Information Law. Your inquiry pertains to rights of access to a preliminary budget in possession of the East Quogue Board of Education.

According to your letter, you have been denied access by the Board to its preliminary budget on the grounds that it constitutes an "interoffice memo" and that disclosure would adversely affect collective bargaining negotiations. In my opinion, the contents of the preliminary budget are in great measure accessible.

The amended Freedom of Information Law is based upon a presumption of access. The Law states that all records are accessible unless records or portions thereof fall within one or more specific categories of deniable records [§87(2)]. One of the exceptions to rights of access concerns "inter-agency or intra-agency materials," except to the extent that such materials consist of statistical or factual tabulations or data, instructions to the staff that affect the public or final agency policy or determinations [§87(2)(g)]. Although the preliminary budget may be classified as an "intra-agency" document, its contents consist largely of "statistical or factual tabulations or data." Therefore, to the extent that the preliminary budget consists of statistical or factual data, it is in my view accessible.

While the statistical or factual data contained in the preliminary budget may be reflective of advice appearing in the form of numbers, it has been held that such records are accessible. In determining rights of access in a similar situation, the courts held that statistical tabulations of this nature are accessible even if they are reflective only of advice [see Dunlea v. Goldmark, 54 A.D. 2d 446; affirmed 43 NY 2d 754(1977)]. In view of the judicial interpretation of the

Freedom of Information Law rendered by State's highest court, I believe that the "statistical or factual tabulations or data" within the preliminary budget are accessible, except to the extent that disclosure would impair collective bargaining negotiations [see Freedom of Information Law, §87(2)(c)].

Further, upon receipt of a written request reasonably describing records, an agency has five business days to grant or deny access. If access is denied, the denial must be in writing giving the reasons therefor, it must apprise the individual denied of his or her right to appeal and it must identify the person to whom an appeal should be directed [see attached, regulations, §1401.7]. In addition, §89(4)(a) of the Freedom of Information Law requires agencies to transmit to the Committee on Public Access to Records copies of all appeals and the determinations thereon which must be rendered within seven business days of receipt of an appeal.

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:nb
Enc.

cc: Mr. William Luhrs
Mr. William Knab

STATE OF NEW YORK
COMMITTEE ON PUBLIC ACCESS TO RECORDS

FOIL-AO-761

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

April 4, 1978

Mr. William L. Matthes
Editor and Publisher
The Lookout
Fishkill Road
Hopewell Junction, New York 12533

Dear Mr. Matthes:

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

Your inquiry concerns a refusal by the Town Clerk of the Town of Beekman to permit you to photograph or photocopy accessible records in her possession. Further, according to your letter, the Clerk stated that the Freedom of Information Law enables the Clerk to reserve the right to make copies and gives the Town "the right to revenues for copymaking."

I disagree with the contentions of the Clerk. Although an agency, such as a town, may assess a fee for photocopies, it may not prohibit you from taking notes based upon the contents of records or from copying the records yourself with your camera or photocopying machine, for example.

Specifically, 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, state that, upon request for copies of records, the records access officer must:

> "i. Make a copy available upon payment or offer to pay established fees, if any; or
> ii. Permit the requester to copy those records."
> [see attached regulations, §1402(b)(4)].

In view of the regulations, it is clear that you may either request that copies be made for a fee or you may make the copies yourself.

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:nb
Enc.

cc: Evelyn Heady, Town Clerk

STATE OF NEW YORK
COMMITTEE ON PUBLIC ACCESS TO RECORDS FOIL-AO-763

COMMITTEE MEMBERS
ELIE ABEL - Chairman
C. ELMER BOGARDUS
MARIO M. CUOMO
MARY ANNE KRUPSAK
HOWARD F. MILLER
JAMES C. O'SHEA
GILBERT P. SMITH
ROBERT W. SWEET
EXECUTIVE DIRECTOR
ROBERT J. FREEMAN

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

April 5, 1978

Mr. Richard Bettini
[redacted]

Dear Mr. Bettini:

Thank you for your interest in the Freedom of Information Law. Your inquiry concerns the means by which a request should be made and the scope of rights of access granted by the Law.

First, a written request reasonably describing the records sought must be made [Freedom of Information Law, §89(3)]. The request should be directed to the designated records access officer (regulations, §1401.2). The agency has five business days from the receipt of the request to grant or deny access or to acknowledge receipt of the request and estimate when a response will be given [Freedom of Information Law, §89(3)]. If the request is acknowledged, the agency has ten business days from the date of acknowledgment to grant or deny access [regulations, §1401.5(d)].

Second, you may transmit your request in person or by mail. Requests must be accepted during "regular business hours" (regulations, §1401.4). Since the agency has five business days to respond, it is suggested that waiting for immediate production of the records would be of no value.

Third, the presence of an attorney is unnecessary for the purpose of making a request.

And fourth, although the City University is publicly funded, it has the ability to deny access to records pursuant to §87(2) of the Freedom of Information Law. The cited provision states that all records are accessible, except to the extent that records or portions thereof fall within categories of deniable records enumerated in §87(2)(a) through (h).

STATE OF NEW YORK
COMMITTEE ON PUBLIC ACCESS TO RECORDS FOIL-AD-764

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

COMMITTEE MEMBERS
TIE ABEL - Chairman
J. ELMER BOGARDUS
MARIO M. CUOMO
MARY ANNE KRUPSAK
HOWARD F. MILLER
JAMES C. O'SHEA
GILBERT P. SMITH
ROBERT W. SWEET
EXECUTIVE DIRECTOR
ROBERT J. FREEMAN

April 5, 1978

[redacted]

Dear [redacted]:

Thank you for your interest in the Freedom of Information Law. Your inquiry pertains to records relative to your dismissal by the New York City Board of Education.

As you suggested in your letter, I contacted Mr. Walter Sweeney, the legal representative to the Division of Personnel of the Board of Education. Mr. Sweeney informed me that you had not been "dismissed" from a job but rather that you were refused employment. In addition, he stated that you have a right to appeal the determination to the Executive Director of the Board of Education. In view of the discussion, it is suggested that you appeal the determination. When the appeal is made, you will be granted access to all records relevant to the initial determination. By means of an appeal, any controversy that may have arisen under the Freedom of Information Law will in effect disappear.

Finally, Mr. Sweeney explained that although a tape recording of your hearing had been made available, you requested that a transcript of the recording be prepared. In this regard, the Freedom of Information Law does not require an agency to create a record in response to a request. As such, the Board of Education has no obligation to type a transcript of a tape recorded hearing on your behalf.

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: Walter Sweeney

STATE OF NEW YORK
COMMITTEE ON PUBLIC ACCESS TO RECORDS FOIL-AD-764

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

COMMITTEE MEMBERS
LUE ABEL - Chairman
ELMER BOGARDUS
MARIO M. CUOMO
MARY ANNE KRUPSAK
HOWARD F. MILLER
JAMES C. O'SHEA
GILBERT P. SMITH
ROBERT W. SWEET
EXECUTIVE DIRECTOR
ROBERT J. FREEMAN

April 5, 1978

[redacted]

Dear [redacted]:

Thank you for your interest in the Freedom of Information Law. Your inquiry pertains to records relative to your dismissal by the New York City Board of Education.

As you suggested in your letter, I contacted Mr. Walter Sweeney, the legal representative to the Division of Personnel of the Board of Education. Mr. Sweeney informed me that you had not been "dismissed" from a job but rather that you were refused employment. In addition, he stated that you have a right to appeal the determination to the Executive Director of the Board of Education. In view of the discussion, it is suggested that you appeal the determination. When the appeal is made, you will be granted access to all records relevant to the initial determination. By means of an appeal, any controversy that may have arisen under the Freedom of Information Law will in effect disappear.

Finally, Mr. Sweeney explained that although a tape recording of your hearing had been made available, you requested that a transcript of the recording be prepared. In this regard, the Freedom of Information Law does not require an agency to create a record in response to a request. As such, the Board of Education has no obligation to type a transcript of a tape recorded hearing on your behalf.

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: Walter Sweeney

STATE OF NEW YORK

COMMITTEE ON PUBLIC ACCESS TO RECORDS FOIL-AO-765

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

April 5, 1978

Mr. Mickey Mayes
[redacted]

Dear Mr. Mayes:

Thank you for your continued interest in the Freedom of Information Law. As requested, enclosed are copies of the amended Freedom of Information Law, the regulations promulgated by the Committee which have the force and effect of law, and an explanatory pamphlet on the subject.

According to your letter, the Town of Warrensburg in 1977 raised its fee for photocopying from twenty-five cents to fifty cents per page. In my opinion, a fee of fifty cents per photocopy constitutes a violation of law. In 1977, the regulations originally promulgated by the Committee were in effect. Under those regulations, agencies were permitted to charge no more than twenty-five cents per photocopy, unless a higher fee had been established by law prior to September 1, 1974, the effective date of the original Freedom of Information Law. Further, the amendments to the Freedom of Information Law provide specific direction with respect to fees. Section 87(1)(b)(iii) states that an agency may charge no more than twenty-five cents per photocopy not in excess of 9 by 14 inches unless a different fee is prescribed by law.

In view of the foregoing, it would appear that the fee adopted by the Town of Warrensburg represents a violation of the Freedom of Information Law both as originally enacted and as amended.

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: Town Board - Town of Warrensburg

STATE OF NEW YORK

COMMITTEE ON PUBLIC ACCESS TO RECORDS FOIL-AO-766

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

April 6, 1978

Mr. Norman L. Drew
[redacted]

Dear Mr. Drew:

Your letter addressed to Joseph Sterzinger, Director of the Bureau of Vital Records, has been transmitted to the Committee on Public Access to Records, which is responsible for advising with respect to the New York Freedom of Information Law. Although the Committee's authority is advisory only, its opinions have been cited as the basis for several judicial determinations. Consequently, a copy of the response will be sent to the Tompkins County Clerk in the hope that it will be persuasive.

In my opinion, census records in possession of the County Clerk that originated in the 19th century are in great measure accessible. The Freedom of Information Law is based upon the presumption that records are accessible, unless they fall within one or more categories of deniable information listed in the statute [see attached Freedom of Information Law, §87(2)(a) through (h)]. The records in question are accessible except to the extent that include information concerning adoptions or specific information such as pleadings or testimony relative to divorces. Records regarding both adoptions and the particulars of matrimonial proceedings are confidential by statute (Domestic Relations Law, §114 and 235 respectively). Based upon discussion with officials of the State Archives, it is unlikely that the census records contain confidential information pertaining to divorces. Consequently, the census records in which you are interested are accessible, except to the extent that they contain the confidential information heretofore discussed.

Enclosed is a copy of a pamphlet entitled "The New Freedom of Information Law and How to Use It" which I believe will be useful 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:nb
Encs.

cc: County Clerk
Tompkins County

Joseph Sterzinger, Director
Bureau of Vital Records

STATE OF NEW YORK

COMMITTEE ON PUBLIC ACCESS TO RECORDS FOIL-AO-762

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

April 5, 1978

Ms. Beverly J. Best
Town Clerk
Town of DeRuyter
DeRuyter, New York 13052

Dear Ms. Best:

Thank you for transmitting a copy of the resolution adopted by the Town of DeRuyter under the Freedom of Information Law.

Although compliance with the regulations promulgated by the Committee would generally be sufficient, I believe that the Town must adopt a resolution more specific. For example, a records access officer and appeals officer should be identified in the manner prescribed by the regulations. In addition, the sites where records are to be made available and the hours during which offices will be open for the purpose of responding to requests should be included in the Town's resolution.

While a model resolution for the purpose of adoption of rules consistent by those promulgated by the Committee has not yet been drawn, I have attached a copy of the model regulations offered to municipalities for the purpose of complying with the original Freedom of Information Law. Although its content is not exactly the same as that of the revised regulations (see attached), I believe that it may be useful in terms of guidance.

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:nb
Enc.

Enclosed for your consideration are copies of the Freedom of Information Law, 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, an explanatory pamphlet on the subject and an advisory opinion rendered by this office 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

Robert J. Freeman
Executive Director

RJF:js
Enc.

STATE OF NEW YORK
COMMITTEE ON PUBLIC ACCESS TO RECORDS

FOIL-AO-768

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

April 10, 1978

Mr. Raymond G. Kuntz
[redacted]

Dear Mr. Kuntz:

Thank you for your interest in complying with the Freedom of Information Law. Your letter deals not with rights of access per se, but rather with the obligation of the Little Falls School District to create records in response to a request.

In my letter of March 21 addressed to Dr. Arthur J. Brewster, I advised that bills submitted by a law firm to the Little Falls School District are accessible. Although it was not directly stated that the District need not create records not in its possession in response to a request, I believe that my letter implicitly so states. Specifically, the first sentence of the second paragraph advised that the records in question are accessible "to the extent that the bills exist..."

In sum, if no records have been compiled that are reflective of "the time or dollar amount allocable to each particular charge," the District has no obligation to compile the records on behalf of Dr. Brewster.

I hope that I have been of some assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:nb

cc: Dr. Arthur J. Brewster

STATE OF NEW YORK

COMMITTEE ON PUBLIC ACCESS TO RECORDS FOIL-AO-769

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

April 10, 1978

Mr. H. Neal Hellman
Business Manager Clerk
Board of Education
City School District
770 East Main Street
Little Falls, New York 13365

Dear Mr. Hellman:

Thank you for your letter of April 6. Your inquiry concerns the status of "preliminary material leading to the preparation of a tentative budget" for the Little Falls School District under the Freedom of Information Law.

Attached is a copy of the opinion written at the request of Ms. McEvoy, a member of the School Board. Ms. McEvoy sought advice with respect to a determination by the Board that the materials in question must remain confidential. In a general response, it was advised that the amended Freedom of Information Law is based upon a presumption of access and that "statistical or factual tabulations or data" found within intra-agency materials are accessible under §87(2)(g)(i). Further, to bolster my contention, a citation was provided for the leading judicial decision pertinent to the question.

Due to the general nature of the request, I advised in a general manner, i.e., that case law indicates that preliminary budget materials are accessible. Nevertheless, I agree with the inference in your letter that if disclosure of some of the figures might "impair" ongoing collective bargaining negotiations, to that extent the records may be withheld.

It is emphasized that §87(2) in its introductory language permits agencies to deny access to "records or portions thereof" which fall within the enumerated categories of deniable information. In this regard, it is possible that portions of a tentative budget may properly be withheld when disclosure would impair collective bargaining negotiations.

However, the remaining portions of the materials consisting of statistical or factual data should in my view 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:nb
Enc.

cc: Ms. Marian McEvoy

STATE OF NEW YORK
COMMITTEE ON PUBLIC ACCESS TO RECORDS FOIL-AO-770

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

April 10, 1978

Mr. Bruce Goldsmith
Headmaster
Summit Center
339 North Broadway
Upper Nyack, New York 10960

Dear Mr. Goldsmith:

Thank you for your letter of April 5.

As requested, attached are copies of a pamphlet entitled "The New Freedom of Information Law and How to Use It" and the provisions of the Mental Hygiene Law regarding confidentiality of records.

It is emphasized that the New York Freedom of Information Law is not applicable to student records maintained by educational agencies or institutions. Rights of access to such records are governed by the Family Educational Rights and Privacy Act, which is commonly known as the "Buckley Amendment" (20 U.S.C. 1232g). As such, enclosed are the regulations promulgated pursuant to the Buckley Amendment by the United States Department of Health, Education and Welfare. The regulations delineate the scope of "education records" and provide specific direction concerning rights of access of parents to records identifiable to their children.

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:nb
Encs.

STATE OF NEW YORK

COMMITTEE ON PUBLIC ACCESS TO RECORDS FOIL-AO-771

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

April 10, 1978

Mr. Michael Lamb
[redacted]

Dear Mr. Lamb:

Your letter addressed to Commissioner O'Shea has been transmitted to the Committee on Public Access to Records, of which Commissioner O'Shea is a member and which is housed in the Department of State.

It is noted at the outset that the Committee has only the authority to advise with respect to the interpretation of the Freedom of Information Law. The Committee does not have the capacity, as your letter suggests, to either open or close records. Consequently, the advice presented in the ensuing paragraphs may be accepted or rejected by an agency in possession of records.

First, what limitations may be imposed with respect to public access to personnel files of past and present public employees? In this regard, the Freedom of Information Law as amended is based upon a presumption of access. All records in possession of government are accessible, except to the extent that they fall within one or more categories of deniable records listed in §87(2)(a) through (h) of the Law. Some personnel records or portions thereof may likely be withheld pursuant to two of the exceptions. Section 87(2)(b) states that an agency may withhold records or portions thereof the disclosure of which would result in an unwarranted invasion of personal privacy. Further, §89(2)(b) of the Law lists five examples of unwarranted invasions of privacy, several of which may be applicable regarding records contained in a personnel file. Section 87(2)(g) states that an agency may withhold inter-agency or

intra-agency materials, except to the extent that such materials consist of statistical or factual tabulations or data, instructions to staff that affect the public or statements of agency policy or final determinations. If, for example, you were the subject of a determination by a school board, the determination would be accessible. On the other hand, an evaluation by a supervisor merely reflective of advice or an impression would be deniable pursuant to the cited provision.

Second, may the subject of records permit the custodian of records to release information pertaining to himself or herself? Section 89(3)(c) states that unless otherwise deniable, disclosure shall not be construed to constitute an unwarranted invasion of personal privacy "when the person to whom the records refer consents in writing to disclosure." Stated differently, if records could be characterized as deniable on the ground that disclosure would result in an unwarranted invasion of personal privacy, the subject of the records may sign a release permitting disclosure of the records.

Third, is it possible to "place a blanket" on personnel files? The Freedom of Information Law does not provide any authority to an individual regarding restrictions upon rights of access to records identifiable to himself or herself. On the contrary, the Freedom of Information Law is permissive. Although an agency may deny access to certain records, it need not, unless a different statute requires confidentiality. Consequently, you do not have the legal authority to seek to "place a blanket" upon your file.

And fourth, what recourse is there for one whose rights may have been violated? As noted in the previous paragraph, since the Freedom of Information Law is permissive, it would appear that a school district may disclose any records in its possession, except when records are confidential by statute. Therefore, it would appear that there are no "rights" involved. To reiterate, unless a statute precludes an agency from disclosing, nothing in the Freedom of Information Law requires that an agency deny access to records.

Enclosed are copies of the Freedom of Information Law and an explanatory pamphlet on the subject which may be useful 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
Enc.

cc: James C. O'Shea, Commissioner

STATE OF NEW YORK

COMMITTEE ON PUBLIC ACCESS TO RECORDS FOIL-AO-772

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

April 11, 1978

Mr. Bob Krolikowski
[redacted]

Dear Mr. Krolikowski:

Thank you for your letter of April 6. Your inquiry concerns the status of private institutions of higher education under the Freedom of Information Law.

Private educational institutions are not subject to the Freedom of Information Law, for the coverage of the Law includes only governmental entities [see attached, Freedom of Information Law, §86(3)]. Nevertheless, if such institutions receive federal funds, they must comply with the provisions of the 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" of students under the age of eighteen are accessible to their parents to the exclusion of all others, and that students attain the rights of their parents when they reach the age of eighteen. Consequently, if you are a student at an institution of higher education in receipt of federal funds, many records identifiable to you in possession of the institution should be made available to you.

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

Sincerely,

Robert J. Freeman

Robert J. Freeman
Executive Director

RJF:js

STATE OF NEW YORK

COMMITTEE ON PUBLIC ACCESS TO RECORDS FOIL-AO-773

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

April 13, 1978

Mr. Robert D. Stone
The University of the State
of New York
The State Education
Department
Albany, New York 12234

Dear Bob:

Thank you for your letter of April 10 regarding the Department's regulations promulgated under the Freedom of Information Law and your interest in complying with the Law.

I do not mean to be over-technical in my comments. Nevertheless, there are some aspects of the Department's regulations which I believe merit reconsideration.

First, reference is made to forms prescribed by the Commissioner that must be completed by an applicant. In this regard, the Committee has long advised that failure to complete a form prescribed by an agency cannot be a valid ground for denial of access. Any written request that "reasonably describes" the record sought should suffice [see Freedom of Information Law, §89(3)]. The rationale for this stance is based upon the fact that requests may not in all cases be submitted personally. For example, an applicant residing in Jamestown or Montauk should not be required to write to Albany, wait for the transmission of a form and then return the form to the access officer in Albany. Very simply, it takes an unnecessary amount of time.

Second, the amendments to the statute no longer make reference to a fiscal officer charged with the duty of preparing the payroll. Consequently, reference to the designation of a fiscal officer in the Committee's regulations has been deleted. You might want to delete the reference to the fiscal officer from your regulations.

And third, the Department's regulations contain no provisions regarding the time limitations for responding to

requests. It is suggested that language consistent with §1401.5(d) of the Committee's regulations be added to Department regulations.

I hope that I have been of some assistance. If you or your staff would like to discuss the matter, please do not hesitate to call.

Sincerely,

Robert J. Freeman
Executive Director

RJF:nb

OML-AO-206
FOIL-AO-774

By separating the definition into its component parts, one can conclude that the committees are clearly public bodies.

First, the committees consist of more than two members and are required to act by means of a quorum. In the case of the Nominating Committee, the rules of procedure adopted on February 27, 1978, require the presence of two-thirds of the membership. In the absence of a specific quorum requirement, §41 of the General Construction Law states that a committee or similar entity designated to act collectively may act only after having convened a majority of its total membership.

Second, the history cf the committees and the means by which they were created indicate that they transact public business for a public corporation, in this case a school district. As such, I do not believe that the committees could be considered as entities separate and distinct from the District. On the contrary, the resolutions pertaining to the committees were ratified by voters residing within the District.

Since the committees are public bodies, they are subject to the Open Meetings Law. Therefore, their meetings must be convened in public and preceded by the provision of notice to the public and the news media. In addition, although public bodies may enter into executive session in conjunction with §100(1) of the Law, it does not appear that the nominating process in its entirety could properly be discussed behind closed doors. It might be argued that an executive session could be held under §100(1)(f) 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..."

Nevertheless, the quoted provision could not in my view be appropriately invoked, except in a situation in which employment history is discussed.

Further, the rules of procedure adopted by the Nominating Committee require that deliberations of the committee be confidential. In this regard, insofar as the rules are more restrictive than the provisions of the Open Meetings Law, they are in my opinion null and void. Section 105(1) of the Open Meetings Law states that:

> [A]ny provision of a charter, administrative code, local law, ordinance, or rule or regulation affecting a public body which is more restrictive with respect to public access than this article shall be deemed superseded hereby to the extent that such provision is more restrictive than this article."

Therefore, the rule regarding confidentiality adopted by the committee, which is more restrictive than the Open Meetings Law, is superseded thereby and is of no effect.

Finally, Article III(8) of the resolution, which deals with procedures of the Nominating Committee, states that "[V]oting shall be by secret ballot." Secret ballot voting constitutes a violation of the Freedom of Information Law. Specifically, §87(3)(a) of the statute requires that each agency maintain:

> "a record of the final vote of each member in every agency proceeding in which the member votes..."

Since the Nominating Committee is both a public body under the Open Meetings Law and an "agency" under the Freedom of Information Law [see §86(3)], it must compile minutes (see Open Meetings Law, §101) and a record of votes identifiable to each member in each instance in which the member votes.

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: Scarsdale School Board

STATE OF NEW YORK
COMMITTEE ON PUBLIC ACCESS TO RECORDS FOIL-AO-775

COMMITTEE MEMBERS
ELIE ABEL, Chairman
T. ELMER BOGARDUS
MARIO M. CUOMO
MARY ANNE KRUPSAK
HOWARD F. MILLER
JAMES C. O'SHEA
GILBERT P. SMITH
ROBERT W. SWEET
EXECUTIVE DIRECTOR
ROBERT J. FREEMAN

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

April 17, 1978

Mr. Eugene T. Dooley
Town Clerk
Town of Brookhaven
Town Hall
Patchogue, New York 11772

Dear Mr. Dooley:

Thank you for your interest in complying with the Freedom of Information Law. Your inquiry concerns whether financial disclosure statements submitted to the Town of Brookhaven pursuant to its Local Law are subject to the Freedom of Information Law as soon as they are filed in the Office of the Town Clerk or whether statements may be withheld until review by the Town Board of Ethics.

In my opinion, the financial disclosure statements are subject to the Freedom of Information Law as soon as they are in possession of a town official. If the Town Clerk receives them prior to review by the Board of Ethics, the statements are subject to rights granted by the Freedom of Information Law when his office gains custody of the statements.

Having reviewed the financial disclosure forms, it is emphasized that portions of the statements may likely be deleted on the ground that disclosure would constitute an unwarranted invasion of personal privacy. Therefore, to the extent that the privacy exception would be applicable, portions of a financial disclosure statement may be withheld. Nevertheless, the remaining portions would be accessible whether in possession of the Clerk or the Board of Ethics.

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-776

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

April 17, 1978

Mr. Thomas J. Kelly
[redacted]

Dear Mr. Kelly:

Thank you for your letter of April 6. Your inquiry concerns the scope of an authorization to release school records identifiable to your child sought by Lansingburgh High School.

It is noted at the outset that the question does not deal with the New York Freedom of Information Law, but rather arises under a federal statute, the Family Educational Rights and Privacy Act, which is commonly known as the "Buckley Amendment." In brief, the Buckley Amendment states that education records identifiable to a student under the age of eighteen are accessible only to the parents of the student, unless the parent signs a release authorizing disclosure. You may consent to disclosure of all of the records sought to be released by the school. On the other hand, unless otherwise provided by statute, you may effectively prohibit the school from releasing any of the records in question. Consequently, it is suggested that you discuss the matter with officials of Lansingburgh High School to determine which records, if any, should in your judgment be released to third parties.

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:nb

cc: Lansingburgh High School
Guidance Office

STATE OF NEW YORK

COMMITTEE ON PUBLIC ACCESS TO RECORDS FOIL-AO-777

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

April 17, 1978

Mr. Henry E. Nass
[redacted]

Dear Mr. Nass:

Thank you for your letter and the correspondence appended to it. According to the materials, the controversy pertains to rights of access to records relative to abandoned property.

I agree with your contention that the records sought are accessible and that a reason for the request need not be given as a condition precedent to inspection.

First, the Freedom of Information Law is based upon a presumption of access. Records may be denied only to the extent that they fall within categories of deniable records listed in §87(2) of the Freedom of Information Law. Moreover, §89(5) of the Law states that:

> "Nothing in this article shall be construed to limit or abridge any otherwise available right of access at law or in equity of any party to records."

In this regard, since §1401 of the Abandoned Property Law specifically states that the records in question constitute "public record," the provisions of the Freedom of Information Law cannot in my view be asserted to abridge rights granted by §1401.

And second, the Committee long ago resolved that if records are available, they should be made equally available to any person without regard to status or interest.

Consequently, I believe that an inquiry by the Department of Audit and Control with respect to the purpose of your request

is contrary to one of the basic principles 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:nb

cc: Mr. Marvin Rosen
Mr. Walter Holmes

STATE OF NEW YORK
COMMITTEE ON PUBLIC ACCESS TO RECORDS FOIL-AO-778

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EXECUTIVE DIRECTOR
ROBERT J. FREEMAN

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

April 17, 1978

David P. Fishbein, Esq.
Town Attorney
Town of Riverhead
200 Howell Avenue
Riverhead, New York 11901

Dear Mr. Fishbein:

Thank you for your letter of April 12. Your inquiry concerns rights of access to marriage records kept by a town clerk.

It is noted at the outset that the Freedom of Information Law is not applicable to rights of access to marriage records. The governing provisions of law under the circumstances are found in Article Three of the Domestic Relations Law. Specifically, §19 of the Domestic Relations Law states that records pertaining to marriages are accessible "whenever the same may be necessary or required for judicial or other proper purposes." Consequently, marriage records must be made available upon a showing of a "proper purpose," which unfortunately is undefined in terms of scope by the statute.

Although there is a paucity of case law interpreting the scope of what constitutes "proper purpose," I believe that a request for records sought for a commercial purpose would likely fall outside of the "proper purpose" standard. In cases in which there was a more significant nexus between the applicant for a marriage record and the applicant under the circumstances that you presented, it was held that the records need not be made available [see Goldsmith v. Hubbard, 183 Misc. 889, 52 NYS 2d 871 (1945)].

In sum, the registrar of vital records, in this instance the town clerk, has substantial discretion to determine what constitutes a "proper purpose." Moreover, barring any legal

direction to the contrary, the clerk in my view has no obligation to furnish a marriage record to an individual seeking the records for commercial purposes.

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:nb

STATE OF NEW YORK
COMMITTEE ON PUBLIC ACCESS TO RECORDS FOIL-AO-779

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

April 18, 1978

Mr. Patrick J. King, Jr.
Clerk and Registrar
Village of Woodsburgh
30 Piermont Avenue
Hewlett, New York 11557

Dear Mr. King:

Thank you for your interest in the Freedom of Information Law. Your inquiry pertains to a situation in which the City of Long Beach permitted inspection of records, but refused to make copies on request.

The Freedom of Information Law grants not only the right to inspect records, but also requires agencies to make copies upon payment or offer to pay a fee prescribed by the agency pursuant to the Freedom of Information Law [§89(3)]. The right to make copies of accessible records was established long before the existence of the Freedom of Information Law [see e.g. Re Becker, 200 AD 178, 192 NYS 754 (1922)], and merely reaffirms a judicial stance in existence for decades.

Your letter also indicates that the agency refused to issue a written denial of access to the copies requested. In this regard, the regulations promulgated by the Committee, which have the force of law, state that a denial of access must be in writing and provide the reasons therefor (see attached regulations, §1401.7). As such, if an agency denies access, its denial must be given in writing and must inform the applicant of his or her right to appeal to the head or governing body of the agency.

Further, it appears that the City of Long Beach has not adopted rules or regulations in compliance with the amended Freedom of Information Law. To force compliance with this aspect of the Law, an individual may initiate a proceeding

under Article 78 of Civil Practice Law and Rules to compel the City to perform a duty that it is required to perform by law. However, if the agency has not promulgated the rules or amended existing rules, there is no penalty that may be invoked.

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:nb
Enc.

cc: City of Long Beach

FOIL-AO-780

STATE OF NEW YORK

COMMITTEE ON PUBLIC ACCESS TO RECORDS FOIL-AO-781

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

April 19, 1978

Mr. Paul Feiner
[redacted]

Dear Mr. Feiner:

Thank you for your interest in the Freedom of Information Law. Your question pertains to the status of the State Legislature under the Law.

It appears that you are under the impression that the State Legislature has no obligation to release records to the public. On the contrary, although the State Legislature does not fall within the broad access standards applicable to the remainder of government in New York State, it is subject to §88 of the Freedom of Information Law (see attached), which grants access to eleven categories of records in its possession. Moreover, while rights of access granted by §88 are not as broad as those granted with respect to other entities of government, I believe that both houses have substantial responsibilities to provide public access to records.

To the best of my knowledge, there have been no bills introduced to date that require the State Legislature to conform to the same standards as other entities of government. I am aware of two companion bills, however, which if enacted, would require both houses of the Legislature to compile a payroll record indicating the city, county, town, village or hamlet of persons on the legislative payroll. If enacted, the substance of the legislative payroll would differ from that of other agencies of government, which are required to indicate public office addresses of public employees. I cannot conjecture as to the chance of passage of the bills (Assembly bill 10336; Senate bill 7698).

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:nb
Enc.

FOIL-AD-782

STATE OF NEW YORK
COMMITTEE ON PUBLIC ACCESS TO RECORDS FOIL-AO- 783

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

April 20, 1978

Mr. Ernst Auerbacher
School District Clerk
Rush-Henrietta Central
School District
Administration Building
2034 Lehigh Station Road
Henrietta, New York 14467

Dear Mr. Auerbacher:

Thank you for your interest in complying with the Freedom of Information Law and for sending a copy of the revised policy adopted by the Rush-Henrietta Central School District.

Although I believe that the procedures adopted by the District comply with those promulgated by the Committee, I would like to direct your attention to provisions within the Committee's regulations that should perhaps be reconsidered.

While paragraph (4) of the policy statement indicates that records will be provided within five business days of receipt of a written request, there may be circumstances in which a request cannot be answered within the stated time limit. Under such circumstances, the records access officer should acknowledge receipt of the request and estimate the date when production or denial will be forthcoming. Further, according to the Committee's regulations, if no response is given within five business days of receipt of a request, or if a request is acknowledged but a determination is not made within ten business days of the date of the acknowledgment, the request is considered a denial that may be appealed [see attached regulations, §1401.5(d)].

In addition, the regulations do not specify that a determination on appeal must be rendered within seven business days of the receipt of an appeal. It is suggested that the policy statement be amended accordingly in order that an appellant is apprised of an anticipated date of a response.

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-784

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

April 20, 1978

Mrs. Elizabeth F. Smith
[redacted]

Dear Mrs. Smith:

Thank you for your letter of April 7.

I am well aware of problems that have arisen with respect to access to census information as well as vital records sought for the purpose of genealogical searches.

In my opinion, census records in possession of a county clerk that originated in the 19th century, for example, are in great measure accessible. The Freedom of Information Law is based upon the presumption that records are accessible, unless they fall within one or more categories of deniable information listed in the statute [see attached Freedom of Information Law, §87(2)(a) through (h)]. The census records in question are likely accessible except to the extent that they include information concerning adoptions or specific information such as pleadings or testimony relative to divorces. Records regarding both adoptions and particulars of matrimonial proceedings are confidential by statute (Domestic Relations Law, §114 and §235 respectively). Based upon discussions with officials of the State Archives, it is unlikely that the census records contain confidential information pertaining to divorces. Consequently, the census records in which you are interested are likely accessible, except to the extent that they contain the confidential information heretofore discussed.

With respect to vital records, rights of access granted by the Freedom of Information Law are not applicable. On the contrary, §4173 and §4174 of the Public Health Law govern access to vital records and state that those records may be available upon a showing of a "proper purpose." Unfortunately, the scope of the phrase "proper

purpose" remains undefined. To further compound the problem, the State Health Department has issued a directive to local registrars of vital statistics instructing them to direct individuals who want to perform a genealogical search to transmit their requests to the State Health Department. In view of these difficulties, I recently discussed a possible amendment to the Public Health Law regarding access to death records with a state legislator, whom I believe will introduce remedial legislation on the subject.

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-785

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

COMMITTEE MEMBERS
ELIE ABEL Chairman
T. ELMER BOGARDUS
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EXECUTIVE DIRECTOR
ROBERT J. FREEMAN

April 24, 1978

Professor Bernard Eisenberg
[redacted]

Dear Professor Eisenberg:

Thank you for your interest in the Freedom of Information Law. Your inquiry concerns the right to inspect budgets and expenditures for Kingsborough Community College for fiscal years 1975-76, 1976-77 and 1977-78.

The records sought are in my opinion clearly available under the Freedom of Information Law. The Law, which was recently amended, is based upon a presumption of access. All records are accessible except to the extent thay they fall within enumerated categories of deniable information listed in §87(2)(a) through (h) of the statute (see attached).

Further, although §87(2)(g) enables an agency to deny access to "inter-agency or intra-agency materials", such materials are accessible to the extent that they consist of statistical or factual tabulations or data, instructions to the staff that affect the public or agency policy or determinations. Relative to your inquiry, budget records and records reflective of breakdowns of expenditures are accessible, for they constitute statistical and factual data as well as final determinations made by an agency.

To request the records, it is suggested that you submit a request in writing, reasonably describing the records sought. The request should be directed to the designated records access officer, who has five business days from the receipt of your request to provide a response.

Enclosed for your consideration 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, and an explanatory pamphlet

entitled "The New 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:nb
Encs.

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

COMMITTEE MEMBERS
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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-787

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

April 24, 1978

[redacted]

Dear [redacted]:

Thank you for your continued interest in the Freedom of Information Law. Your inquiry pertains to unsuccessful attempts to gain access to records in possession of the New York State Insurance Department.

As you recall, an advisory opinion regarding the substantive issues surrounding access to your complaint file was written on your behalf and sent to the State Insurance Department on February 17. Your most recent letter deals not with rights of access per se but with the procedural obligations of the Insurance Department. Specifically, the regulations promulgated by the Committee, which have the force and effect of law, require that denials of access by agencies be stated in writing and provide the reasons therefor. In addition, the denial must apprise the applicant of his or her right to appeal to the head of the agency and give the name and address of the person to whom an appeal should be directed. Further, §89(4) of the Freedom of Information Law requires the head of an agency or the person designated to hear appeals to respond fully in writing to an appeal within seven business days of receipt of the appeal. Copies of appeals and the determinations thereon must be transmitted to the Committee on Public Access to Records. If the Insurance Department has not complied with the aspects of the Law described herein, the Department has in my view acted in violation of 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:nb

cc: Morton Greenspan, Esq.

STATE OF NEW YORK

COMMITTEE ON PUBLIC ACCESS TO RECORDS FOIL-AO-788

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

April 24, 1978

Mr. Roland W. Beers
Village Clerk
Village of New Hyde Park
Municipal Building
Jericho Turnpike and New Hyde
Park Road
New Hyde Park, New York 11040

Dear Mr. Beers:

Thank you for your letter of April 19. Your communication concerns a denial of access by the Village of New Hyde Park with respect to time cards.

According to your letter as well as our discussions on the matter, the time cards contain not only factual information concerning hours of work performed by municipal employees, but also contain information relative to the employees' "tax structure".

I agree with your contention that the entire time card need not be made available. Although the amended Freedom of Information Law is based upon a presumption of access, §87(2) states that records or "portions thereof" may be withheld when records or portions of records fall within enumerated categories of deniable information listed in paragraphs (a) through (h) of the cited provision. While I believe that the factual tabulations reflective of work performed by public employees are clearly accessible pursuant to §87(2)(g)(i), additional information contained in the time cards concerning the level of taxation of public employees, such as the amounts of monies withheld or the number of deductions claimed, would be deniable on the ground that disclosure would constitute an unwarranted invasion of personal privacy under §87(2)(b) and §89(2).

As a general matter, the Committee has advised that records relevant to the performance of the official duties of public employees are accessible, for disclosure of those records would

constitute a permissible as opposed to an unwarranted invasion of personal privacy. For example, records indicating the number of hours worked by public employees are clearly relevant to the performance of their duties and as such are accessible. On the other hand, the number of deductions claimed by a particular employee has no relevance to the manner in which the employee performs his or her official duties. As such, in my view, disclosure of tax information would constitute an unwarranted invasion of personal privacy (see Matter of Wool, Supreme Court, Nassau County, NYLJ, November 22, 1977).

In sum, I believe that the statistical or factual portions of a time card that are reflective of the performance of the duties of public employees are accessible, while remaining portions of the time cards having no relevance to the performance of their duties may be withheld.

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:nb

STATE OF NEW YORK

COMMITTEE ON PUBLIC ACCESS TO RECORDS FOIL-AO-789

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

April 24, 1978

Mr. J. Paul Graham
Dean of Business Affairs
Mohawk Valley Community College
1101 Sherman Drive
Utica, New York 13501

Dear Mr. Graham:

I am in receipt of a copy of your letter to Leo Harford, in which you stated that you are waiting for a determination from the Committee concerning Mr. Harford's request.

Please be advised that the Committee on Public Access to Records has no authority to adjudicate or render determinations; it merely has the power to advise. Consequently, the appeals person or body designated by the Mohawk Valley Community College must render a determination regarding the appeal submitted by Mr. Harford.

To the extent that I recall the controversy, it appears that Mr. Harford has been permitted to inspect sabbatical leave proposals but has been denied the opportunity to make copies. If that is the case, it is advised that the right to copy or to have copies made upon payment or offer to pay a fee prescribed by an agency is part and parcel of the Freedom of Information Law [§89(3)]. Stated differently, if the College permits Mr. Harford to inspect the leave proposals, Mr. Harford should also have the ability to make copies or have copies made on request.

With regard to the deletion of names of the subjects of the sabbatical leave proposals, it is my understanding that Mr. Harford has reviewed the minutes of meetings of the Board of Trustees and by means of the minutes has identified the persons to whom the leave proposals relate. If that is the case, although identifying details may be withheld when disclosure would constitute an unwarranted invasion of personal privacy,

deletion in this instance would not in my view serve any useful purpose.

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: Leo Harford

STATE OF NEW YORK

COMMITTEE ON PUBLIC ACCESS TO RECORDS FOIL-AO-790

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

April 25, 1978

Mr. Art Trozzi
Assistant to the Mayor
City of Utica
Office of the Mayor
City Hall
Utica, New York 13502

Dear Mr. Trozzi:

Thank you for your interest in complying with the Freedom of Information Law. Your inquiry pertains to the authority to appoint a person or body to hear appeals following denials of access.

Section 87(1)(a) of the Law states that:

> "...the governing body of each public corporation shall promulgate uniform rules and regulations for all agencies in such public corporation pursuant to such general rules and regulations as may be promulgated by the committee on public access to records in conformity with the provisions of this article, pertaining to the administration of this article."

In view of the quoted provision, it is clear that the governing body of a public corporation, such as a county legislature or a city council, has the responsibility to adopt uniform rules for all agencies within the public corporation.

The designation of the governing body represents a clarification of the Freedom of Information Law as originally enacted. The original statute did not specify who had the responsibility for issuing regulations. Consequently, disputes arose between governing bodies and executives. It is hoped that the amendments to the Law will diminish the occurrence of such controversies.

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-791

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

April 25, 1978

Mr. Ernest Coralluzzo
75A0848
Drawer B
Stormville, New York 12582

Dear Mr. Coralluzzo:

Thank you for your interest in the Freedom of Information Law. Several questions are raised in your letter.

First, the New York State Division of Parole is subject to the New York Freedom of Information Law. It does not fall within the provisions of either the federal Freedom of Information Act or the federal Privacy Act, for those statutes apply only to records in possession of federal agencies. To request records from the Division of Parole, you should direct your inquiry to the Senior Parole Officer at the correctional facility in which you are located and send a copy of the request to Edward R. Hammock, Chairman, New York State Division of Parole, 1450 Western Avenue, Albany, New York 12203.

Second, what is the procedure for having records related to charges that were dismissed or that resulted in acquittals sealed? It is suggested that you contact the New York State Division of Criminal Justice Services, which is located at the Executive Park Tower, Stuyvesant Plaza, Albany, New York 12203. Your inquiry should be sent to the Director of Data Systems.

And third, does an inmate have the ability to inspect medical records pertaining to himself? Section 5.20(7) of the regulations promulgated by the Department of Correctional Services states that medical records shall be made available to:

> "...attorneys representing inmates in proceedings in which the inmate's commitment pursuant to section 408 of the Correction 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..."

In view of the quoted provision, although an inmate may not have direct access to his records, indirect access may be provided through an attorney.

Attached for your consideration are copies of the Freedom of Information Law and an explanatory pamphlet on the subject.

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:nb
Encs.

STATE OF NEW YORK

COMMITTEE ON PUBLIC ACCESS TO RECORDS FOIL-AO-792

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

April 25, 1978

Mr. Patrick M. Hanley, Sr.
[redacted]

Dear Mr. Hanley:

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. In your letter, you suggested that an investigation be commenced to determine whether the Office of General Services has violated any provision of law due to its failure to provide you with records reflective of the total amount of federal money granted to the Office of General Services during the fiscal year 1977.

According to the denial of access attached to your letter, the Office of General Services does not have possession of records containing the information sought. In this regard, although the Freedom of Information Law provides access to a great number of records in possession of government, an agency has no obligation to create a record in response to a request [see attached Freedom of Information Law, §89(3)]. Under the circumstances, since the information sought does not exist in the form of a record, the Office of General Services has no obligation to create a new record on your behalf.

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-793

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

April 26, 1978

Mr. Peter S. Wilson
Clerk
Board of Supervisors
County of Fulton
County Building
Johnstown, New York 12095

Dear Mr. Wilson:

Thank you for your interest in complying with the Freedom of Information Law and for sending a copy of the resolution adopted by the Fulton County Board of Supervisors.

Having reviewed the resolution, I believe that its contents comply with both the Freedom of Information Law and the regulations promulgated by the Committee in all respects.

Thanks again.

Sincerely,

Robert J. Freeman

Robert J. Freeman
Executive Director

RJF:nb

STATE OF NEW YORK
COMMITTEE ON PUBLIC ACCESS TO RECORDS

OML-AO-214
FOIL-AO-794

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

April 26, 1978

Robert C. Glennon, Esq.
State of New York
Executive Department
Adirondack Park Agency
P.O. Box 99
Ray Brook, New York 12977

Dear Bob:

Thank you for sending your draft of revisions regarding Agency rules and regulations. I attempted to contact you to discuss the proposals on several occasions without success.

First, although the Agency may promulgate rules regarding the Open Meetings Law, there is no need to do so. The Open Meetings Law is basically procedural in nature and there is in my view no need to reiterate what is already stated in the Law.

Nevertheless, I have two comments with respect to the proposal. The provision pertaining to executive sessions refers only to a vote of "Agency" members. However, the definition of "meeting" in a preceding section refers not only to the Agency, but also to "any committee, or other body consisting of Agency members, designees or members of the general public formally created by the Agency..." Therefore, if you promulgate rules regarding the Open Meetings Law, the reference to "Agency members" in the provision dealing with executive sessions should be altered to make reference to members of all public bodies that "transact business" for or on behalf of the Agency.

The last section, which pertains to exemptions, states that Agency deliberations on "projects or variances" are considered quasi-judicial and therefore outside the scope of the Open Meetings Law. In my opinion the exemption is overly broad. Would all deliberations regarding projects be considered quasi-judicial? Might not some of those discussions be classified as either quasi-legislative or administrative? Furthermore, as we have discussed,

the scope of what constitutes a quasi-judicial proceeding has not to the best of my knowledge been specifically defined. It is possible that deliberations regarding a variance may not be considered quasi-judicial since the granting of a variance is reflective of a privilege; rights per se are not involved. Although I tend to agree that deliberations regarding a variance would in the opinion of a court be considered quasi-judicial, there is no case law that specifically upholds the proposition.

I have but two comments with regard to the proposal concerning the Freedom of Information Law. First, much of the proposal is unnecessary for it merely restates statutory provisions. For example, the proposal defines "record" and specifies the grounds for denial that may be offered. In addition, the proposal seeks to define both "statistical tabulation" and "factual tabulation." When phrases such as those quoted are defined, there is a danger that the definitions will be more restrictive than the terms of the statute. Moreover, §87(2)(g)(i) of the Law makes reference to "statistical or factual tabulations or data"(emphasis mine). In my view, factual data might in the eyes of a court consist of something more than "a collection or orderly presentation" of statistical or factual information. I recommend that the two definitions in question be deleted.

Finally, subdivision (a)(5) of the section dealing with denial of access to records refers to records otherwise "exempt" pursuant to subdivision (2) of §87 of the Freedom of Information Law. I do not mean to be overtechnical. However, the Freedom of Information Law does not provide exemptions, but rather the ability to deny. The only "exemption" in the Law is found in §87(2)(a), which refers to records that are exempt from disclosure by statute. If records are not exempt under §87(2)(a), they may be deniable under the remaining provisions within §87(2).

Thanks again for sending a copy of your proposals. If you would like to discuss the matter, please do not hesitate to call.

Sincerely,

Robert J. Freeman
Executive Director

RJF:js

STATE OF NEW YORK

COMMITTEE ON PUBLIC ACCESS TO RECORDS FOIL-AO-795

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

April 26, 1978

Mr. Leonard Rosen
[redacted]

Dear Mr. Rosen:

Thank you for your letter of April 22. Your inquiry concerns the ability to gain access to payroll information regarding specific employees in possession of the Bureau of Disability Determination, which is housed in the Department of Social Services.

It is noted at the outset that the Freedom of Information Law does not require an agency to compile records in response to a request, except in circumstances specified by the Law. One of the circumstances in which a record must be compiled involves the creation of a payroll record consisting of the name, public office address, title and salary of all officers or employees of an agency [§87(3)(b)]. Therefore, you have the ability to request and inspect the payroll record in possession of the Department. However, the Department has no obligation to create a record on your behalf identifying employees that you have designated.

It is suggested that you direct your request to Stephen Morello, Records Access Officer, Department of Social Services, 40 North Pearl Street, Albany, New York 12243, and request copies of the pages in the payroll record that identify the employees in which you are interested. In addition, you should offer to pay the requisite fees for copying.

You indicated that you are interested in knowing the amount of money paid by particular employees out of each check for federal, state, city and Social Security tax. In my opinion, the Department may deny access to information of that nature on the ground that disclosure would constitute an unwarranted invasion of personal privacy. As a general matter, the Committee has advised and the courts have tended to uphold the notion that

records relative to the performance of the official duties of public employees are accessible, for disclosure of such records would constitute a permissible as opposed to an unwarranted invasion of personal privacy. Conversely, records that are not relevant to the performance of the official duties of public employees may be withheld. In my opinion, the amount of money withheld from paychecks for taxes has no relevance to the performance of the duties of the employees in question. Consequently, the only items that must be made available in relation to your inquiry are those contained in the payroll record required to be compiled by §87(3)(b).

By means of payroll records, you also have the ability to determine when particular employees were promoted to higher grades. For example, a review of last year's payroll record in comparison with a most recent payroll record should indicate which employees were upgraded.

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-796

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EXECUTIVE DIRECTOR
ROBERT J. FREEMAN

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

April 27, 1978

Mr. Eugene T. Dooley
Town Clerk
Town of Brookhaven
Town Clerk's Office
Town Hall
Patchogue, New York 11772

Dear Mr. Dooley:

Thank you for your interest in complying with the Freedom of Information Law and for transmitting a copy of the financial disclosure statement issued by the Town of Brookhaven.

You have asked that I review the financial disclosure statement and indicate each area in which I feel that the information should be deleted on the ground that disclosure would constitute an unwarranted invasion of personal privacy. Since the privacy standard in the statute is flexible, subject to interpretation, and involves subjective judgments, I do not feel that I have the authority or the capacity to determine which portions of the statement would if disclosed result in an unwarranted as opposed to a permissible invasion of personal privacy. The Committee has not issued guidelines regarding unwarranted invasions of personal privacy because it cannot render what is tantamount to a judicial determination concerning the scope of this ground for denial. If I were to offer advice with respect to each of the provisions in the financial disclosure statement, I would be imposing my judgment which would in my view be unfair and somewhat arbitrary.

Nevertheless, on page one of the statement, the subject of the statement is required to submit his or her bank account identification numbers. In this instance, I would conjecture that disclosure of the account numbers could have a harmful effect and would serve no useful purpose. It is suggested that this portion of the statement may be deleted pursuant to §89(2)(b)(iv), which

states that an unwarranted invasion of personal privacy includes:

> "...disclosure of information of a personal nature when disclosure would result in economic or personal hardship to the subject party and such information is not relevant to the work of the agency requesting or maintaining it..."

I believe that disclosure of bank account numbers could result in personal hardship to the subject of the statement and that the identification numbers are in no way relevant to the work of the Town of Brookhaven.

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-797

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

April 28, 1978

Mr. Howard Ervin
[redacted]

Dear Mr. Ervin:

Thank you for your interest in the Freedom of Information Law. Your inquiry concerns the status of the New York State Board of Law Examiners under the Freedom of Information Law and the extent to which records pertaining to you in possession of the Board are accessible.

Under the definition of "agency" [§86(3)], all governmental entities in the state are subject to the statute, "except the judiciary" and the State Legislature. Section 87(1) defines "judiciary" to include "the courts of the state, including any municipal or district court, whether or not of record." Since the Board of Law Examiners is not a court, but rather an arm thereof, it is in my view an agency subject to the Freedom of Information Law.

Nevertheless, §90(10) of the Judiciary Law states that:

> "[A]ny statute or rule to the contrary notwithstanding, all papers, records and documents upon the application or examination of any person for admission as an attorney and counsellor at law and upon any complaint, inquiry, investigation or proceeding relating to the conduct or discipline of an attorney or attorneys, shall be sealed and be deemed private and confidential. However, upon good cause being shown, the justices of the appellate division having jurisdiction are empowered, in their discretion, by written order, to

> permit to be divulged all or any part of such papers, records and documents. In the discretion of the presiding or acting presiding justice of said appellate division, such order may be made either without notice to the persons or attorneys to be affected thereby or upon such notice to them as he may direct..."

In view of the provision quoted above, it appears that records pertaining to you in possession of the Board of Law Examiners are confidential unless a court in its discretion determines to disclose any or all of the records in question. The Freedom of Information Law does not affect the quoted provision, for §87(2)(a) of the Law states that an agency may deny access to records that "are specifically exempted from disclosure by state or federal statute..."

It is suggested, however, that you obtain a copy of the relevant rules on the subject from the Appellate Division in which you reside.

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:nb

STATE OF NEW YORK
COMMITTEE ON PUBLIC ACCESS TO RECORDS FOIL-AO-798

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

May 1, 1978

Mr. Charles K. Scott
Executive Secretary
City of Watertown
Municipal Civil Service
Commission
Room 301
Watertown Municipal Building
245 Washington Street
Watertown, New York 13601

Dear Mr. Scott:

Thank you for your interest in complying with the Freedom of Information Law. Your inquiry concerns the status of records that the Civil Service Commission of the City of Watertown has classified as "confidential".

It is noted at the outset that the word "confidential" has in my view been much overused and as a consequence has resulted in a great deal of confusion regarding its meaning. Based upon a case law rendered in New York, records may be classified as "confidential" in only two instances. First, records are confidential if a statute specifically precludes disclosure. And second, records may be deemed confidential if in the opinion of a court disclosure would on balance result in detriment to the public interest [see e.g., Cirale v. 80 Pine Street Corp., 35 NY 2d 113(1974)]. As such, to be characterized as confidential, records must be exempt from disclosure by statute or deemed confidential after having been reviewed by a court.

With respect to records relative to eligible lists and applications, I believe that the rules promulgated by the Department of Civil Service can be used to provide direction. The regulations adopted by the State Department of Civil Service provide by implication that neither applications nor applicants' names should be publicly disclosed. Section 71.1 of the Regulations states:

> "A candidate's application for examination may be exhibited, upon request, to the appointing officer to whom his name is certified, or to his representative..."

The implication of the above is that an application can be made available only to specified officials. Next, Section 71.2 provides:

> "A candidate's papers may not be exhibited except as provided in section 71.1...provided, however, that the administrative director may, upon request, authorize the inspection of a candidate's application and other papers, for legitimate official purposes, by law enforcement and other officials or their representatives, where there appear satisfactory and compelling reasons for the need for such inspection."

And third, Section 71.3 provides:

> "Eligible lists may be published with the standing of the persons named in them, but under no circumstances shall the name of persons who failed examinations be published nor shall their examination papers be exhibited or any information given about them except as provided in this regulation..."

By gaining access to applications, it would be possible to discover the names of those individuals who failed their examinations. Therefore, by implication, disclosures of applications would have the effect of circumventing the intent of the regulation promulgated by the State Department of Civil Service. Moreover, rules adopted by a municipal civil service commission, must be approved by the State Department of Civil Service [Section 20, Civil Service Law].

In terms of the Freedom of Information Law, I believe that the eligible lists must be made available, while applications and other information reflective of all candidates taking examinations and their scores may be withheld. Since records indicating the scores of all candidates identify those candidates who fail examinations, such records may be denied on the ground that disclosure would constitute an unwarranted invasion of personal privacy [see Freedom of Information Law, §87(2)(b) and §89(2)(b)]. Disclosure of lists of applicants for exams compared with eligible lists would reveal the names of failing candidates, which would likely embarrass some of the individuals who failed. On the other hand, the rules

promulgated by the Department of Civil Service indicate that the elegible list that identifies passing candidates may be made available. Although the regulations state that such lists "may" be made available, the Freedom of Information Law provides no such discretion. As such, I believe that eligible lists are accessible and applications for examinations may be withheld.

Personnel folders regarding each employee may be in part accessible or deniable depending upon their contents. Relevant to the folders is §87(2)(g), which states that an agency may deny access to records or portions thereof that:

> "are inter-agency or intra-agency materials 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."

In view of the quoted provisions, statistical or factual tabulations indicating hours of work performed, time on the job, dates of promotion, salary, title and similar information must be disclosed. In addition, if, for example, an employee is the subject of a grievance which has resulted in a determination, the determination is also accessible. Contrarily, records in the nature of advice or impression are deniable. Further, as noted previously, there may be some items in a personnel folder which may be withheld based on the privacy exception in the Freedom of Information Law. With respect to records identifiable to public employees, the Committee has advised and the courts have tended to uphold the notion that records reflective of the performance of official duties of public employees are accessible, since disclosure would constitute a permissible as opposed to an unwarranted invasion of personal privacy. Conversely, if records have no relevance to the manner in which public employees perform their duties, they may be withheld. For instance, records indicating social security numbers, the number of deductions claimed or the amount of taxes withheld from an employee's paycheck have no relevance to the performance of duties and therefore may be withheld on the ground that disclosure would constitute an unwarranted invasion of personal privacy.

The names of "old examination candidates" would be accessible or deniable based upon the same reasoning as that offered concerning applications and eligible lists.

Similarly, rights of access to the contents of a correspondence file "set up by departments" would be determined by a review of §87(2)(g), which in essence contains a double negative. Although an agency may deny access to inter-agency or intra-agency materials, it may do so only to the extent that records or portions thereof are not statistical or factual tabulations or data, instructions to staff that affect the public, or agency policy and determinations.

Finally, access to "decentralized exams with score sheets" is governed by §87(2)(h), which enables an agency to deny access to records or portions thereof that:

> "are examination questions or answers which are requested prior to the final administration of such questions."

Under the quoted provision, if an examination question is to be used in the future, the question and the answer are deniable. However, if the examination question will never be used again, both the question and the answer 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

Robert J. Freeman
Executive Director

RJF:nb
Enc.

STATE OF NEW YORK

COMMITTEE ON PUBLIC ACCESS TO RECORDS FOIL-AO-799

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

May 1, 1978

Mr. Peter L. Davis
[redacted]

Dear Mr. Davis:

Thank you for your interest in the Freedom of Information Law. Your inquiry pertains to a denial of access by the Office of the District Attorney of New York County to a "prosecutor's trial preparation manual."

It appears that the manual is reflective of routine prosecutorial techniques and is somewhat analogous to the manual determined to be accessible in Matter of Fink (Supreme Court, New York County, NYLJ, July 25, 1977). Although the Fink determination was rendered under the Freedom of Information Law as originally enacted, I concur with your contention that rights of access to the manual in question are to be based upon the same principles as those enunciated in Fink. Moreover, the amended Freedom of Information Law indicates that the Legislature intended to permit public access to records containing routine techniques and procedures adopted by law enforcement agencies.

The Fink decision was based largely upon §88(1)(e) of the Freedom of Information Law as originally enacted. The cited provision granted access to "administrative staff manuals and instructions to staff that affect the public." After having reviewed the manual, which was devised by the Special Prosecutor for Nursing Homes and Health Related Facilities, the court in Fink discovered that nothing in its contents would involve:

> "'the premature disclosure of the results of an investigation,' or prevent the government from presenting 'its strongest case in court,' or reveal 'the procedures by which the agency conducted its investigations,

> and by which it has obtained information' (Frankel v. S.E.C., 460 R. 2d 813, 818, cert. den. 409 U.S. 889). All that is set forth is by way of techniques, procedure and example. Nothing relates to any particular investigation."

If the manual is similar to that described in Fink and contains, for instance, models regarding the preparation of witnesses for trial, opening statements to juries, presentation of witnesses on direct examination, summations to the jury and evidentiary techniques, I believe that it is accessible. Disclosure of records in the nature of those described by means of example would not indicate the results of particular investigations or preclude the District Attorney from presenting his strongest case, but rather would merely shed light upon routine techniques and procedures followed by members of his staff in carrying out their duties.

In addition, the amended Freedom of Information Law which is based upon a presumption of access, states that unless records or portions thereof fall within one or more enumerated categories of deniable records, they must be made available. Under the amended statute, the trial preparation manual appears to be accessible pursuant to §87(2)(g), which states that an agency may deny access to records or portions thereof that:

> "are inter-agency or intra-agency materials 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..."

While the manual may be classified as "intra-agency" material, its contents consist of instructions to staff that affect the public and agency policy regarding the manner in which the Office of the District Attorney prepares for trials.

Further, although §87(2)(e) of the Freedom of Information Law states that an agency may withhold some records compiled for law enforcement purposes, the manual could not

in my opinion be characterized as a record compiled for law enforcement purposes, but rather a record compiled in the ordinary course of business. Even if the manual was classified as a record compiled for law enforcement purposes under §87(2)(e), the cited provision is based upon the effects of disclosure. Records compiled for law enforcement purposes may be withheld when disclosure would "reveal criminal investigative techniques or procedures, except routine techniques and procedures" [§87(2)(e)(iv)]. Under the circumstances, disclosure of the manual would apparently have no adverse effect upon the ability to detect criminal activity, but would merely permit the public to know the routine prosecutorial techniques followed by the District Attorney in preparation for trials.

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:nb

cc: Peter Zimroth

STATE OF NEW YORK
COMMITTEE ON PUBLIC ACCESS TO RECORDS FOIL-AO-800

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

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EXECUTIVE DIRECTOR
ROBERT J. FREEMAN

May 2, 1978

Mr. Bill Jansen
North American Beekeepers
Association
21905 Garrison
Dearborn, Michigan 48124

Dear Mr. Jansen:

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 deals with denials of access to a computerized mailing list of registered beekeepers in New York by the Department of Agriculture and Markets. In my opinion, the denials rendered by the Department were likely appropriate.

Although the Freedom of Information Law is based upon a presumption of access, agencies subject to the Law may deny access to enumerated categories of records [see attached, Freedom of Information Law, §87(2)]. One of the categories of deniable records includes records or portions thereof which would if disclosed result in "an unwarranted invasion of personal privacy under the provisions of subdivision two of section eighty-nine" of the statute. Section 89(2)(b) provides five illustrative examples of unwarranted invasions of personal privacy. Relevant to your inquiry, §89(2)(b)(iii) states that an unwarranted invasion of personal privacy includes the "sale or release of lists of names and addresses if such lists would be used for commercial or fund-raising purposes". If the list has not been sought for commercial or fund-raising purposes, it is suggested that you contact the Department of Agriculture and Markets to specify the purpose of the request.

It is also noted that the federal Freedom of Information Act is not applicable to records in possession of state and local government in New York, for the federal Act pertains only to records in possession of federal agencies.

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:nb
Enc.

cc: Attorney General Lefkowitz

STATE OF NEW YORK
COMMITTEE ON PUBLIC ACCESS TO RECORDS FOIL-AO-801

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EXECUTIVE DIRECTOR
ROBERT J. FREEMAN

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

May 3, 1978

Donald Schatz, Esq.
New York City Housing
Authority
250 Broadway
New York, New York 10007

Dear Mr. Schatz:

Thank you for your interest in complying with the Freedom of Information Law. Your inquiry concerns rights of access to a weekly payroll sheet which identifies employees of private contractors engaged by the Housing Authority and provides specific financial data regarding the employees.

Having reviewed the payroll form, I believe that portions of the form may be denied, while the remainder of its contents are accessible.

As a general matter, the Committee has advised and the courts have tended to uphold the notion that records relevant to the duties of public employees and employers are accessible (see e.g. Matter of Wool, Supreme Court, Nassau County, NYLJ, Nov. 20, 1977). In such instances, disclosure would result in a permissible as opposed to an unwarranted invasion of personal privacy. Contrarily, records not relevant to the work of public employees or employers that identify individuals may be withheld on the ground that disclosure would constitute an unwarranted invasion of personal privacy pursuant to §87(2)(b) of the Freedom of Information Law and the guidance provided by §89(2)(b).

In terms of the form, column one includes the name, address and social security number of employees of the private contractor. In my opinion, such information may be denied on the ground that disclosure would constitute an unwarranted invasion of personal privacy. Even if the employees were public employees, rather than employees of a private contractor, only their names would in my view be required to be made available, for the home addresses and social security numbers would likely have no relevance to the manner in which they perform their

duties. However, since the names in question relate to employees of a private contractor, all of the information contained in column one may in my view be withheld. Columns two through six contain statistical information regarding hours worked each day, total hours, rates of pay, and gross amounts earned. Information of this nature constitutes "statistical or factual data" which is clearly accessible pursuant to §87(2)(g)(i) of the Law. Consequently, those columns in the payroll form must be made available. Columns seven through eleven identify the number of exemptions claimed by employees, the amount of taxes withheld from their paychecks, and the net amounts paid to employees. Again, information relative to the number of deductions claimed or the amounts of taxes withheld have no relevance to the performance of the duties of either the employees in question or the Housing Authority. Consequently, I believe that the information contained in those columns may be withheld, also based upon the notion that disclosure would result in an unwarranted invasion of personal privacy of the individuals to whom the information relates.

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:nb

STATE OF NEW YORK
COMMITTEE ON PUBLIC ACCESS TO RECORDS FOIL-AO-802

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

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

May 3, 1978

Paul S. Hudson, Esq.
Crime Victims Compensation Board
State of New York
Executive Department
876 Central Avenue
Albany, New York 12206

Dear Mr. Hudson:

Thank you for transmitting a copy of the rules proposed by the Crime Victims Compensation Board. My comments are directed only to the provisions pertaining to the implementation of the Freedom of Information Law.

I have but few suggestions to make in connection with §525.15 of the proposed rules. Nevertheless, I would like to direct your attention to the following areas.

First, subdivision (d) states that the Chairman of the Board is responsible for ensuring compliance with the regulations. In this regard, the regulations promulgated by the Committee state that the governing body, if there is a governing body, is responsible for compliance with rules adopted by the body.

Second, paragraph (4) of subdivision (b) makes reference to a fiscal officer responsible for maintaining the payroll record required to be compiled by §87(3)(b) of the Freedom of Information Law. Although the Freedom of Information Law as originally enacted made specific reference to the designation of a fiscal officer [§88(1)(g)], the amended statute makes no such reference. Consequently, while the Board's rules may refer to a fiscal officer, they need not.

And third, subdivision (g), entitled "[R]ecords available," delineates the categories of records that may be denied by the Board. Since this provision merely reiterates §87(2) of the Freedom of Information Law, and

since the regulations promulgated by the Committee deal only with the procedural implementation of the statute, subdivision (g) is unnecessary. In addition, the first two categories of deniable records, both of which deal with confidentiality, have virtually the same meaning.

In all other respects, I believe that the proposed rules insofar as they relate to the Freedom of Information Law are proper.

Enclosed for your perusal is a copy of model regulations drawn by the Committee that may be of some utility to you.

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

Sincerely,

Bob Freeman

Robert J. Freeman
Executive Director

RJF:js

STATE OF NEW YORK
COMMITTEE ON PUBLIC ACCESS TO RECORDS FOIL-AO-803

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

May 4, 1978

Howard M. Sinnott, II, Esq.
Town of North Hempstead
Town Hall
Manhasset, New York 11030

Dear Mr. Sinnott:

Thank you for transmitting copies of a determination on appeal as well as the new rules adopted by the Town of North Hempstead under the Freedom of Information Law.

First, I agree with the determination on appeal. And second, I have but three comments to make with regard to the rules.

Section 3(a) of the rules states that an agency shall require an applicant to make requests in writing on forms prescribed by the Town. In this regard, the Committee has consistently advised that any written request that reasonably describes the records sought should suffice and that a failure to complete a form prescribed by an agency cannot be a valid ground for denial of access.

Subdivision (f) of §3 states that records are available between the hours of 9:30 a.m. and 4:00 p.m. If those are the regular business hours of the Town of North Hempstead, the rules comply with the regulations promulgated by the Committee. However, if those hours are less than regular business hours, the rules should be amended accordingly (see regulations, §1401.4).

And finally, the use of the terms "records access officer" and "town records access officer" are somewhat confusing. Although I believe that the provision in which the phrases are found comply with the Committee's regulations, I believe that it would be preferable to characterize the "town records access officer" as the "appeals officer."

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-804

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

May 4, 1978

Mr. Lester Denenberg
[redacted]

Dear Mr. Denenberg:

Thank you for your interest in the Freedom of Information Law. As requested, enclosed are several documents which may be of utility to you, including the Freedom of Information Law as amended, the regulations promulgated by the Committee which govern the procedural aspects of the Law and an explanatory pamphlet on the subject.

Your question concerns the status of the New York City and State Departments of Social Services under the Freedom of Information Law. In this regard, since the Law is applicable to all agencies in the State, both departments are subject to the provisions of the Law. It is important to note, however, that the Freedom of Information Law states that records exempt from disclosure by statute remain exempt under its provisions [see §87(2)(a)]. With respect to records in possession of the departments in question, §136 of the Social Services Law states that records identifiable to recipients of and applicants for public assistance are confidential. Consequently, although statements of policy or statistical information in possession of departments of social services are accessible, information identifiable to recipients and applicants is confidential by 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:js
Enc.

STATE OF NEW YORK

COMMITTEE ON PUBLIC ACCESS TO RECORDS FOIL-AO-805

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

May 4, 1978

Mr. Philip R. Goodhines
[redacted]

Dear Mr. Goodhines:

Thank you for your interest in the Freedom of Information Law. Your inquiry pertains to rights of access to records in possession of the Susquehanna Valley Home, which you characterized as a private facility.

It is noted at the outset that the Freedom of Information Law applies only to records in possession of governmental entities in New York. As such, the Law does not apply to records in possession of the Susquehanna Valley Home. Similarly, although Congress has enacted the Privacy Act, the Act is applicable only to records in possession of federal agencies.

Nevertheless, you mentioned in your letter that Oneida County provided money to the home to provide services for you. It is suggested that you contact the appropriate office within Oneida County government to determine whether the County continues to maintain records identifiable to you. Although the Susquehanna Valley Home has no obligation to grant access to its records, perhaps you can gain access indirectly to records pertaining to yourself through Oneida County government.

Enclosed for your perusal is a copy of a pamphlet entitled "The New 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

RJF:js
Enc.

STATE OF NEW YORK

COMMITTEE ON PUBLIC ACCESS TO RECORDS FOIL-AO-806

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

May 4, 1978

Mr. Frank Eydent, Jr.
237 Draime Hall
S.U.C.P.
Potsdam, New York 13676

Dear Mr. Eydent:

Thank you for your interest in the Freedom of Information Law. As requested, enclosed are copies of the Law, the regulations promulgated by the Committee which govern the procedural aspects of the Law, and an explanatory pamphlet on the subject.

Your question is whether the Freedom of Information Law is applicable to the State University College at Potsdam. In this regard, the Law defines "agency" [§86(3)] to include all governmental entities in the state, except the courts and the State Legislature. Since University College is a governmental entity, it is subject to the Freedom of Information Law in all respects. I believe that a close review of the pamphlet will answer many of your questions concerning the duties of University College under the Law.

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

Sincerely,

Robert J. Freeman

Robert J. Freeman
Executive Director

RJF:nb
Encs.

STATE OF NEW YORK

COMMITTEE ON PUBLIC ACCESS TO RECORDS FOIL-AO-807

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

May 4, 1978

Mrs. Marie-Therese Carponcy
[redacted]

Dear Mrs. Carponcy:

Thank you for your letter of April 27. Your inquiry concerns requests for records in possession of the Governor's Office.

As you stated in your letter, it is the Committee's responsibility to furnish advisory opinions to any person and "to request such assistance, services and information as will enable the Committee to effectively carry out its powers and duties." In this regard, when I received your first letter dated April 7, I contacted the Governor's Office to inquire with respect to your letter and to attempt to ensure that a response would be given promptly. Upon receipt of your most recent letter, I once again contacted the Governor's Office and was informed that your inquiry is currently being considered by the Office of Counsel.

With regard to your request, I concur with your contention that the records required to be compiled by §87(3) of the Law must be maintained by the Executive Chamber and made available in accordance with the remaining provisions of the Freedom of Information Law.

It is noted that the Law does not require an agency to transmit to the Committee copies of initial denials. However, when an appeal is made by an individual denied access, copies of the appeal as well as the determination that ensues must be transmitted to the Committee.

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

Sincerely,

Robert J. Freeman

Robert J. Freeman
Executive Director

RJF:js

FOIL-AO-808

State of New York
COMMITTEE ON PUBLIC ACCESS TO RECORDS
MEMORANDUM

May 5, 1978

TO : Fred Koster

FROM : Bob Freeman

SUBJECT : Request for Mailing List

According to the letter attached to your request for comments, the American School of Real Estate Sciences, a not-for-profit Missouri Corporation, is seeking a mailing list of names and addresses of real estate brokers and salespeople located in the southern part of the state. The letter specifically states that the list is to be used to mail catalogues and course offerings to the people identified on the list.

Despite the expressed intended use of the mailing list, the correspondent stated that the list "would not be used for any commercial or fund-raising venture." I cannot understand how, in the same breath, it could be stated that the list is intended to be used to mail catalogues and course offerings while at the same time it is stated that the list would not be used for commercial or fund-raising ventures.

In my opinion, the list should be denied. As we have discussed in the past, the examples of unwarranted invasions of personal privacy listed in the Freedom of Information Law [§89(2)(b)] are merely illustrative and represent but five among conceivable dozens of unwarranted invasions.

Moreover, in a situation in which a firm in the business of providing review courses for candidates for an examination for certified public accountant was sought, it was held that disclosure would indeed constitute an unwarranted invasion of personal privacy [Person-Wolinsky Associates v. Nyquist, 377 NYS 2d 897 (1975)].

To reiterate the concerns that I have expressed in the past, the Freedom of Information Law is intended to ensure that government be accountable, not to permit an individual to line his pockets, whether the lining is characterized as "not-for-profit" or otherwise.

cc: Elia Malara

STATE OF NEW YORK
COMMITTEE ON PUBLIC ACCESS TO RECORDS FOIL-AO-809

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

May 5, 1978

Dr. Betty J. Bernstein
Project Director
Citizens' Inquiry on Parole
and Criminal Justice, Inc.
135 East 15th Street
New York, New York 10003

Dear Dr. Bernstein:

Thank you for your interest in the Freedom of Information Law. As requested, attached are copies of the Law, the regulations promulgated by the Committee, which govern the procedural aspects of the statute and with which each agency must comply, and a pamphlet entitled "The New Freedom of Information Law and How to Use It". If you need additional copies of the materials, I will be happy to provide them.

With regard to the request directed to the Division of Criminal Justice Services, it is noted that the Freedom of Information Law does not require agencies to create a record in response to a request [see §89(3)]. As such, if, for example, the Division of Criminal Justice Services has no list containing information analogous to that which you have sought, it has no obligation to create a list on your behalf. Nevertheless, the Law grants access to "statistical or factual tabulations or data" [§87(2)(g)(i)]. Consequently, individual records or portions thereof reflective of the information sought would be 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
Exeoutive Director

RJF:nb
Encs.

STATE OF NEW YORK
COMMITTEE ON PUBLIC ACCESS TO RECORDS

OML-AO-218
FOIL-AO-810

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

May 8, 1978

Ms. Felice Freyer
Assistant Editor
Harrison Independent
217 Harrison Avenue
Harrison, New York 10528

Dear Ms. Freyer:

Thank you for your interest in the Freedom of Information Law and the Open Meetings Law. Your letter raises questions regarding both subjects, and I will attempt to deal with each of them.

First, according to your letter, the Harrison School Board two years ago appointed a "Citizens' Budget Committee", which is responsible for advising the Board, but which has no capacity to take final action or determine policy. In my opinion, the Committee is a public body subject to the Open Meetings Law that must comply with the Law in all respects.

Section 97(2) of the Open Meetings Law defines "public body" 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."

The Committee is an entity consisting of more than two members which performs a governmental function for a public corporation, a school district. Although it does not consist of public officials, it is required to act by means of a quorum pursuant to §41 of the General Construction Law, which defines "quorum". Moreover, the leading judicial determination on the Open Meetings Law found that the term "transact" found within the phrase "transact public business" means merely "to discuss"; it does not

necessarily involve either an intent or capacity to take final action (see Ottaway Publications Inc. v. Council of the City of Newburgh, 401 NYS 2d 84). Further, recent determinations held that an advisory committee designated by the Governor and a citizens committee designated by a city council are public bodies subject to the Open Meetings Law, notwithstanding a lack of capacity to take final action (see respectively, Matter of MFY Legal Services 401 NYS 2d 510 and Pissare v. City of Glens Falls, Supreme Court, Warren County). In view of the foregoing, the Citizens' Committee is in my view required to open its meetings to the public and provide the requisite notice pursuant to §99 of the Open Meetings Law.

Second, while collective bargaining negotiations were ongoing, the Citizens' Committee presented to the School Board its recommendations regarding the teachers' contract, which you requested under the Freedom of Information Law. After having been denied access to the report, a contract settlement was reached. Nevertheless, according to your letter, the report of the Citizens' Committee was further denied on appeal on the ground that disclosure of the report would impair the progress of collective bargaining negotiations.

The situation described appears to present an issue of fact. The key question that must be answered is whether under the Freedom of Information Law disclosure of the report would impair collective bargaining negotiations and therefore be deniable on that basis under §87(2)(c) of the Law. If an agreement has essentially been reached and all that remains is the signing of a contract, it would appear that discussion of the Committee's report would have no adverse affects, since the negotiations have terminated. If, on the other hand, the negotiations were continuing and discussion would place the School District at a disadvantage, or if discussion would detract from the ability to negotiate an agreement, the report could justifiably be denied.

With respect to the time limit in response to an appeal, §89(4)(a) of the Freedom of Information Law requires that determinations on appeal be rendered within seven business days of receipt of an appeal. In addition, the Law requires agencies to transmit to this Committee copies of appeals as well as the determinations that ensue.

Third, your letter states that the Board of Education "will meet tonight in executive session" to discuss "personnel matters". However, it is your contention that the discussion will focus on whether or not to eliminate certain positions and that the names of specific employees will not be mentioned.

Since an executive session is a portion of an open meeting [see Open Meetings Law §97(3)], and since a public body cannot enter into executive session unless a motion is made during an open meeting which is passed by a majority vote of its total membership that identifies the general area or areas of proposed discussion, a public body cannot in my view determine in advance that it will conduct an executive session. Moreover, §100(1)(a) through (h) specifies and limits the subjects that may appropriately be considered in executive session. Relevant to your inquiry, §100(1)(f) states that a public body may enter into executive session to discuss:

> "the medical, financial, credit or employment history of any person or corporation, or matters leading to the appointment or removal of any person or corporation."

In this regard, in its second annual report to the Legislature on the Open Meetings Law, the Committee wrote that the quoted provision:

> "...should be asserted to protect privacy, rather than shield discussions regarding policy under the guise of privacy. For example, a distinction should be made between a situation in which a municipal board discusses the dismissal of public employees for budgetary reasons (a policy matter that should be publicly discussed) and a situation in which the board discusses dismissal of a particular employee because that person is not performing his or her duties adequately (a personnel matter that deals with the employment history of a named individual that may properly be discussed in executive session)."

As such, a discussion regarding budget cuts generally, as opposed to a discussion regarding the performance of specific employees, should in the opinion of the Committee be discussed during an open meeting.

With regard to the same meeting, I believe that the Board would be required to give notice of the meeting, notwithstanding its plans to enter into executive session.

You asked further whether actions taken during an unannounced meeting are legal. Only a court can determine this issue. Although §102 of the Open Meetings Law states that a

court may declare action taken in violation of the Law null and void, it need not.

And finally, you asked what a reporter can do, aside from going to court, "when she feels that she has been illegally excluded from a meeting or denied access to public documents". All that I can suggest is that the best way in my view to avoid controversies that arise under the Freedom of Information Law or Open Meetings Law is to become fully educated regarding those statutes. I would like to stress that the educational process should not be restricted to members of the news media; on the contrary, I believe that a lesser number of disputes would arise if government, the public and the news media were to become more familiar with the statutes. In addition to the educational process, persons with questions should do as you did in this instance--call or write to the Committee and seek assistance.

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:nb
Enc.

cc: School Board
Harrison School District

STATE OF NEW YORK
COMMITTEE ON PUBLIC ACCESS TO RECORDS FOIL-AO-811

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

May 11, 1978

Mr. Thomas M. Ryan
Sergeant of Police
Oswego Police Department
218 W. 1st Street
Oswego, New York 13126

Dear Mr. Ryan:

Thank you for your interest in complying with the Freedom of Information Law. Your inquiry pertains to rights of access to "investigation reports" compiled by the Police Department of the City of Oswego.

It is noted at the outset that the Freedom of Information Law as originally enacted in 1974 has been substantially amended. Enclosed is a copy of the amendments to the Freedom of Information Law which became effective January 1, 1978.

According to your letter, an investigation report is a record prepared by a police officer regarding specific incidents in which the officer lists "his suspects, follow-up action, and referrals to other divisions within the department". In this regard, I would like to direct your attention to §87(2) of the Freedom of Information Law, which in relevant part states 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..."

In my opinion, the investigation report is clearly compiled for law enforcement purposes and disclosure of the report would in many situations "interfere with law enforcement investigations", reveal "confidential information relating to a criminal investigation" and in some instances might potentially "endanger the life or safety" of an individual or individuals named in the report. As such, I believe that if the impediments to effective law enforcement described above would arise due to disclosure, the investigation report may be justifiably denied.

It is also important to note that the exceptions appearing in §87(2)(e) and (f) are based upon the effects of disclosure. If, for example, an investigation report pertains to an event occurring years ago and there would be no harmful effects of disclosure, the grounds for denial might no longer exist.

In sum, while I believe that you may in most instances deny access to the reports, it is suggested that you carefully consider the grounds for denial to which I have referred in the preceding paragraphs.

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:nb
Enc.

STATE OF NEW YORK

COMMITTEE ON PUBLIC ACCESS TO RECORDS FOIL-AO-812

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

May 12, 1978

Mrs. Marie-Therese Carponcy
[redacted]

Dear Mrs. Carponcy:

I am in receipt of your letter of May 8 and I trust that you have received my letter of May 4.

Without dealing with specific aspects of the controversy, I would like to direct your attention to §7505 of the Unconsolidated Laws, which pertains to disclosures by the State Commission of Investigation. The cited provision states that:

> "[A]ny person conducting or participating in any examination or investigation who shall disclose to any person other than the commission or an officer having the power to appoint one or more of the commissioners the name of any witness examined, or any information obtained or given upon such examination or investigation, except as directed by the governor or commission, shall be guilty of a misdemeanor."

In view of the quoted provision, it is clear that many of the records in possession of the Commission of Investigation may be considered confidential and therefore deniable under §87(2)(a) of the Freedom of Information Law, which provides that an agency may withhold records or portions thereof that are exempt from disclosure by state or federal statute.

I am not aware of the extent to which §7505 of the Unconsolidated Laws may be applicable to the records in which you are interested. However, I believe that you should be aware of the provision.

I regret that I cannot be of greater assistance.

Sincerely,

Robert J. Freeman

Robert J. Freeman
Executive Director

RJF:nb

STATE OF NEW YORK
COMMITTEE ON PUBLIC ACCESS TO RECORDS

FOIL-AO-813

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

May 15, 1978

Mr. Robert Zaleski
1st Vice President
Hicksville Congress of
Teachers
Hicksville Public Schools
Hicksville, New York 11801

Dear Mr. Zaleski:

Thank you for your interest in the Freedom of Information Law. Your inquiry pertains to rights of access to tape recordings made by the Hicksville Board of Education at its meetings, as well as alleged violations of the Freedom of Information Law.

First, with respect to rights of access to tape recordings of school board meetings, the original Freedom of Information Law enacted in 1974 failed to define the term "record". As such, numerous questions arose regarding the status of tape recordings, microfilm, computer tapes and discs, for example. However, the amended Freedom of Information Law, which became effective January 1, 1978, defines "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."

In view of the definition, tape recordings in possession of a school district are clearly records subject to rights of access granted by the Law.

Second, the amendments to the Law are based upon a presumption of access. Unlike the original statute which granted access to specified categories of records to the exclusion of all others, the amendments to the Law state that all records are accessible except to the extent that they fall within categories of deniable records listed in §87(2) of the statute. Based upon review of the categories of deniable records, a tape recording of an open meeting held by a school board is in my opinion accessible, for none of the categories of deniable records may be appropriately asserted.

According to your letter, a request for the tapes was made more than a month ago and, to date, no response to the request has been given. In this regard, the Law states that an agency must respond to a request within five business days of receipt of a request [§89(3)]. If an agency cannot either grant or deny access within five business days, it may acknowledge receipt of the request and delay a response. The delay in responding, however, may not extend beyond ten additional business days from the date of acknowledgment of receipt of a request [see attached regulations, §1401.5(d)]. Under the regulations promulgated by the Committee which have the force and effect of law and with which each agency must comply, an agency must respond to a request within five business days or acknowledge the receipt of the request and respond within ten business days of the acknowledgment. In both instances, if no response is given, the person making the request may consider a failure to respond a denial of access that may be appealed. Consequently, assuming that at least fifteen business days have transpired without either a written denial of access or production of the tape recordings, you may consider yourself to have been constructively denied and may appeal to the School Board or whomever the Board has designated to determine appeals. It is also noted that when an appeal is made, the agency is required to send a copy of the appeal as well as the determination that ensues to the Committee [see §89(4)(a)].

Third, I concur with the contention made in your letter that the fee for copying tape recordings should be based upon the actual cost of reproduction. Section 87(1)(b)(iii) of the Law provides specific direction regarding fees and states that a fee of no more than twenty-five cents per photocopy may be assessed with respect to records up to 9" by 14". In the case of records not subject to conventional photocopying, the Law states that the agency may charge "the actual cost of reproducing any other records".

And finally, your letter states that no subject matter list is maintained by the Hicksville School District and that

requests for records are dealt with only one day a week. With respect to the subject matter list, §87(3)(c) of the Law clearly 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 the records are accessible. In terms of producing records, the regulations promulgated by the Committee (see attached) state that:

> "each agency shall accept requests for public access to records and produce records during all hours they are regularly open for business." [see §1401.4(a)].

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:nb
Encs.

cc: Thomas Nagle

STATE OF NEW YORK

COMMITTEE ON PUBLIC ACCESS TO RECORDS FOIL-AO-814

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

May 15, 1978

F. Gibbs Kerns, Esq.
Chautauqua County
Department of Law
County Office Building
Mayville, New York 14757

Dear Mr. Kerns:

Thank you for your interest in complying with the Freedom of Information Law. Your inquiry deals with rights of access to home addresses of county employees, as well as the interpretation of the privacy provisions in the Freedom of Information Law.

First, with respect to the home addresses of county employees, the original Freedom of Information Law enacted in 1974 stated that each agency was required to compile a payroll record indicating the name, address, title and salary of every officer or employee of the agency. Under that provision, it was unclear whether the home address or the business address of public employees had to be included within the payroll record. However, the amendments to the Freedom of Information Law, which became effective January 1, 1978, specifically provide that the payroll record required to be compiled by §87(3)(b) must make reference to the "public office address" of public employees. Therefore, in most instances, issues regarding disclosure of public employees' home addresses should not arise.

Second, rights of access to payroll information was established by case law long before the enactment of the Freedom of Information Law [see e.g., Winston v. Mangan, NYS 2d 654 (1972); Chambers v. Kent, 201 NYS 2d 439 (1960)]. As such, in my opinion, §87(3)(b) represents specific direction by the Legislature that the payroll record not only be compiled, but also that it be made available on the ground that in this instance disclosure would constitute a permissible as opposed to an unwarranted invasion of personal privacy.

Your letter also cites §89(2)(b)(iii), which provides that an unwarranted invasion of personal privacy includes the sale or release of lists of names and addresses that would be used for commercial or fund-raising purposes. In my opinion, the cited provision was intended to permit agencies to deny access to lists identifying members of the public having a particular status, when such lists would be used for the purpose of solicitation, for example. I do not believe that §89(2)(b)(iii) was intended to pertain to the payroll record discussed earlier in view of the specific direction appearing in the Law and the case law rendered prior to the enactment 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

RJF:nb

cc: Christine Davis
Chief Records Access Officer

STATE OF NEW YORK

COMMITTEE ON PUBLIC ACCESS TO RECORDS FOIL-AO-815

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

May 15, 1978

Mr. Bill Jansen
President
North American Beekeepers
Association
21905 Garrison
Dearborn, Michigan 48124

Dear Mr. Jansen:

I am in receipt of your letter dated May 5, 1978.

According to your letter, the North American Beekeepers Association is a "non-profit Michigan Corporation". Once again, I would like to direct your attention to §89(2)(b) of the New York Freedom of Information Law. As stated in my letter of May 2, I believe that the IBM mailing label list that you are seeking may properly be denied under the language stating that an agency may withhold lists of names and addresses that may be used for commerical or fund-raising purposes. In addition, it is emphasized that the introductory language in §89(2)(b) states that an unwarranted invasion of personal privacy includes, "but shall not be limited to" the five illustrations of unwarranted invasions of personal privacy that ensue. In my opinion, the illustrations appearing in the Law are merely five examples of unwarranted invasion of personal privacy among conceivable dozens. Consequently, an agency has the ability to withhold records on the ground that disclosure would constitute an unwarranted invasion of personal privacy in situations other than those presented in §89(2)(b)(i) through (v).

It is also noted that the Committee on Public Access to Records does not possess records generally, nor does it have the capacity to order agencies to grant or deny access to records. Although an agency may rely upon the advice of the Committee, it need not. Therefore, a final determination regarding disclosure of the list of beekeepers can be made only

by the custodian of the list, the Department of Agriculture and Markets.

If you feel that a final denial by the Department of Agriculture and Markets is unsupportable, you may challenge the denial by means of the initiation of judicial proceedings.

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:nb

cc: Dennis Buckley

STATE OF NEW YORK
COMMITTEE ON PUBLIC ACCESS TO RECORDS

OML-AO-221
FOIL-AO-816

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

May 16, 1978

Mr. Daniel F. Leary
[redacted]

Dear Mr. Leary:

Thank you for your letter of May 9 and the correspondence appended to it. I have also reviewed your letter of May 1 and the materials attached thereto.

Upon review of the opinion written by Alexander J. Hersha, Town Attorney for the Town of Onondaga, I agree with many of his contentions, but I continue to disagree with several of the statements that he made.

First, I recognize the distinction between minutes approved by a public body and unapproved minutes. Nevertheless, the amendments to the Freedom of Information Law pertain to all records in possession of an agency, whether they are categorized as "official" or otherwise. Section 86(4) of the Freedom of Information Law defines "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."

In view of the quoted definition, virtually all information in the form of records in possession of the Town is subject

to rights of access. This is not to say that all records in possession of the Town are accessible, but rather that an agency cannot deny access merely by classifying records as "unofficial", for example.

Second, I am familiar with the opinions of the State Comptroller regarding the legal requirement that a town clerk must maintain custody of complete and accurate proceedings of each meeting of a town board. However, to the best of my knowledge, no opinion rendered by the Comptroller specifically pertains to rights of access to unapproved minutes. Nevertheless, at several gatherings during which I was present, representatives of the Office of Counsel to the Comptroller advised orally that unapproved minutes are accessible. The rationale for the advice was based in part on the provisions of §51 of the General Municipal Law, which has long stated that virtually all records in possession of municipalities are accessible.

Third, I agree with Mr. Hersha's contention that "it is nonsense for drafts or outlines of minutes to be widely disseminated so that the various members of the public who attend meetings can ask to have included in the minutes what they think they heard". In this regard, I believe that it is the duty of a town clerk to present in the form of minutes what he or she heard, independent of suggestions that might be made by members of the public or members of the Board. The clerk's rendition of the activities that transpired at a meeting should in my opinion be reviewed by the Board to determine the accuracy of facts presented. I do not believe that a member of the public or an individual member of a board can appropriately seek changes in draft minutes prepared by a town clerk on an ad hoc basic.

And fourth, although the term "minutes" is undefined, direction concerning the scope and content of minutes is found in §101(1) of the Open Meetings Law, which states:

> "minutes shall be taken at all open meetings of a public body which shall consist of a record or summary of all motions, proposals, resolutions and any other matter formally voted upon and the vote thereon."

In view of the quoted provision, it is clear that minutes may but need not include reference to each comment made at a meeting by either a member of a board or a member of the public.

And finally, it remains my opinion that unapproved minutes of meetings in possession of a town clerk are accessible under the Freedom of Information Law. Again, it is suggested that by noting on unapproved minutes that they are non-final or draft, the public may be apprised that the minutes are subject to change and members of the board who may disagree with the contents of unapproved minutes are given a measure of protection, for they may seek to amend the draft at an ensuing meeting. In sum, if all interested parties, including the public and members of a board, are aware that unapproved minutes are subject to change, it is difficult from my perspective to envision potential harm as a result of disclosure.

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:nb

cc: Alexander J. Hersha

STATE OF NEW YORK
COMMITTEE ON PUBLIC ACCESS TO RECORDS FOIL-AO-817

MMITTEE MEMBERS
ELIE ABEL - Chairman
T. ELMER BOGARDUS
MARIO M. CUOMO
MARY ANNE KRUPSAK
HOWARD F. MILLER
JAMES C. O'SHEA
GILBERT P. SMITH
ROBERT W. SWEET
EXECUTIVE DIRECTOR
ROBERT J. FREEMAN

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

May 16, 1978

Mr. R. Paul Martin
The Gay Activists Alliance
P.O. Box 2
Village Station, New York 10014

Dear Mr. Martin:

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

According to your letter, members of your organization are interested in gaining access to records pertaining to them in possession of various local government and state agencies. In this regard, I believe that the Freedom of Information Law may be of substantial utility.

The Law as recently amended is based upon a presumption of access. Specifically, §87(2) of the statute states that all records in possession of agencies are accessible, except to the extent that records or portions thereof fall within one or more categories of deniable information listed in paragraphs (a) through (h) of the cited provision. Moreover, the exceptions are based largely upon the effects of disclosure. For example, §87(2)(e) provides that an agency may deny access to records or portions thereof that are compiled for law enforcement purposes, but only when disclosure would result in the harmful effects described in §87(2)(e)(i) through (iv). As such, an agency cannot deny access to records solely on the ground that the records were compiled for law enforcement purposes; there must be a further ground based upon hindrance of the law enforcement process.

Enclosed for your perusal are copies of the Freedom of Information Law, the regulations promulgated by the Committee which have the force of law and with which each agency must comply, a pamphlet entitled "The New Freedom of Information Law

and How to Use It," and a pocket card outlining the Law. If you need additional material, I will be happy to send 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

RJF:js
Enc.

STATE OF NEW YORK

COMMITTEE ON PUBLIC ACCESS TO RECORDS FOIL-AO-818

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

May 16, 1978

Mr. Herbert H. Klein
[redacted]

Dear Mr. Klein:

I enjoyed our discussion at the gathering run by Mr. Tills and appreciate your providing me with a copy of the regulations adopted by the Town of Boston.

Upon review of the regulations adopted by the Town, it is suggested that you reconsider their contents in conjunction with the following comments.

First, the resolution statement cites Chapters 578, 579 and 580 of the Laws of 1974 as the basis for the regulations that ensue. As you are aware, the Freedom of Information Law was amended. The new Law, which appears in 933 of the Laws of 1977, became effective January 1, 1978.

Second, Section II of the regulations pertain to the designation of a fiscal officer. Although the Freedom of Information Law as originally enacted and the initial regulations promulgated by the Committee made reference to a fiscal officer, the amendments to the Freedom of Information Law make no such reference. Consequently, although the Town may designate a fiscal officer, it need not.

Third, Section V(A) states that all requests shall be submitted on forms prescribed by the Comptroller of the State of New York, copies of which may be obtained from the Town Clerk. In this regard, §89(3) of the Law states that an agency may require that a request be made in writing that reasonably describes the records sought. Although the Town may prescribe a form, a failure to complete a prescribed form cannot in my view be cited as a valid ground to denial of access. Any written request that reasonably describes the records sought should suffice.

Fourth, Section VII states that fees shall be charged at the rate of fifty cents per page for each copy furnished. As we discussed on May 8, §87(1)(b)(iii) of the amendments to the Freedom of Information Law provides a maximum fee of twenty-five cents per photocopy for records up to 9 by 14 inches unless otherwise prescribed by law. In my opinion, unless a statute passed by the State Legislature or a local law in effect prior to September 1, 1974 established a fee higher than twenty-five cents per page, the Town may charge no more than twenty-five cents per photocopy.

And fifth, Section VIII, which includes a record listing by subject matter, pertains to "records maintained and available for public inspection and copying." The provisions regarding the subject matter list in the Law [§87(3)(c)] state 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 this article." In view of the quoted provision, the subject matter list should make reference not only to accessible records, but to all records by category in possession of the Town.

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-819

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

May 16, 1978

Mr. William F. Emlock, Jr.
Departmental Representative
C.S.E.A.
Old Court House
1550 Franklin Avenue
Mineola, New York 11501

Dear Mr. Emlock:

Thank you for your interest in the Freedom of Information Law. Your inquiry pertains to the failure on the part of agencies within Nassau County to compile subject matter lists, as well as other alleged violations of the Freedom of Information Law.

Although the Freedom of Information Law generally requires that an agency need not create a record in response to a request [see attached Freedom of Information Law, §89(3)], the provisions concerning the subject matter list require that agencies compile such lists. Specifically, §87(3)(c) states that:

> "each agency shall maintain... a reasonably detailed current list by subject matter, of all records in possession of the agency, whether or not available under this article."

As such, it is clear that the County government is obligated to create and make available a reasonably detailed list by category of records in its possession.

Your letter also indicates that several requests have been made, but in some instances no responses have been given. In this regard, §89(3) of the Law requires agencies to respond to requests within five business days of receipt of a request. If no response is given within five business days, the request may be considered denied, and the applicant

may appeal to the head of an agency or whomever has been designated to determine appeals. In the alternative, if an agency cannot respond to a request within five business days, it may acknowledge receipt of a request and delay a response. However, under the regulations promulgated by the Committee, which have the force and effect of law, when a request is acknowledged, a response must be given within ten business days of the date of acknowledgment. If no response is given, the request is considered denied and therefore appealable [see attached regulations §1401.5(d)].

Finally, your letter suggests that an investigation by the Committee might be appropriate. Please be advised that the Committee has advisory authority only; it has neither the statutory authority nor the resources to investigate.

I regret that I cannot be of further assistance at this juncture.

Sincerely,

Robert J. Freeman

Robert J. Freeman
Executive Director

RJF:nb
Encs.

cc: Francis T. Purcell
County Executive

James E. Picken
Commissioner of Consumer Affairs

STATE OF NEW YORK

COMMITTEE ON PUBLIC ACCESS TO RECORDS FOIL-AO-820

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

May 16, 1978

Mr. R. Gagné
[redacted]

Dear Mr. Gagné:

Thank you for your interest in the Freedom of Information Law. Your inquiry raises several questions regarding the interpretation of the Freedom of Information Law as well as other statutes.

First, are the various bar associations in New York agencies subject to the Freedom of Information Law? In my opinion, the Freedom of Information Law is not applicable to bar associations. Although bar associations may in some ways be related to government or chartered by the State Legislature, they are not-for-profit corporations. As such, bar associations are not governmental entities, and therefore, they are not in my view subject to the Freedom of Information Law.

Second, does the Freedom of Information Law exempt from disclosure records of complaints against attorneys and records of disciplinary proceedings pertaining to attorneys? As we discussed yesterday, the records in question are in great measure confidential by statute. Specifically, §90(10) of the Judiciary Law provides that:

> "[A]ny statute or rule to the contrary notwithstanding, all papers, records and documents upon the application or examination of any person for admission as an attorney and counsellor at law and upon any complaint, inquiry, investigation or proceeding relating to the conduct or discipline of an attorney or attorneys, shall be sealed and be deemed private and confidential. However, upon good cause being shown, the justices of the appellate division

> having jurisdiction are empowered, in their discretion, by written order, to permit to be divulged all or any part of such papers, records and documents. In the discretion of the presiding or acting justice of said appellate division, such order may be made either without notice to the persons or attorneys to be affected thereby or upon such notice to them as he may direct. In furtherance of the purpose of this subdivision, said justices are also empowered, in their discretion, from time to time to make such rules as they may deem necessary. Without regard to the foregoing, in the event that charges are sustained by the justices of the appellate division having jurisdiction in any complaint, investigation or proceeding relating to the conduct or discipline of any attorney, the records and documents in relation thereto shall be deemed public records."

In view of the quoted provision, although similar records in the nature of complaints in possession of other agencies might in some cases be subject to disclosure, the records in which you are interested are dealt with by a specific statute requiring confidentiality, except where otherwise expressly provided. Consequently, the records may be withheld under §87(2)(a) of the Freedom of Information Law, which states that an agency may deny access to records that are exempt from disclosure by statute.

Third, your letter indicates that you have been asked questions regarding your identity, the purpose for requesting records sought and the intended use of the records. In my opinion, those questions should not be raised when a request is made under the Freedom of Information Law. One of the basic principles of the Law is that accessible records should be made equally available to any person, without regard to status or interest.

Fourth, a question is raised regarding disclosure of the name of a person who has submitted a complaint to an agency. In this regard, the Committee has advised that although the substance of complaints should in most instances

be made available, the name of a complainant may be deleted on the ground that disclosure of the identity of the complainant would constitute an unwarranted invasion of personal privacy pursuant to Sections 87(2)(b) and 89(2)(b) of the Freedom of Information Law. In addition, a recent decision rendered by the First Department, Appellate Division was consistent with the Committee's advice [see Church of Scientology of New York v. State, 403 NYS 2d 224 (1978)]. It is emphasized, however, that the Freedom of Information Law is permissive. Although an agency may deny access to records in accordance with the provisions of §87(2), it need not, except in situations in which a statute specifically requires confidentiality, as in the case of §90(10) of the Judiciary Law.

And fifth, are agencies that grant licenses or permits to engage in specific vocations required to provide access to applications submitted by individuals? The central issue regarding this question involves the privacy provisions of the Freedom of Information Law. Relevant to the question, §89(2)(b)(i) states that an unwarranted invasion of personal privacy includes the "disclosure of employment, medical or credit histories or personal references of applicants for employment..." While not all applications could be considered as employment histories, it is emphasized that the introductory language of §89(2)(b) states that an unwarranted invasion of personal privacy includes "but shall not be limited to" the examples of unwarranted invasions that ensue. In my view, the five examples of unwarranted invasions of personal privacy listed in the cited provision are merely illustrative and represent but few among conceivable dozens of such invasions. Consequently, I believe that an agency may in many instances deny access to applications for licenses to engage in particular vocations. However, once a license is granted, it represents a final determination by an agency and is in my view available. Therefore, if you are interested in determining whether a particular individual is licensed as a physician, for example, the license identifiable to the physician should in my opinion be 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:nb

STATE OF NEW YORK
COMMITTEE ON PUBLIC ACCESS TO RECORDS FOIL-AO-821

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

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EXECUTIVE DIRECTOR
ROBERT J. FREEMAN

May 17, 1978

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

Dear Ms. Bernstein:

Thank you for your continued interest in the Freedom of Information Law. Your question deals with the rights of access of a public employee to his or her own personnel file.

In my opinion, portions of a personnel file are accessible to the subject of the file, but other portions may be denied. Relevant to your inquiry, §87(2)(g) of the Law states that an agency may deny access to records or portions thereof that:

> "are inter-agency or intra-agency materials 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..."

In essence, the provision contains a double negative. An agency may deny access to inter-agency or intra-agency materials, except to the extent that they consist of any of the items listed in subparagraphs (i.),(ii.) and (iii.). As such, statistical or factual data, including time sheets, payroll information and the like are accessible. Similarly, if, for example, an employee has been involved in disciplinary proceedings which have resulted in a determination, the determination would be accessible. Nevertheless, records or

portions thereof in the nature of advice or impression appear to be deniable.

In terms of intent, Assemblyman Mark Siegel, the Assembly sponsor of the amended Freedom of Information Law, wrote that §87(2)(g) was intended to be interpreted as follows:

> "[F]irst, it is the intent that any so-called "secret law" of an agency be made available. Stated differently, records or portions thereof containing 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.

It is noted that there may be provisions contained in collective bargaining agreements that expand upon rights of access granted by the Freedom of Information Law. For instance, I have been informed that there may be collective bargaining agreements which require that all information contained in a personnel file be made available to the subject of the file. In such cases, the contractual provisions would be of greater utility than 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:nb

STATE OF NEW YORK
COMMITTEE ON PUBLIC ACCESS TO RECORDS

FOIL-AO-822

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

May 17, 1978

Ms. Vivian M. Joynt
[redacted]

Dear Ms. Joynt:

Thank you for your thoughtful and lengthy letter of May 2 and your continued interest in the Freedom of Information Law.

Your letter pertains to a series of events that occurred in conjunction with your requests for minutes in possession of the Lackawanna School Board. After describing the situation, you raised several questions which I will attempt to answer in full.

First, are you correct in believing that an appointment must be made to inspect records such as minutes of school board meetings? In my opinion, you need not make an appointment to request or inspect records of the Lackawanna School District. Section 1401.4(a) of the regulations promulgated by the Committee, which have the force of law and with which each governmental entity in the state must comply, provide that:

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

In view of the quoted provision, a member of the public should not be required to make an appointment in advance in order to inspect or request records if the agency has regular business hours. Since the Lackawanna School District is of substantial size and is open for business from Monday to Friday, the School Board, which is responsible for compliance with the Committee's regulations, is required to adopt rules that permit the public to request records during all regular business hours.

STATE OF NEW YORK
COMMITTEE ON PUBLIC ACCESS TO RECORDS FOIL-AO-823

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

May 17, 1978

Mr. Lee Slocum
Community Service Systems, Inc.
301 Ridge Road
Oriskany, New York 13424

Dear Mr. Slocum:

Thank you for your expansive letter and your interest in the Freedom of Information Law. Your inquiry pertains to rights of access to marriage license applications in possession of local registrars of vital statistics, such as town clerks.

It is noted at the outset that although the Freedom of Information Law pertains to records generally, rights of access to marriage records are governed not by the Freedom of Information Law, but rather by §19 of the Domestic Relations Law. Consequently, the Freedom of Information Law cannot be cited or used as a means of gaining access to records relative to marriages.

Section 19 of the Domestic Relations Law provides the custodian of marriage records with a great deal of latitude regarding disclosure of the records. In relevant part, the cited statute provides that marriage records may be made available when "necessary or required by judicial or other proper purposes." In view of the quoted language, it is clear that a clerk need not make marriage records available unless he or she is satisfied that a request is reflective of "a proper purpose." Unfortunately, what constitutes a proper purpose is undefined, and there is little case law on the subject.

Since the Bureau of Vital Records in the State Health Department maintains custody of original marriage records and that Department has issued regulations on the subject, it is suggested that you contact the Bureau. Any such correspondence

should be addressed to the Bureau of Vital Records, New York State Health Department, Empire State Plaza, Tower Building, Albany, New York 12237.

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

Sincerely,

Robert J. Freeman

Robert J. Freeman
Executive Director

RJF:js

STATE OF NEW YORK
COMMITTEE ON PUBLIC ACCESS TO RECORDS

FOIL-AO-824

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

May 18, 1978

Mr. William J. O'Reilly
City of Olean
Municipal Building
Olean, New York 14760

Dear Mr. O'Reilly:

Thank you for your interest in complying with the Freedom of Information Law. Your inquiry pertains to a request for a diary in possession of the Olean Police Department written by an individual who shot and killed several persons and later allegedly committed suicide. According to your letter, the parents of the writer of the diary continue to reside in Olean. Further, although the diary was obtained in the course of a criminal investigation, the investigation is now closed.

The Freedom of Information Law provides that all records in possession of government in New York are accessible, except to the extent that records or portions thereof may be withheld pursuant to one or more of the categories of deniable records listed in §87(2)(a) through (h) of the Law. Relevant to your inquiry, §87(2)(b) states that an agency may deny access to records or portions thereof that:

> "if disclosed would constitute an unwarranted invasion of personal privacy under the provisions of subdivision two of section eighty-nine of this article."

Section 89(2)(b) provides that an unwarranted invasion of personal privacy includes:

> "iv. disclosure of information of a personal nature when disclosure would result in economic or personal hardship to the subject party and such information is not relevant to the work of the agency requesting or maintaining it; or

> v. disclosure of information of a personal nature reported in confidence to an agency and not relevant to the ordinary work of such an agency."

Under the circumstances, disclosure of the diary could result in personal hardship to the family of the writer of the diary. In addition, since the criminal investigation has been closed, it would appear that the diary is no longer of relevance to the Police Department.

It is further noted that §89(2)(b) states that an unwarranted invasion of personal privacy includes, "but shall not be limited to" the five examples of such invasions that ensue, such as the two examples quoted above. Consequently, the five examples listed in the Law are merely illustrative and represent but few among conceivable dozens of unwarranted invasions of personal privacy. As such, records may be withheld on the ground that disclosure would constitute an unwarranted invasion of personal privacy, even if the situation is not exactly analogous to any of the five examples described in 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:nb

Second, under the circumstances described in your letter, it appears that there was no individual present when you made your requests who had the authority to supply records. Nevertheless, in my view, such a situation need not arise. Although the School Board may designate a single records access officer, §1401.2(a) of the Committee's regulations specifically provides that an agency may designate "one or more persons as records access officer". Moreover, the same provision of the regulations states that:

> "[T]he designation of one or more records access officers shall not be construed to prohibit officials who have in the past been authorized to make records or information available to the public from continuing to do so."

As such, the regulations deal with situations in which individuals have in the past been authorized to disclose information but who may not be records access officers. Those persons, unless prohibited from so doing should continue to provide access to records. The regulations are intended to be flexible in order that the Freedom of Information Law can be asserted as a vehicle for making public access easier and more direct; the opposite result should never in my view occur.

Third, you asked whether one month is an excessively long time for a particular official to be informed of his assignment as records access officer and begin implementing regulations. In this regard, if the School Board complied with the Freedom of Information Law since its original enactment in 1974 and adopted regulations three years ago in compliance with those promulgated by the Committee in 1974, the task of a newly designated records access officer should not be overly burdensome. Although the amendments to the Freedom of Information Law differ substantially from the provisions of the Law as originally enacted, the alterations within the regulations are relatively minor. In any event, enclosed is a copy of the Committee's amended regulations for your consideration. I will also send copies of the regulations and model regulations to the designated records access officer.

And finally, I do not believe that your actions with respect to a request for records represent "nit-picking", as described by the Superintendent of Schools. On the contrary, your letter appears to indicate that you are familiar with the provisions of the Freedom of Information Law and the

regulations, and that many school district officials may not be familiar with those documents. I believe that an educated public is the best vehicle for insuring compliance with the Freedom of Information Law as well as other statutory requirements that affect all units 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

RJF:nb
Enc.

cc: Richard Pytak

STATE OF NEW YORK

COMMITTEE ON PUBLIC ACCESS TO RECORDS FOIL-AO-875

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

May 18, 1978

David D. Hagstrom, Esq.
Town Attorney
Office of Town of Poughkeepsie
P.O. Box 3209
Poughkeepsie, New York 12603

Dear Mr. Hagstrom:

Thank you for your interest in complying with the Freedom of Information Law. Your inquiry concerns rights of access by the public and/or a town councilman to a newsletter posted on the bulletin board of the squad room of the Town of Poughkeepsie Police Department.

Having reviewed the newsletter, a copy of which is appended to your letter, it appears that virtually all of the information contained thereon is factual and uncontroversial. Moreover, the majority of statements appearing in the newsletter relate to records that are clearly accessible. Therefore, it is my view that the newsletter is accessible pursuant to §87(2)(g)(i) of the Freedom of Information Law, which states that an agency may deny access to inter-agency or intra-agency materials, except to the extent that such materials consist of statistical or factual data, instructions to staff that affect the public or final agency policy or determinations. Since the contents of the newsletter are reflective of factual data, it is in my opinion accessible to both the public as well as a member of the Town Board.

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:nb

STATE OF NEW YORK
COMMITTEE ON PUBLIC ACCESS TO RECORDS FOIL-AO-826

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

May 18, 1978

Ms. Mary Stamper
[redacted]

Dear Ms. Stamper:

Thank you for your letter dealing with rights of access to records pertaining to you in possession of a high school in which you are in attendance.

It is noted at the outset that the Freedom of Information Law does not deal with access to student records. Access to such records is governed by the Family Educational Rights and Privacy Act, which is commonly known as the "Buckley amendment." The provisions of the Buckley amendment pertain to all educational agencies or institutions that receive funds under any federal program for which the United States Commissioner of Education has administrative responsibility. Therefore, if you attend a public high school or a private school in receipt of federal funds, the school is subject to the provisions of the Buckley amendment.

The Buckley amendment states that most student records are available only to parents of students under the age of eighteen or to an "eligible student," which is defined as "a student who has attained eighteen years of age, or is attending an institution of post-secondary education." An eligible student acquires the rights of his or her parents. Consequently, since you have attained the age of eighteen, the Buckley amendment in my opinion requires the school to provide you with access to much of the information contained in your "permanent record card."

It is possible, however, that some of the information that you have described in the permanent record card may be daniable. The regulations issued by the United States Department of Health, Education and Welfare define "education records" to include records that are directly related to a student and are maintained by an

educational agency or institution or by a party acting for the agency or institution. However, the term 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 addition, the term does not include records relating to an eligible student which are:

> "(i) Created or maintained by a physician, psychiatrist, psychologist, or other recognized professional or paraprofessional acting in his or her professional or paraprofessional capacity, or assisting in that capacity;
>
> (ii) Created, maintained, or used only in connection with the provision of treatment to the student, and
>
> (iii) Not disclosed to anyone other than individuals providing the treatment; Provided, That the records can be personally reviewed by a physician or other appropriate professional of the student's choice. For the purpose of this definition, "treatment" does not include remedial educational activities or activities which are part of the program of instruction at the educational agency or institution."

If the permanent record card does not include the information described above that is not considered part of an "education record," it is in my view accessible to you in its entirety.

Attached is a copy of the rules and regulations issued by the Department of Health, Education and Welfare under the Buckley amendment. Each educational agency or institution subject to the Buckley amendment is required to comply with the rules.

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
Att.

STATE OF NEW YORK
COMMITTEE ON PUBLIC ACCESS TO RECORDS FOIL-AO-827

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

May 19, 1978

Mr. Lance F. Wheeler
WCKL
Box 445
Catskill, New York 12414

Dear Mr. Wheeler:

Thank you for your continued interest in the Freedom of Information Law. Your question pertains to a situation in which the Hudson Police Department maintains two police blotters, one of which according to the Chief apparently is accessible and the other deniable.

It is important to emphasize at the outset that the Freedom of Information Law as amended is based upon a presumption of access. Stated differently, §87(2) of the Law provides that all records in possession of an agency are accessible, except to the extent that records or portions thereof may be withheld pursuant to one or more of the categories of deniable information listed in paragraphs (a) through (h) of the cited provision. Moreover, the categories of deniable records are based largely upon the effects of disclosure. Consequently, to determine whether or not records are accessible, one must review the categories of deniable records to discover whether any may be appropriately raised. In addition, the mere classification of records as "internal" or "confidential" may be meaningless in terms of the Law in many situations.

The phrase "police blotter" has been used by means of custom and usage for decades. However, it has never been specifically defined by statute or regulation. Nevertheless, a recent decision rendered by the Appellate Division, Third Department, construed the phrase and held that:

> "a blotter is in the nature of a log or diary in which any event reported by or to a police department is recorded.

> it contains no investigative information but merely summarizes an occurrence." [Matter of Sheehan, 59 AD 2d 808, 809 (1977)].

In view of the determination, it is clear that the blotter is intended to be representative of events reported by or to a police department; it is not intended to pertain to other records or files in possession of a police department. Moreover, in my opinion, any record analogous to that described in the determination is accessible at least in part, regardless of the manner in which it is characterized. Consequently, with respect to the two blotters maintained by the Hudson Police Department, portions of both blotters may in some cases be accessible or deniable depending upon their contents.

For example, if a blotter merely indicates the report of events, such as the commission of crimes, accidents, fires and the like, but does not identify possible suspects or other information the disclosure of which would impede a criminal investigation, the blotter would in my view be accessible. On the other hand, §784 of the Family Court Act states that all police records relating to the arrest and disposition of a juvenile or a youth must be kept in files "separate and apart" from the arrest of adults and must be withheld from public inspection. As such, a separate book, which might be categorized as a blotter, must be kept with respect to juvenile delinquents and youthful offenders and such a book must remain confidential. Other items in a blotter, however, that are not specifically deemed confidential by statute, are in my opinion accessible, even though the contents might identify the individuals charged. In this regard, reference is made to the original Freedom of Information Law which specifically granted access to "booking records," which are the records of arrest compiled by an arresting agency. The booking records remain accessible, except in situations in which the contents are required to be kept confidential, as in the case of the situation in which a person has been adjudicated a youthful offender.

In some circumstances, I believe that portions of a blotter may be deleted on the ground that disclosure would constitute an unwarranted invasion of personal privacy. For instance, if the blotter contains information regarding an alleged rape, the name of the victim may in my opinion be deleted on the ground that disclosure would result in an unwarranted invasion of the victim's privacy.

In sum, it would not in my opinion be proper to classify either or both blotters as totally available or deniable. To determine rights of access, I believe that the contents of each must be reviewed on an ongoing basis in order to gauge the extent to which the information contained therein is accessible or 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:js

cc: Samuel T. Wheeler
Police Commissioner

STATE OF NEW YORK
COMMITTEE ON PUBLIC ACCESS TO RECORDS FOIL-AO-828

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

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EXECUTIVE DIRECTOR
ROBERT J. FREEMAN

May 19, 1978

Ms. Susan Stetson
Patent Trader
Patent Trader Building
Box 240
Mount Kisco, New York 10549

Dear Ms. Stetson:

Thank you for your continued interest in the Freedom of Information Law. Your inquiry once again deals with rights of access to records relative to the Yorktown community development rehabilitation program.

As in the case of our first communication on the subject, the question raised here is whether information may be disclosed which cites the category of participation for which members of the public qualify, as well as the amount of a grant or subsidy received, including the total cost of a project.

As stated in both my initial response dated December 29, 1977, as well as our telephone conversation, I believe that any disclosure that permits the public to determine the general income level of a participant in the program may be withheld on the ground that disclosure would constitute an unwarranted invasion of personal privacy. For example, if a program participant receives a grant, one can determine that his or her income falls below a specific level. Consequently, in my view the Town may withhold information that distinguishes individuals on the basis of their receipt of a grant as opposed to subsidized loans. Similarly records reflective of the amount of a grant or a loan subsidy that identifies members of the public may in my view be withheld based upon the same principle.

Nevertheless, if you are interested in learning of the nature or success of the program or whether grants or

loans are going to qualified persons, it may be possible to delete identifying details regarding the recipients of grants or loans while providing access to the factual data upon which the grants or loans are based. For example, if you know that a grant has been made and you want to determine whether the individual in receipt of the grant has an income that qualifies for a grant, perhaps identifying details contained in the application could be deleted, while the remaining factual data used by the Town to make its determination may be made available. Similarly, I believe that figures relative to total project costs are accessible when identifying details pertaining to projects can 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:nb

cc: Arthur J. Selkin, Esq.
Town Attorney

STATE OF NEW YORK
COMMITTEE ON PUBLIC ACCESS TO RECORDS FOIL-AO-829

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

May 22, 1978

Shaka M. Shedeke, Esq.
City of New York
Commission on Human Rights
52 Duane Street
New York, New York 10007

Dear Ms. Shedeke:

Thank you for your continued interest in complying with the Freedom of Information Law. Your inquiry pertains to several issues that have arisen while in the process of developing guidelines pertaining to the availability of records and procedures of the New York City Commission on Human Rights.

First, is the New York City Commission on Human Rights required to make rules pursuant to §87(1) of the Freedom of Information Law? In my opinion, §87(1)(a) requires the governing body of a public corporation, such as the City of New York, to promulgate uniform rules for all agencies within the public corporation. Therefore, if the Commission is considered an agency of New York City, regulations adopted by the City should nullify the need for adoption of regulations by the Commission. Nevertheless, enclosed are copies of the regulations promulgated by the Committee, which govern the procedural aspects of the Freedom of Information Law and with which each agency must comply, and model regulations which may be useful as a guide.

Second, is the language in §87(2)(b) discretionary? In my opinion, all of the grounds for denial of access listed in §87(2)(a) through (h) are discretionary, except paragraph (a), which pertains to records that are confidential by statute. Since the Freedom of Information Law is permissive, an agency may deny access when the records fall within one or more of the exceptions, but it need not, unless records are specifically exempted from disclosure by statute.

Third, would the Commission be subject to a "tort cause of action for invasion of privacy" if, for example, it disclosed an employment history that could be denied? In my view, so such cause of action would result. To the best of my knowledge, rights to privacy granted by statute in New York are extremely minimal. The only statutes of which I am aware that pertain specifically to the right to privacy are §50 and §51 of the Civil Rights Law, which state that a person may initiate proceedings based upon invasion of privacy when his or her name or likeness are used for commercial purposes without prior consent. Moreover, case law has long held that a public officer may disclose in the performance of his or her duties and be immune from liability, even if the disclosure is defamatory (see e.g., Sheridan v. Crisona, 14 NY 2d 108). As such, if disclosure of an employment history, for instance, is made in the performance of a public officer's official duties, he or she is in my view immune from liability.

Fourth, are records exempt from disclosure by the New York City Administrative Code considered exempt from disclosure by statute pursuant to §87(2)(a) of the Freedom of Information Law? In my opinion, an administrative code cannot be equated with a statute. Therefore, I believe that exemptions from disclosure appearing in the New York City Administrative Code are of no effect to the extent that they are more restrictive than the Freedom of Information Law. Moreover, a decision dealing with records exempted by the New York City Charter were held to be accessible under the Freedom of Information Law and that Charter provisions more restrictive than the Freedom of Information Law are void to that extent (see Matter of Elisofon, Supreme Court, New York County, NYLJ, July 3, 1975).

And finally, does the "law enforcement purpose" exemption apply to investigative records in possession of the Commission? In this regard, I believe that §87(2)(e) was drawn to accommodate the needs of both criminal law enforcement agencies as well as administrative law enforcement agencies, such as the Commission. However, as you are aware, the amended Freedom of Information Law represents a significant departure from the statute as originally enacted. Under the original Freedom of Information Law, it was held that the field investigators files and recommendations relative to a complaint were accessible (see attached, Matter of Maloff). However, it is possible that the amendments to the Law will be interpreted in a different manner.

Your final paragraph pertains to guidelines that have been filed with this office by other agencies in the state. Please be advised that agencies are not required to file rules with the Committee. It is suggested, however, that your staff might review provisions regarding access to records in the New York Code of Rules and Regulations.

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:js
Enc.

STATE OF NEW YORK
COMMITTEE ON PUBLIC ACCESS TO RECORDS FOIL-AO-830

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

May 22, 1978

Louis N. Kash, Esq.
City of Rochester
Department of Law
City Hall
30 West Broad Street
Rochester, New York 14614

Dear Mr. Kash:

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

Your inquiry pertains to rights of access to records reflective of the residence addresses of absentee property owners. According to your letter and our conversation, the addresses of absentee owners have been sought for real estate purposes and in order that an absentee owner may be approached and offered a price for his or her property.

Although case law has long held that records used in the preparation of assessments, such as assessment rolls and data cards used by an assessor to arrive at the valuation of property are accessible [see e.g., Sanchez v. Papontas, 303 NYS 2d 711 (1969); Sears Roebuck & Co. v. Hoyt, 107 NYS 2d 756(1951)], the addresses of absentee owners under the circumstances have no relevance to the manner in which property is valuated. In fact, as described in your letter, the records relating to assessments do not contain the addresses of absentee owners. Further, it appears that the use for which the information is sought is commercial solicitation.

In my opinion, records containing the home addresses of absentee owners of real property may be likely denied on the ground that disclosure would constitute an unwarranted invasion of personal privacy pursuant to §87(2)(b) of the Freedom of Information Law. Several of the examples of unwarranted invasions of personal privacy listed in §89(2)(b) of the Law may be relevant to a determination to deny access. Moreover, the examples of such invasions listed in the cited

provision are in my view merely illustrative and represent but five among conceivable dozens of unwarranted invasions of personal privacy. Consequently, you may deny access to the information in question if in your judgment 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

Robert J. Freeman
Executive Director

RJF:nb

STATE OF NEW YORK
COMMITTEE ON PUBLIC ACCESS TO RECORDS

FOIL-AO-831

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

May 22, 1978

John J. Darwak, Esq.
St. John, Ronder and Bell
Route 28
P.O. Box 213
Shokan, New York 12481

Dear Mr. Darwak:

Thank you for your interest in the Freedom of Information Law. Your inquiry pertains to a denial of access to a legal opinion offered by the attorney to the Planning Board of the Town of Olive that has been cited by the Board as the basis for a determination.

As we discussed, advice provided by a municipal attorney to his or her client, a municipal board, is generally considered confidential under the attorney-client privilege and therefore deniable under §89(2)(a) of the Freedom of Information Law. Nevertheless, according to the correspondence attached to your letter, the advice provided by the attorney was read aloud at an open meeting attended by the public. Since the opinion was disclosed to persons other than the clients, the attorney-client privilege in my opinion can no longer be cited as a ground for denial. As such, I disagree with the contention of Mr. Barringer, the Town Supervisor, that the attorney-client privilege was not waived by means of public disclosure. On the contrary, I believe that the privilege was nullified due to public reading of the opinion.

A second possible ground for denial involves §87(2)(g) of the Freedom of Information Law, which states that an agency may deny access to records or portions thereof that:

> "are inter-agency or intra-agency materials 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..."

Although the communication by the attorney may once have been an opinion, you stated in our conversation that the opinion has in effect been adopted by the Board as its determination. If your contention is accurate, what was once the advice is now essentially representative of the determination of the Board, and therefore, in my view 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

Robert J. Freeman
Executive Director

RJF:nb

STATE OF NEW YORK
COMMITTEE ON PUBLIC ACCESS TO RECORDS FOIL-AO-832

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

May 22, 1978

Mrs. Shirley L. Woodward
Broome County Historian
R. D. 2, Box 122
Endicott, New York 13760

Dear Mrs. Woodward:

Thank you for your letter of May 16. Your inquiry concerns access to genealogical records.

It is noted at the outset that the Freedom of Information Law does not apply to vital records, including birth, death and marriage records. Access to birth and death records is governed by §4173 and 4174 of the Public Health Law; access to marriage records is governed by §19 of the Domestic Relations Law. The original vital records are maintained by the Bureau of Vital Records of the State Health Department, which has promulgated regulations regarding rights of access, fees and the like.

To complicate matters, the statutes governing rights of access provide that the records may be made available upon a showing of a "proper purpose." Unfortunately none of the statutes defines "proper purpose." Consequently, there have been many situations reported to this office in which one custodian of records determines that a request is reflective of a proper purpose, while a clerk in a neighboring community denies access. Further, although local registrars of vital records maintain duplicates of original records filed in Albany, the State Health Department has issued a directive to local registrars requiring them to refer all requests for genealogical searches to the State Health Department.

In my opinion, a request for a death certificate relative to a grandparent of an applicant indeed constitutes a "proper purpose" and therefore should be honored. However, this Committee has no control over access to

vital records, and I suggest that you contact Mr. Joseph Sterzinger, Director, Bureau of Vital Records, Department of Health, Tower Building, Empire State Plaza, Albany, New York 12237. Perhaps Mr. Sterzinger can help you and apprise you of the nature of the regulations issued by the Health Department.

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:nb

STATE OF NEW YORK
COMMITTEE ON PUBLIC ACCESS TO RECORDS FOIL-AO-833

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

May 23, 1978

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

Dear Mr. Sheehan:

Thank you for your letter of May 10. Your inquiry concerns a failure to respond to a request as well as a fee of fifty cents per photocopy imposed by the City of Binghamton.

First, I have received a copy of a response sent to you by Ms. Conlon, the records access officer. As such, I trust that there are no further questions on that matter.

Secondly, although the Freedom of Information Law generally states that no more than twenty-five cents per photocopy may be assessed, §87(1)(b)(iii) stipulates that a maximum of twenty-five cents may be charged, "except when a different fee is otherwise prescribed by law." In the case of the City of Binghamton, §16 of its Charter imposes a fee of fifty cents for xerox copies. Since the fifty cent fee was adopted prior to the enactment of the Freedom of Information Law, it is in my opinion valid.

I hope that I have been of some assistance.

Sincerely,

Robert J. Freeman

Robert J. Freeman
Executive Director

RJF:nb

STATE OF NEW YORK
COMMITTEE ON PUBLIC ACCESS TO RECORDS

FOIL-AO-834

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

May 24, 1978

Mr. Isidore Gerber
[redacted]

Dear Mr. Gerber:

Thank you for your continued interest in the Freedom of Information Law. Your inquiry concerns rights of access to information relative to a tentative budget as well as an approved budget of the Village of Liberty.

In my opinion, the issues that you have raised deal only indirectly with the Freedom of Information Law and specifically with the provisions of the Village Law, §5-506. As you are aware, the Freedom of Information Law does not require an agency to create a record in response to a request. However, as I interpret your statements, the Village of Liberty has failed to comply with §5-506(1)(f) of the Village Law, which requires that the tentative budget include:

> "A schedule of wages and salaries to be paid which shall be subdivided by administrative units and shall show in parallel columns, for each office or position of employment, the title, the number of persons in the title, the recommended rate of compensation for the title and the total recommended appropriation for the title."

In view of the quoted provision, the information intended to be included within the tentative budget is clearly accessible. Moreover, the Village Law specifically requires that the information to which the quoted provision refers be compiled.

In sum, it appears that your inquiry deals with compliance with the Village Law rather than the Freedom of Information Law. Under the circumstances, I regret that there is little that I can do to assist you.

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:js

cc: Board of Trustees
Village of Liberty

STATE OF NEW YORK
COMMITTEE ON PUBLIC ACCESS TO RECORDS

FOIL-AO-835

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

May 24, 1978

Mr. Louis J. Mustico
County Attorney
Chemung County
Department of Law
203 Lake Street
Elmira, New York 14901

Dear Mr. Mustico:

Thank you for your continued interest in complying with the Freedom of Information Law. Your inquiry concerns rights of access to records that relate to matters which may become the subjects of lawsuits.

In my opinion, if records are determined to be accessible, they remain accessible notwithstanding either the pendency or the initiation of litigation. Attached for your consideration are both the Supreme Court and the Appellate Division decisions rendered in Burke v. Yudelson. The litigation arose when an attorney attempted without success to gain access to materials in possession of the City of Rochester by means of discovery proceedings. Subsequently, he made a request for clearly accessible records under the Freedom of Information Law. Both courts upheld his request and held in essence that if records are available, they must be made available despite their potential relevance to litigation to any person, without regard to status or interest. As such, the fact that petitioner was a litigant did not detract from his rights of access under the Freedom of Information Law. Similarly, the same records would in my view remain accessible to any member of the public seeking them.

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:nb
Enc.

STATE OF NEW YORK
COMMITTEE ON PUBLIC ACCESS TO RECORDS FOIL-AO-840

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

May 25, 1978

Dr. Robert L. Richardson
[redacted]

Dear Dr. Richardson:

Thank you for your interest in the Freedom of Information Law. Your inquiry concerns a report in your possession dated June, 1975, which is entitled "Evaluation of the North Syracuse Board of Education and Recommended Objectives for the Board of Education 1975-76." The question is whether you may place copies of the report in local libraries in your vicinity.

It is noted at the outset that your inquiry does not deal directly with the Freedom of Information Law, which pertains to rights of access to records in possession of government. As you have described the circumstances, it is my opinion that you may do with the report as you see fit. It is emphasized, however, that the preceding statement concerning disclosure of the report does not deal with the status of any comments that you might make regarding its contents, but rather only upon your ability to disclose the report.

In terms of rights of access, the Freedom of Information Law is based upon a presumption of access and states that all records in possession of an agency are accessible, except to the extent that records or portions thereof may be withheld pursuant to one or more categories of deniable records listed in the Law [see attached Freedom of Information Law, §87(2)]. Relevant to your inquiry, §87(2)(g) states that an agency may deny access to records or portions thereof that:

> "are inter-agency or intra-agency materials 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..."

Although the report is an intra-agency document, portions of the report consist of "statistical or factual tabulations or data." Consequently, to the extent that the report contains such data, it is accessible.

Secondly, §89(5) of the Law states that nothing in the Law shall be construed to limit or abridge rights of access previously granted by either judicial determination or other provisions of law. In this regard, one such provision of law is §2116 of the Education Law, which since 1947 has provided 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, it is arguable that the report would be accessible notwithstanding the apparent ability to withhold portions of the report under §87(2)(g) of the Freedom of Information Law.

And third, the Freedom of Information Law is permissive; although §87(2) states that agencies may deny access to certain records, there is nothing in the Law that states that an agency must deny 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

Robert J. Freeman
Executive Director

RJF:nb
Enc.

STATE OF NEW YORK

COMMITTEE ON PUBLIC ACCESS TO RECORDS FOIL-AO-837

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

May 24, 1978

Mr. Michael Albergo
RFD 6, Odessa Road
Mahopac, New York 10541

Dear Mr. Albergo:

Your letter addressed to the Speaker of the Assembly 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 the ability to use your own photographic equipment to make copies of records in possession of a municipality. As a general matter, case law rendered as long as fifty years prior to the enactment of the Freedom of Information Law has held that a member of the public has the ability to copy or take extracts from accessible records. Similarly, the Freedom of Information Law provides that an agency must make copies of accessible records on request.

Moreover, §1401.2(b)(4) of the regulations promulgated by the Committee, which have the force and effect of law, state that:

> "[U]pon request for copies of records:
>
> (i) Make a copy available upon payment or offer to pay established fees, if any; or
>
> (ii) Permit the requester to copy those records..."

In view of the regulations, it appears that the public has the right to make copies of accessible records. Nevertheless, it is noted that the Law enables agencies to deny access to records "or portions thereof" that fall within

one or more categories of deniable information [see attached Freedom of Information Law, §87(2)]. Therefore, if, for example, you are interested in records which are in part accessible and in part deniable, as in a case in which identifying details may be deleted to protect personal privacy, an agency may prohibit the public from inspecting the records. In such cases, the agency would likely copy its original records, delete identifying details therefrom, and make the copies available for a fee to the public. In addition, copying large numbers of records may in some instances violate copyright laws and the "fair use" doctrine. Finally, a municipal clerk is responsible for maintaining custody of the records in possession of the municipality. Consequently, if copying by the public in some manner detracts from the clerk's ability to maintain custody or control over the records, the clerk may in my opinion regulate copying by the public in a responsible manner.

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:nb
Enc.

cc: Hon. Stanley Steingut
Speaker of the Assembly

STATE OF NEW YORK
COMMITTEE ON PUBLIC ACCESS TO RECORDS

FOIL-AO-838

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

May 24, 1978

Ms. Bea Havranek
Huguenot Herald
Cherry Hill Center
246 Main Street
P.O. Box 537
New Paltz, New York 12561

Dear Ms. Havranek:

Thank you for your interest in the Freedom of Information Law. Your inquiry pertains to a denial of access by the Town of Rosendale to its bank book regarding federal revenue sharing.

In my opinion, the bank book is accessible. First, §87(2)(g)(i) of the Freedom of Information Law specifically provides access to "statistical or factual tabulations or data" appearing in intra-agency materials. Since the contents of the bank book constitute factual data, the bank book is accessible. Second, the bank book, which is likely issued by a bank, might not be considered an intra-agency document. If it could not be categorized as such, there would in my opinion be no ground for denial that could appropriately be raised by the Town. And third, §89(5) of the Freedom of Information Law provides that nothing in the Law shall be construed to limit or abridge rights of access previously granted either by judicial determination or other provisions of law. In this regard, §51 of the General Municipal Law 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 view of the quoted provision, it is clear that rights of access to records of account such as bank books and their contents have long been accessible.

Your letter also indicates that your initial request was denied by the Town Supervisor, who is the designated appeals officer. According to your letter, his denial essentially precludes you from appealing. In my opinion, the practice described violates the regulations promulgated by the Committee, which have the force and effect of law and state that the designated records access officer is responsible for dealing with requests [see attached regulations, §1401.2(b)] and that the records access officer cannot be the appeals officer [see §1401.7(b)].

As requested, copies of this opinion will be sent to the persons identified in your letter, and a copy of the Committee's regulations and model regulations will be sent to the records access officer.

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:nb
Enc.

cc: Richard Glazer, Supervisor
Hugh Halligan, Councilman
William Ritter, Councilman
Lee Comar, Councilman
Benjamin Stormer, Councilman
Catherine O'Leary, Records Access Officer

STATE OF NEW YORK

COMMITTEE ON PUBLIC ACCESS TO RECORDS FOIL-AO-839

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

May 24, 1978

Mr. Joel A. Reines
County of Suffolk
Human Rights Commission
Veterans Memorial Highway
Hauppauge, New York 11787

Dear Mr. Reines:

Your letter addressed to the Solicitor 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 the scope of the phrases "public corporation" and "public authority." In this regard, §66 of the General Construction Law defines "public corporation" as follows:

> "1. A 'public corporation' includes a municipal corporation, a district corporation, or a public benefit corporation.
>
> 2. A 'municipal corporation' includes a county, city, town, village and school district.
>
> 3. A 'district corporation' includes any territorial division of the state, other than a municipal corporation, heretofore or hereafter established by law which posses the power to contract indebtedness and levy taxes or benefit assessments, whether or not such territorial division is expressly declared to be a body corporation and politic by the statute creating or authorizing the creation of such territorial division.

> 4. A 'public benefit corporation' is a corporation organized to construct or operate a public improvement wholly or partly within the state, the profits from which inure to the benefit of this or other states, or to the people thereof."

Although there is no specific definition of "public authority" I believe that public authorities are included within the definition of "public benefit corporation." Moreover, the definition of "agency" appearing in §86(3) of the Freedom of Information Law includes all governmental entities performing governmental functions. To obtain more specific information concerning authorities generally, it is suggested that you review the provisions of Article 9 of the Public Authorities Law.

Enclosed for your perusal are copies of the text of the Freedom of Information Law in its entirety.

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-840

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

May 25, 1978

Dr. Robert L. Richardson
[redacted]

Dear Dr. Richardson:

Thank you for your interest in the Freedom of Information Law. Your inquiry concerns a report in your possession dated June, 1975, which is entitled "Evaluation of the North Syracuse Board of Education and Recommended Objectives for the Board of Education 1975-76." The question is whether you may place copies of the report in local libraries in your vicinity.

It is noted at the outset that your inquiry does not deal directly with the Freedom of Information Law, which pertains to rights of access to records in possession of government. As you have described the circumstances, it is my opinion that you may do with the report as you see fit. It is emphasized, however, that the preceding statement concerning disclosure of the report does not deal with the status of any comments that you might make regarding its contents, but rather only upon your ability to disclose the report.

In terms of rights of access, the Freedom of Information Law is based upon a presumption of access and states that all records in possession of an agency are accessible, except to the extent that records or portions thereof may be withheld pursuant to one or more categories of deniable records listed in the Law [see attached Freedom of Information Law, §87(2)]. Relevant to your inquiry, §87(2)(g) states that an agency may deny access to records or portions thereof that:

> "are inter-agency or intra-agency materials 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..."

Although the report is an intra-agency document, portions of the report consist of "statistical or factual tabulations or data." Consequently, to the extent that the report contains such data, it is accessible.

Secondly, §89(5) of the Law states that nothing in the Law shall be construed to limit or abridge rights of access previously granted by either judicial determination or other provisions of law. In this regard, one such provision of law is §2116 of the Education Law, which since 1947 has provided 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, it is arguable that the report would be accessible notwithstanding the apparent ability to withhold portions of the report under §87(2)(g) of the Freedom of Information Law.

And third, the Freedom of Information Law is permissive; although §87(2) states that agencies may deny access to certain records, there is nothing in the Law that states that an agency must deny 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

Robert J. Freeman
Executive Director

RJF:nb
Enc.

STATE OF NEW YORK
COMMITTEE ON PUBLIC ACCESS TO RECORDS FOIL-AO-841

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

May 29, 1978

Ms. Douglass Ann Ruble
Town Clerk
Town of Big Flats
Town Hall
476 Maple Street
Big Flats, New York 14814

Dear Ms. Ruble:

Thank you for your interest in complying with the Freedom of Information Law and for sending a copy of the resolution adopted by the Town of Big Flats.

Having reviewed the regulations, I believe that they are in general compliance with those promulgated by the Committee on Public Access to Records. However, I would like to direct your attention to §1401.5(d) of the regulations promulgated by the Committee, a copy of which is attached. Although §6(b) of the Town's resolution provides for a delay in response to a request when the request is acknowledged, it contains no time limit for a response after a request is acknowledged. In this regard, please be advised that the Committee's regulations state that a request that is acknowledged must be answered within ten business days of the date of acknowledgment. If no response is given within ten business days, it is considered a denial that may be appealed.

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

Sincerely,

Robert J. Freeman

Robert J. Freeman
Executive Director

RJF:nb
Enc.

STATE OF NEW YORK

COMMITTEE ON PUBLIC ACCESS TO RECORDS FOIL-AO-842

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

May 31, 1978

Mr. Vincent Nantista
[redacted]

Dear Mr. Nantista:

Thank you for your interest in the Freedom of Information Law. Your inquiry pertains to a denial of access to records by the Village of Valley Stream relative to a complaint concerning a zoning violation.

The Freedom of Information Law is based upon a presumption of access and states that all records in possession of an agency, such as the Village of Valley Stream, are accessible except to the extent that records or portions thereof fall within one or more categories of deniable information [see attached Freedom of Information Law, §87(2)]. With respect to complaints submitted to the Superintendent of Public Works, there are in my view no appropriate grounds for denial under the circumstances.

The Committee has generally advised that the substance of complaints transmitted to agencies are accessible, but that the names or other identifying details regarding the complainants may be deleted on the ground that disclosure might constitute an unwarranted invasion of personal privacy pursuant to §87(2)(b) and §89(2)(b). Nevertheless, in this case, your letter indicates that the Village Code provides that:

> "[T]he Superintendent of Public Works shall keep a record of every identifiable complaint of violation of any of the provisions of this ordinance, and of the action taken consequent on each such complaint, which records shall be public records."

Since §89(5) of the Freedom of Information Law states that nothing in the Law shall be construed to limit or abridge rights of access granted by other provisions of law or by means of judicial determination, and since the cited provision of the Village Code grants rights of access to the records in question, the Freedom of Information Law in my view cannot in any way be cited to restrict rights of access granted by the Code. As such, it appears that the Village without legal justification has denied access to records available pursuant to its Code as well as the Freedom of Information Law.

With regard to records in possession of the Village relating to complaints, §87(2)(g) of the Freedom of Information Law states that an agency may deny access to records or portions thereof that:

> "are inter-agency or intra-agency materials 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..."

In essence, the provision quoted above contains a double negative. Although inter-agency and intra-agency communications may be denied, portions of such communications that contain statistical or factual data, instructions to staff that affect the public or agency policy or determination must be made available. Consequently, both the Code and the Freedom of Information provide access to records reflective of action taken subsequent to the receipt of complaints.

While the Committee does not have the statutory authority to enforce the Freedom of Information Law, the courts have in many instances cited the Committee's opinions as the basis for their determinations. Consequently, a copy of this response will be sent to both the Village Clerk as well as the Board of Trustees. Perhaps it will be persuasive.

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:nb

cc: John W. Gathard
Village Clerk

Board of Trustees

STATE OF NEW YORK

COMMITTEE ON PUBLIC ACCESS TO RECORDS FOIL-AO-843

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

June 5, 1978

Robert A. Cantore, Esq.
Vladeck, Elias, Vladeck,
Zimney & Engelhard, P.C.
1501 Broadway
New York, New York 10036

Dear Mr. Cantore:

Thank you for your letter of May 16. I have attempted to contact you on several occasions without success to discuss its contents.

Your letter seeks a reconsideration regarding an opinion drafted by this office concerning disclosure of information in possession of the New York City Housing Authority. Specifically, the opinion dealt with rights of access to a weekly payroll sheet containing financial data pertaining to employees of private contractors engaged by the Housing Authority. Although it was advised that much of the information may be justifiably withheld, you contend that your "client's peculiar relationship with both the employers and employees would more than counter any fear of 'an unwarranted invasion of personal privacy.'"

While I recognize the special relationship that your client has with the persons identified in the records sought, I do not believe that my opinion offered on May 2 can be amended. As a general matter, I am sure that you will agree that disclosure of financial data identifiable to employees of private contractors engaged in a contractual relationship with the Housing Authority would justify a denial based upon the ground that disclosure would result in an unwarranted invasion of personal privacy. Moreover, one of the basic principles of the Freedom of Information Law is that accessible records should be made equally available to any person, without regard to status or interest. If it is advised that the information sought is accessible, to be consistent similar advice should be given when the same information is sought by another party who may have no connection with the persons identified in

the records. As such, although your client now possesses much of the information you are seeking and I recognize the relationship between your client and the subjects of the records, it would in my view be inappropriate to advise that the information sought is accessible. To do so could establish a precedent that might be unfortunate, for others could argue that if disclosure in this instance would not result in an unwarranted invasion of personal privacy, the same conclusion must be reached in other instances. In essence, I believe that the matter can be resolved only by means of further discussion between you or your client and the Housing Authority.

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:nb

cc: Donald Schatz, Esq.

STATE OF NEW YORK

COMMITTEE ON PUBLIC ACCESS TO RECORDS FOIL-AO-844

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

June 5, 1978

Ms. Charlotte M. Gavaghan
Town Clerk
Town Clerk's Office
Town of Somers
Westchester County
Somers, New York 10589

Dear Ms. Gavaghan:

Thank you for your interest in complying with the Freedom of Information Law and sending a copy of the new rules and regulations adopted by the Town of Somers.

Having reviewed the Town's regulations, I believe that they are in substantial compliance with those promulgated by the Committee. Nevertheless, I would like to bring two points to your attention. First, the last page of the Town's regulations states that records shall be available for public inspection and copying "at the Town House, Route 100 and 202..." The list of agencies and their locations, however, makes reference to offices other than the Town House. Second, the same page makes reference to a fiscal officer. Although both the original Freedom of Information Law and the initial regulations promulgated by the Committee required the designation of a fiscal officer, neither the amended Freedom of Information Law nor the recently promulgated regulations include such a requirement. As such, while the Town's rules and regulations may include reference to a fiscal officer, such a provision is in my opinion unnecessary.

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:nb

STATE OF NEW YORK
COMMITTEE ON PUBLIC ACCESS TO RECORDS

OML-AO-225
FOIL-AO-845

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

June 9, 1978

Mr. James Vacca
[redacted]

Dear Mr. Vacca:

Thank you for your letter of June 1. Your inquiry pertains to the ability of a New York City community planning board to elect its officers by means of a secret ballot vote.

The first question that must be answered is whether a community planning board is a public body subject to the Open Meetings Law. Section 97(2) of the Open Meetings Law defines "public body" 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."

A community planning board is an entity that consists of more than two members, is required to act only by means of a quorum (see General Construction Law, §41), and performs a governmental function for a public corporation, in this instance the City of New York. As such, a community planning board is a public body subject to the Open Meetings Law.

Second, is a community planning board an agency subject to the provisions of the Freedom of Information Law? Section 86(3) of the Freedom of Information Law defines "agency" to include:

> "...any state or municipal department, board, bureau, division, commission, committee, public authority, public corporation, council, office or other governmental entity performing a governmental or proprietary function for the state or any one or more municipalities thereof, except the judiciary or the state legislature."

Since §84 of the New York City Charter provides that community planning boards are created by the City Planning Commission and are comprised of both governmental officials and appointees of a borough president, a community board is a governmental entity that performs a governmental function for New York City. Therefore, a community planning board is an agency subject to the Freedom of Information Law.

Third, §87(3)(a) of the Freedom of Information Law states that each agency shall maintain:

> "a record of the final vote of each member in each proceeding in which the member votes..."

Stated differently, the cited provision of the Freedom of Information Law requires each agency to compile a voting record identifiable to each member in each instance in which a vote is taken. Consequently, the Freedom of Information Law precludes public bodies, including community planning boards, from voting by secret ballot.

In sum, a community planning board is in my opinion subject to both the Freedom of Information Law and the Open Meetings Law, and an election of its officers must be recorded in a manner which identifies each member and his or her vote.

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:nb

STATE OF NEW YORK
COMMITTEE ON PUBLIC ACCESS TO RECORDS FOIL-AO-846

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

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EXECUTIVE DIRECTOR
ROBERT J. FREEMAN

June 12, 1978

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

Dear Mr. Wolfe:

Thank you for your interest in complying with the Freedom of Information Law. Your inquiry concerns a request for examination of records in possession of the Lewis County Department of Social Services by a person interested in gaining information about her ancestry.

As you are aware, §136 of the Social Services Law generally states that records identifiable to applicants for and recipients of public assistance are confidential. This statutory exemption from disclosure is preserved by §87(2)(a) of the Freedom of Information Law, which provides that an agency may deny access to records that are exempted from disclosure by state or federal statute. In addition, I have reviewed Part 357 of 18 NYCRR promulgated by the State Department of Social Services. The cited regulations provide that records relative to public assistance are generally confidential, but that they may be made available under limited circumstances. However, under no circumstance can records be made available for purposes other than those for which they are intended to be used. Since a genealogical search has no relevance to the provision of public assistance, I believe that the records sought may properly be withheld.

Your letter also seeks a copy of the general guidelines regarding access to records in possession of the State Department of Social Services. Please be advised that the cited section of the regulations is entitled "Confidential Nature of Records" and that agencies are not required to submit their general regulations adopted under the Freedom of Information Law to the Committee. It is

suggested that you review the New York Code of Rules and Regulations to learn of the Department's policy regarding 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:nb

STATE OF NEW YORK
COMMITTEE ON PUBLIC ACCESS TO RECORDS FOIL-AO-847

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

June 14, 1978

Ms. Evelyn Outcalt
Editor
Adirondack Publishing Co., Inc.
P.O. Box 318
Saranac Lake, New York 12983

Dear Ms. Outcalt:

Thank you for your continued interest in the Freedom of Information Law. Your inquiry pertains to a denial of access by the Lake Placid Board of Education to a study of drug abuse in the School District. According to our telephone conversation on the subject, the study provides statistical findings and in no way identifies students.

In my opinion, the study is accessible and the denial was improper. The Freedom of Information Law as amended is based upon a presumption of access. In brief, §87(2) provides that all records in possession of an agency, which includes a school district, are accessible, except to the extent that records or portions thereof fall within one or more enumerated categories of deniable information.

Relevant to your inquiry, §87(2)(g) states that an agency may deny access to records or portions thereof that:

> "are inter-agency or intra-agency materials 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..."

The quoted provision contains what in effect is a double negative. While District offices may withhold inter-agency or intra-agency materials, statistical or factual data, instructions to staff that affect the public, or agency policy or determinations contained within inter-agency or intra-agency materials are accessible.

Although the study in question may be considered an "intra-agency" document, it appears that its contents consist solely of what may be categorized as "statistical or factual tabulations or data." Since §87(2)(g)(i) specifically grants access to such data, I believe that the findings of the study 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:nb

cc: Joan D. Rascoe
District Clerk

Arthur Thompson
Supervising Principal

Peter A. Hopkins, Jr., Esq.

STATE OF NEW YORK

COMMITTEE ON PUBLIC ACCESS TO RECORDS FOIL-AO-848

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

June 14, 1978

Ms. Elayne Paulson
[redacted]

Dear Ms. Paulson:

I am in receipt of your letter regarding fees for copies assessed by the Chief Medical Examiner of New York City. The form attached to your letter indicates that in some instances the fees for photocopies are as high as two dollars.

In this regard, §87(1)(b)(iii) of the Freedom of Information Law (see attached) states that agencies must adopt regulations pertaining to:

> "the fees for copies of records which shall not exceed twenty-five cents per photocopy not in excess of nine inches by fourteen inches...except when a different fee is otherwise prescribed by law."

Stated differently, an agency cannot charge more than twenty-five cents per photocopy unless another provision of law enables the agency to charge a higher fee.

Under the circumstances, the Chief Medical Examiner is authorized to charge the fees that you were assessed. Section 879-2.0 of the Administrative Code of the City of New York includes a fee schedule that permits the Medical Examiner to charge in accordance with the fees that you paid. Enclosed is a copy of the applicable section of the Administrative Code that sets forth the fees in question.

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:nb
Encs.

STATE OF NEW YORK

COMMITTEE ON PUBLIC ACCESS TO RECORDS FOIL-AO-849

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

June 14, 1978

Mr. Arthur Green
76-A-3097
Ward-5
Box 300
Marcy, New York 13403

Dear Mr. Green:

I am in receipt of your letter regarding a desire to obtain records pertaining to you in possession of a trial court.

Please be advised that although the Freedom of Information Law is applicable to state and local government, its provisions do not apply to the courts. Nevertheless, §255 of the Judiciary Law generally provides that records in possession of a court clerk are available upon payment of a fee. Since, according to your letter, you do not have the resources to pay for copies, it is suggested that you contact the prisoners' legal services program at the facility in which you are housed. Perhaps those engaged in the program will be able to help you.

I regret that I cannot be of greater assistance.

Sincerely,

Robert J. Freeman

Robert J. Freeman
Executive Director

RJF:nb

STATE OF NEW YORK
COMMITTEE ON PUBLIC ACCESS TO RECORDS FOIL-AO-850

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

June 21, 1978

Mr. William Gates
Daily Star
Chestnut Street
Oneonta, New York 13820

Dear Mr. Gates:

Thank you for your continued interest in the Freedom of Information Law. Your inquiry pertains to rights of access to lists of jurors in order to ascertain the correct spelling of jurors' names.

Although your letter seeks a "ruling" by the Committee, it is noted at the outset that the Committee does not have the authority to "rule." On the contrary, an opinion offered by this office is solely advisory.

The correspondence appended to your letter indicates that the list of jurors in question was denied based upon the direction of the Hon. Joseph A. Mogavero, Jr., Otsego County Judge. The denial was based upon the notion that "disclosure of these lists and others that might be drawn would interfere with judicial proceedings and unnecessarily expose each defendant a denial of the right to a fair trial. If jury lists for criminal cases are not already exempt from disclosure by State Statute, they should be."

With all due respect to Judge Mogavero, the list of jurors is in my view accessible. First, I believe that jurors' names are drawn publicly. Second, the Freedom of Information Law as amended, effective January 1, 1978, is based upon a presumption of access. In brief, §87(2) of the Law states that all records are accessible, except to the extent that records or portions thereof may be denied in accordance with one or more specified categories of deniable information. Relevant to your inquiry, §87(2)(e) provides that an agency may withhold records or portions thereof that:

> "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..."

Since the list of jurors was compiled in the ordinary course of business rather than for law enforcement purposes, the quoted exception is in my view inapplicable. In addition, §87(2)(g) states that an agency may withhold records or portions of records that:

> "are inter-agency or intra-agency materials 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..."

A list of jurors may properly be considered an intra-agency document. Nevertheless, the provision quoted above contains what in effect is a double negative. While inter-agency and intra-agency materials may be withheld, portions of such materials consisting of "statistical or factual tabulations or data," for instance, must be made available. Since the list may be characterized as a factual tabulation, it is in my view accessible.

Further, upon review of Article 16 of the Judiciary Law, there appears to be no ground for denial or specific direction to deny access to a list of jurors. Section 509 of the Judiciary Law, which pertains to the qualification of jurors, provides that juror qualification questionnaires are confidential. However, the records in question are separate and distinct from questionnaires identifiable to potential jurors. Therefore, while the Legislature saw fit to shield certain records relative to potential jurors from public scrutiny, such as a qualification questionnaire, no analogous direction was given by the Legislature with respect to juror lists.

In sum, the juror lists sought are in my opinion accessible, for neither the Freedom of Information Law nor the Judiciary Law apparently provides a ground for denial that may appropriately be raised.

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:nb

cc: Hon. Joseph A. Mogavero, Jr.

Rodney A. Richards

STATE OF NEW YORK

COMMITTEE ON PUBLIC ACCESS TO RECORDS FOIL-AO-851

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

June 26, 1978

Mrs. Marie-Therese Carponcy
[redacted]

Dear Mrs. Carponcy:

I am in receipt of your letter of June 5.

It is emphasized at the outset that the Committee on Public Access to Records has authority only to advise. It has no power to investigate or compel compliance with the Freedom of Information Law. Consequently, in the case of a dispute, the Committee cannot require any agency of government in New York to comply with the Freedom of Information Law. Further, please be aware that I have on several occasions contacted the Governor's office as well as the Commission of Investigation on your behalf. In addition, your letter indicates that my responses to you have not addressed the questions raised in earlier letters.

In this regard, I would like to mention that I spoke to your son several times in order to provide assistance. Attempts to contact you and your son by telephone to discuss particular issues were also made without success. Moreover, your letter of April 27 dealing with the responsibilities of the Executive Chamber was answered briefly, but in my view responsively. In my letter of May 4, it was stated that:

> "I concur with your contention that the records required to be compiled by §87(3) of the Law must be maintained by the Executive Chamber and made available in accordance with the remaining provisions of the Freedom of Information Law."

My letter of May 12 also sought to apprise you of the fact that many of the records in possession of the Commission of Investigation are confidential by statute (§7505, Unconsolidated Laws) and therefore beyond the scope of rights of access granted by the Freedom of Information Law. To the best of my recollection, your son was orally informed of the contents of §7505 of the Unconsolidated Laws long before May 12 and our conversations in April indicated that progress was being made and that much of the information was about to be made available. A recent letter sent to you by Risa G. Dickstein, Chief Counsel to the Commission of Investigation, reiterates the status of the Commission's records and apparently has resulted in providing access to certain records that may be considered deniable, but have nevertheless been made available.

The term "deniable" is emphasized, for, its sense differs from the term "exempt." As you are aware, §87(2)(a) of the Freedom of Information Law pertains to records that "are specifically exempted from disclosure by state or federal statute." An example of a statutory exemption is §7505 of the Unconsolidated Laws, which prohibits disclosure "except as directed by the governor or commission..." The remaining exceptions to rights of access granted by the Freedom of Information Law provide that an agency may deny access to records or portions thereof falling within one or more of the grounds for denial listed in §87(2)(b) through (h).

With regard to communications by officials within an agency or between agencies, §87(2)(g) provides that an agency may deny access to records or portions thereof that:

> "are inter-agency or intra-agency materials 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..."

The quoted provision contains what is essentially a double negative; although an agency may withhold inter-agency or intra-agency materials, statistical or factual data, instructions to staff that affect the public or agency policy or determinations contained within such materials are accessible. According to the Assembly sponsor of the amended Freedom of Information Law, the intent behind the exception is to enable an agency to withhold letters or memoranda transmitted between officials of an agency or agencies when the contents are advisory. Many of the records to which you referred in your letters may likely be characterized as "inter-agency or intra-agency." The ability to deny access to the records, however, depends upon the nature of their contents.

Another potential ground for denial is §87(2)(e), which states that an agency may withhold records or portions thereof that:

> "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..."

Since I am unfamiliar with the controversy, it would be inappropriate to conjecture as to the applicability of the quoted exception. Both the Commission of Investigation and the Human Rights Division compile records for law enforcement purposes. The extent to which disclosure of records compiled for law enforcement purposes would result in the effects described in §87(2)(e)(i) and (ii) must in my view be determined on a case by case basis. If, however, an investigation has been terminated, it would appear that §87(2)(e) would be inapplicable.

In sum, some of the records sought are likely confidential pursuant to §7505 of the Unconsolidated Laws. Rights of access to records that do not fall within the scope of §7505 may in part be accessible, depending upon

their contents and the effects of disclosure. Although I regret that I cannot be more direct, without greater knowledge of the contents of the records in question, it is all but impossible to provide more specific advice.

Sincerely,

Robert J. Freeman

Robert J. Freeman
Executive Director

STATE OF NEW YORK
COMMITTEE ON PUBLIC ACCESS TO RECORDS FOIL-AO-852

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

June 27, 1978

Nathaniel M. Swergold, Esq.
General Counsel
Sanitary District #1
Town of Hempstead
Bay Boulevard
P.O. Box 342
Lawrence, New York 11559

Dear Mr. Swergold:

Thank you for transmitting a copy of an appeal and the ensuing determination thereon rendered by your office.

I agree in part with the determination. According to the materials attached to your letter, a request was made for the following information:

> "List of workers; payroll and shape-up, and if possible, addresses and telephone numbers".

In my opinion, some of the information sought is accessible, while the remainder may justifiably be denied.

First, §87(3)(b) of the Freedom of Information Law requires that each agency create a payroll record indicating the names, public office addresses, titles and salaries of all officers or employees of the agency. In my view, the information required to be compiled by the cited provision is accessible, notwithstanding its possible use. I believe that the specific direction in the statute to prepare the list in question represents a tacit finding by the Legislature that disclosure of such information would constitute a permissible as opposed to an unwarranted invasion of personal privacy. Moreover, payroll information analogous to the contents of the record required to be maintained has been

available by means of case law rendered long before the enactment of the Freedom of Information Law [see e.g. Chambers v. Kent, 201 NYS 2d 439 (1960); Winston v. Mangan, 338 NYS 2d 654, 661 (1972)].

Second, as a general matter, the Committee has advised and the courts have tended to uphold the notion that records relevant to the performance of official duties of public employees are accessible on the ground that disclosure would result in a permissible invasion of personal privacy. Contrarily, information relative to public employees that is irrelevant to the performance of their duties is deniable on the ground that disclosure would constitute an unwarranted invasion of personal privacy.

And third, with respect to addresses and telephone numbers, §87(3)(b) specifies that the payroll record make reference to the public office addresses. Consequently, home addresses need not be made available. Similarly, since home telephone numbers of public employees have no relevance to the manner in which they perform their duties, access to home telephone numbers may in my view be properly 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

RJF:nb

cc: Nicholas J. Calabria

James J. Vilardi

STATE OF NEW YORK
COMMITTEE ON PUBLIC ACCESS TO RECORDS FOIL-AO-853

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

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EXECUTIVE DIRECTOR
ROBERT J. FREEMAN

June 27, 1978

Steven G. Asin, Esq.
Staff Attorney
Special Litigation Unit
The Legal Aid Society
Criminal Defense Division
15 Park Row
New York, New York 10038

Dear Mr. Asin:

Thank you for your interest in the Freedom of Information Law. Your inquiry pertains to the propriety of denials by the New York City Police Department and the status of a subject matter list compiled by the New York County District Attorney's Office.

First, it is noted at the outset that denials by the Police Department cite provisions of the Freedom of Information Law an originally enacted in 1974 and consequently lack legal substance. Second, although the original statute granted access to specified categories of records to the exclusion of all others, the amended statute, effective January 1, 1978, grants access to all records in possession of government, except to the extent that records or portions thereof fall within one or more categories of deniable information appearing in §87(2)(a) through (h). Both points are stressed, for the new statute also alters the burden of proof in a judicial challenge to a denial of access. Specifically, §89(4)(b) requires an agency to prove that the records withheld fall within one or more categories of deniable information.

According to the materials appended to your letter, you have been denied access to the New York City Police Department Patrol Guide. Relevant to your inquiry, §87(2)(e) provides that an agency may withhold records or portions thereof that:

> "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..."

In my opinion, the only ground for denial within §87(2)(e) that may be appropriate pertains to disclosure of investigative techniques and procedures. However, if the contents of the Patrol Guide can be characterized as "routine techniques and procedures," §87(2)(e) cannot in my opinion be properly cited as a ground for denial. Further, the Patrol Guide may have been compiled in the ordinary course of business rather than for law enforcement purposes. If in fact the Guide was compiled in the ordinary course of business, §87(2)(e) is irrelevant, Finally, while §87(2)(g) enables an agency to deny access to "intra-agency" materials, subparagraphs (ii) and (iii) direct that instructions to staff that affect the public and agency policy found within such materials be made available. As such, the Patrol Guide appears to be accessible under either §87(2)(g)(ii) or (iii).

Your second question pertains to the extent to which the subject matter index drawn by the New York County District Attorney complies with the statute. In this regard, §87(3)(c) of the Law requires each agency to maintain:

> "a reasonably detailed current list by subject matter, of all records in the possession of the agency, whether or not available..."

Further, §1401.6(b) of the regulations promulgated by the Committee, which have the force and effect of law, states that:

> "[T]he subject matter list shall be sufficiently detailed to permit identification of the category of the record sought."

Thus the test regarding the sufficiency of the list is whether it permits the identification of the category of any record in possession of the Office of the District Attorney. Although the references in the index may in some instances be used as the basis for requesting a particular record, it appears that the list is not reflective of every category of records in possession of the Office. For example, virtually no reference is made to records relative to the administration of the Office, handbooks or guides, contracts, payroll, labor relations or investigative material, which although potentially deniable must nonetheless be included by reference in the list. If my contention is accurate, i.e. that the list does not include reference to all categories of records in possession of the District Attorney, the list is insufficient.

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:nb

cc: Francis J. McLoughlin

Peter Zimroth

STATE OF NEW YORK
COMMITTEE ON PUBLIC ACCESS TO RECORDS FOIL-AO-854

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 27, 1978

Mr. David Laporte Linfield
[redacted]

Dear Mr. Linfield:

Your letter addressed to Secretary of State Cuomo has been transmitted to the Committee on Public Access to Records, which is responsible for advising with respect to the Freedom of Information Law and of which Mr. Cuomo is a member. Your inquiry seeks advice with respect to rights of access to the following records:

> "(a) Report of the City University Task Force considered by the Daily News on December 16, 1975,
>
> (b) A tape which, in June of 1975, was sent by Brooklyn College to the Board of Higher Education Affirmative Action Program, and
>
> (c) My own, David Laporte Linfield's, administrative file at CUNY."

It is important to emphasize at the outset that the recently amended Freedom of Information Law is based upon a presumption of access. In brief, §87(2) of the Law states that all records in possession of government in New York are accessible, except to the extent that records or portions thereof fall within one or more enumerated categories of deniable information. In addition, in a judicial challenge to a denial of access, an agency has the burden of proving that records withheld fall within one or more of the categories of deniable records listed in §87(2).

Central to the controversy is §87(2)(g), which states that an agency may deny access to records or

portions thereof that:

> "are inter-agency or intra-agency materials 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..."

The quoted provision contains what in effect is a double negative. Although an agency may deny access to inter-agency or intra-agency materials, statistical or factual tabulations or data, instructions to staff that affect the public or final agency policy or determinations within such materials are accessible. Therefore, in view of the records sought, the questions involve the extent to which portions of the records may be withheld or must be made available.

In terms of the legislative history of §87(2)(g), Mark Siegel, the Assembly sponsor of the bill that later became the amended Freedom of Information Law, wrote that:

> "[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."

At this juncture, I would like to consider the status of the three areas of your request.

First, the report of the City University Task Force is in my opinion accessible at least in part. According to our telephone conversation of June 23, the Task Force report contains both statistical and factual findings as well as recommendations. To the extent that the report contains "statistical or factual tabulations or data," it is clearly accessible. The status of the recommendations, however, is less clear. Since recommendations are essentially advisory in nature, they may potentially be withheld under §87(2)(g). Nevertheless, it may be argued that the Task Force is itself an agency and therefore the recommendations are reflective of its final determinations. As such, although the City University had the ability to accept or reject the recommendations of the Task Force, the recommendations nevertheless represented the final determinations made by the Task Force. To date, there has been one determination rendered with respect to non-final recommendations which may be accepted or rejected. In McAulay v. Board of Education City of New York, 403 NYS 2d 116, the Appellate Division, Second Department, held that non-final recommendations rendered at an agency's "predecisional state" need not be made available. While I disagree with the McAulay determination, which I believe is being appealed, the decision is the only one of its kind that deals even tangentially with the status of recommendations made by an advisory panel under the Freedom of Information Law. However, decisions rendered under the Open Meetings Law have held that advisory bodies with no authority to take final action are public bodies subject to that statute in all respects. Since public bodies are required to compile minutes reflective of their determinations, it would appear that non-binding determinations of an advisory body, such as a task force, would generally be accessible as minutes. Nevertheless, the Task Force in question issued its report prior to the enactment of the Open Meetings Law, which became effective January 1, 1977. Consequently, rights of access to the recommendations under the Freedom of Information Law remain questionable.

The second record in which you are interested is a tape recording containing the details of Brooklyn College's Affirmative Action Program. Although the status of items such as tape recordings was unclear under the Freedom of Information Law as originally

enacted in 1974, §86(4) of the amended statute defines "record" to include "...any information kept, held, filed, produced or reproduced, by, with or for an agency...in any physical form whatsoever..." Therefore, a tape recording is clearly a record subject to rights of access granted by the Law. Statements made during our conversation indicate that you believe that the contents of the tape recording are largely statistical and factual accounts regarding the implementation of an affirmative action program. To the extent that the tape consists of statistical or factual tabulations or data, it is available.

And third, you are interested in reviewing the administrative file identifiable to you at the City University of New York. Once again, the provisions of §87(2)(g) are determinative. Statistical or factual information contained within the file is accessible. As we discussed, records reflective of advice or impression are likely deniable. However, while there are no decisions rendered under the Freedom of Information Law that deal with the right of an individual to inspect a personnel file identifiable to him, there is common law which stands for the notion that an individual may in some cases have a right to inspect records pertaining to him when a specific "interest" can be demonstrated. It is noted that the concept of "interest" is contrary to the Freedom of Information Law, which is based upon the notion that accessible records must be made equally available to any person, without regard to status or interest. Common law rights of access were predicated upon a showing of interest by a person seeking to inspect records. In this regard, the subject of a record might be able to demonstrate an "equitable" right of access based upon interest, even when records are beyond the scope of rights of access granted by the Freedom of Information Law. If, for example, it can be demonstrated that deniable records have in some way affected you, perhaps the records could be considered determinations and therefore accessible, or in the alternative they might be found to be available based upon equitable principles.

Enclosed for your perusal are copies of the Freedom of Information Law, regulations promulgated by the Committee that govern the procedural aspects of the Law, a pamphlet entitled "The New Freedom of Information Law and How to Use It," and an earlier advisory opinion

that deals with issues similar to those raised 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:nb
Encs.

STATE OF NEW YORK

COMMITTEE ON PUBLIC ACCESS TO RECORDS FOIL-AO-855

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

June 28, 1978

[redacted]

Dear [redacted]:

I am in receipt of your letter of June 17. Your inquiry relates to information pertaining to you in possession of the Bureau of Disability Determinations in the Department of Social Services.

It is important to emphasize at the outset that the Freedom of Information Law grants access to information that exists in the form of records. Consequently, an agency has no obligation to create a record in response to a request. In the case of the information you are seeking, it appears that much of it may have been transmitted by means of oral rather than written communication. In sum, if no record exists there is nothing to which access may be granted or denied.

Your first question asks why you were ordered to report to a doctor. Again, if there is no record of the reason, the agency has no responsibility to create a record in response to your request. However, if there are written reasons stated in the form of a record, they are in my view likely accessible to you.

Second, you are interested in identifying the persons that supposedly complained of your harassment. In this regard, the Committee has advised and the courts have tended to uphold the notion that the substance of a complaint is accessible, but the identifying details regarding the complainant may be withheld on the ground that disclosure would constitute an unwarranted invasion of personal privacy. By means of example, when a health department receives a complaint that a restaurant is unsanitary, what is important to the department is not who made the complaint, but rather whether the charges have merit. Consequently, the name of a complainant, which is

largely irrelevant to the complaint, may in my view be withheld on the ground of privacy.

Third, according to your letter a report was made summarizing complaints made by fellow employees against you. In this regard, §87(2)(g) of the Freedom of Information Law provides that an agency may deny access to records or portions thereof that:

> "are inter-agency or intra-agency materials 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..."

Stated differently, although an agency may withhold inter-agency or intra-agency materials, it must provide access to statistical or factual data, instructions to staff that affect the public or agency policy or determinations within such materials. In this instance, the report is likely an intra-agency document. To the extent that it contains statistical data, instructions to staff that affect the public or statements or policy or determinations, it is accessible.

And finally, you asked whether you have the ability to seek a hearing regarding the matter. The Freedom of Information Law has no relevance to this question. However, I would suggest that you contact your public employee union, which I am sure will be able to give you advice regarding your ability to seek a hearing on the issues you have raised.

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:nb

STATE OF NEW YORK

COMMITTEE ON PUBLIC ACCESS TO RECORDS FOIL-AO-856

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

July 5, 1978

Joseph F. Gazza, Esq.
[redacted]

Dear Mr. Gazza:

I am in receipt of your letter dated June 6. Your inquiry deals with continual delays by the Office of the Southampton Town Assessor in responding to your requests for assessment cards.

Based upon statements made in your letter, it would appear that the Office of the Assessor is aware of neither the amended Freedom of Information Law, effective January 1, 1978, nor this Committee's amended regulations, which became effective in mid-January of this year.

Your letter indicates that you are required to submit a written request identifying the cards in which you are interested five days in advance of production of the cards. In this regard, although the original Freedom of Information Law required the public to request "identifiable" records, §89(3) of the amended Law merely requires the public to "reasonably describe" the records sought. Secondly, although the cited provision gives an agency five business days to grant or deny access, records that are readily accessible should in my opinion be made available as soon as possible. The five day limitation for response is intended to be just that - a limitation.

Further, both the Law and the attached regulations, which govern the procedural aspects of the Freedom of Information Law and have the force and effect of law, recognize that more than five business days may in some cases be required to locate records or determine rights of access. Specifically, §1401.5(d) of the regulations states:

> "If the agency does not provide or deny access to the record sought within five business days of receipt of a request, the agency shall furnish a written acknowledgment of receipt of the request and a statement of the approximate date when the request will be granted or denied. If access to records is neither granted nor denied within ten business days after the date of acknowledgment of receipt of a request, the request may be construed as a denial of access that may be appealed."

In addition, if no response in the form of either a determination or an acknowledgment is given within five days of receipt of a request, §1401.7(c) directs that such failure to respond is considered a constructive denial of access that may be appealed.

Copies of this opinion as well as the regulations will be sent to those in receipt of copies of your inquiry, as well as Ms. Helen Foster of the Office of the Assessor.

I hope that I have been of some assistance.

Sincerely,

Robert J. Freeman

Robert J. Freeman
Executive Director

RJF:nb
Enc.

cc: Southampton Town Supervisor
Southampton Town Attorney
Southampton Town Assessor
Ms. Helen Foster

STATE OF NEW YORK
COMMITTEE ON PUBLIC ACCESS TO RECORDS FOIL-AO-857

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

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July 5, 1978

Mr. Louis Goldberg
[redacted]

Dear Mr. Goldberg:

Your letter addressed to the Lieutenant Governor has been transmitted to the Committee on Public Access to Records, of which the Lieutenant Governor is a member. The Committee is responsible for advising with respect to the Freedom of Information Law.

The controversy pertains to a denial of access by the Health Department to records upon which the Department and its Board for Professional Medical Conduct based its decision to dismiss a particular complaint. In addition, your letter refers to failures to respond to a series of requests within statutory time limits.

In this regard, I have contacted the appropriate officials of the Health Department on your behalf and apprised them of the limitations for response to requests for records as required by §89(3) of the Freedom of Information Law and the regulations promulgated by the Committee on Public Access to Records (see attached, Freedom of Information Law and regulations). However, despite possible non-compliance in terms of the promptness of response to your requests, I believe that the records sought have been appropriately denied.

Section 87(2)(a) of the Freedom of Information Law states that an agency may deny access to records or portions thereof that are "specifically exempted from disclosure by state or federal statute." One such statute is §230(9) of the Public Health Law, which pertains to committees created by the Board for Professional Misconduct that "conduct disciplinary proceedings" and "assist in other professional conduct matters" [Public Health Law, §230(8)]. Section 230(9) states that "[N]either the

proceedings nor the records of any such committee shall be subject to disclosure...' even in cases in which the records are sought after legal proceedings have been initiated. As such, the Public Health Law implicitly if not specifically prohibits disclosure of the records in which you are interested.

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:nb
Encs.

STATE OF NEW YORK

COMMITTEE ON PUBLIC ACCESS TO RECORDS FOIL-AO-858

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

July 5, 1978

Mr. Leon Scott
[redacted]

Dear Mr. Scott:

Thank you for your letter regarding rights of access to education records identifiable to you in possession of three named institutions of higher education.

It is emphasized at the outset that rights of access to the records in question are not governed by the Freedom of Information Law, but rather by an act of Congress, the Family Educational Rights and Privacy Act (FERPA). FERPA grants access to records to the subjects of records in possession of educational agencies that receive funds from the United States Office of Education. Therefore, to determine rights of access, you must first learn which of the institutions, if any, receive funds through the Office of Education.

In this regard, I suggest that you address your inquiry to:

FERPA Office
Room 526F
Hubert Humphrey Building
Department of Health, Education
and Welfare
Washington, D.C. 20201

I hope that I have been of some assistance.

Sincerely,

Robert J. Freeman

Robert J. Freeman
Executive Director

RJF:nb

STATE OF NEW YORK
COMMITTEE ON PUBLIC ACCESS TO RECORDS FOIL-AO-859

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

July 5, 1978

Peter L. Davis, Esq.
79 West 12th Street
New York, New York 10011

Dear Mr. Davis:

Thank you for your letter of June 13. Your inquiry pertains to rights of access to the Trial Preparation Manual drafted by the staff of the New York County District Attorney. In response to an earlier inquiry on the same subject, it was advised by this office that the Manual is accessible.

Two additional points, however, have been raised in your most recent communication. First, denial of access to the Manual in question appears to be inconsistent with the District Attorney's "previous willingness" to grant access to his complaint room manual and grand jury manual. The inconsistency arises due to the nature of the manual sought, which deals with matters occurring in open court, in comparison to the nature of the two manuals earlier made available, both of which deal with more private and in some instances confidential matters. Second, my opinion dated May 1 was based largely upon the Supreme Court decision rendered in Matter of Fink (NYLJ, July 25, 1977), which has since been modified by the Appellate Division, First Department (404 NYS 2d 610; ___AD 2d ___).

Although the Appellate Division decision in Fink held that portions of a special prosecutor's manual could be withheld, I believe that the holding may not only be distinguished from the instant controversy, but in addition tends to bolster my initial opinion in which it was advised that the District Attorney's Manual is accessible.

Having made an in camera inspection of the office manual of the Special State Prosecutor for Nursing Homes, Health and Social Services, the Court in Fink found that the manual was compiled for law enforcement purposes and that disclosure of Chapters 4 in part and Chapter 5 in toto would interfere with law enforcement investigations and reveal non-routine criminal investigative techniques and procedures. As such, portions of Chapter 4 and all of Chapter 5 were found to be deniable under §87(2)(e)(i) and (iv) of the Freedom of Information Law. In so holding, the Court noted that:

> "...it is immediately apparent that this detailed and comprehensive reconstruction of a full nursing home investigation...intended as an instruction model for the staff, presents the full panoply of techniques and approaches that had been developed... in the course of...experience.
>
> "While none of these techniques are unfamiliar to people experienced in law enforcement, their detailed application to the special area of appellant's work of investigation excludes them in our view from the category of 'routine techniques and procedures.' Moreover, we are of the view that their disclosure to subjects of investigation are more likely to assist wrongdoers to evade the law than to give guidance to those concerned to conform their practices to the requirements of law" (id. at 612).

I believe that the contents of the District Attorney's Manual can be distinguished from the Special Prosecutor's Manual in terms of both the effects of disclosure and the purpose for which it was compiled. The techniques and procedures deemed deniable in Fink were compiled with respect to a specific, narrow area of inquiry, the investigation of the nursing home industry, and could if disclosed enable potential wrongdoers to evade the law. Furthermore, the portions of the manual withheld in Fink relate to events, i.e., investigations, that occur prior to an arrest. In contrast, as you have described the District Attorney's Manual, it appears to consist of models regarding the preparation of witnesses for trial,

opening statements to juries, presentation of witnesses on direct examination, summations to juries, evidentiary techniques and the like. As such, the District Attorney's Manual was likely prepared in the ordinary course of business, rather than for "law enforcement purposes" as envisioned by §87(2)(e). Even if the Manual is considered to have been compiled for law enforcement purposes, its contents do not pertain to a specific area, as in the case of the Special Prosecutor's Manual, but rather to general or routine areas. Moreover, while the deniable information in Fink dealt with techniques and procedures employed prior to an arrest, the District Attorney's Manual deals with techniques and procedures to be used after an arrest has been made. Perhaps most importantly, Fink found that disclosure of portions of the Special Prosecutor's Manual might assist the subjects of investigations in evading the law; there would appear to be no such potentiality with regard to disclosure of the Trial Preparation Manual.

Finally, materials analogous to the Manual in question are available for sale on the open market. For example, in addition to guides, forms, treatises, "hornbooks" and the like, the Bureau of Prosecution Defense Services of the Division of Criminal Justice Services has made a similar manual available.

In sum, if your description of the District Attorney's Trial Preparation Manual is accurate, it is in my view accessible, for disclosure would likely be harmless in terms of effect, and none of the exceptions to rights of access appearing in §87(2) of the Freedom of Information Law could be appropriately raised.

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:nb

cc: Peter Zimroth

STATE OF NEW YORK

COMMITTEE ON PUBLIC ACCESS TO RECORDS FOIL-AO-860

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

July 5, 1978

M E M O R A N D U M

TO: Jeffrey Selchick

FROM: Bob Freeman

SUBJECT: Hearing Reporters - Fees for Transcripts - Freedom of Information Law

For decades hearing reporters employed by the Workmen's Compensation Board have prepared transcripts of hearings and have sold the transcripts to interested parties. Monies received by means of the sales have not been transferred to the Workmen's Compensation Board; on the contrary, the Board has permitted the reporters to sell, as their own property, the transcripts of hearings.

The enactment of an amended Freedom of Information, effective January 1, 1978 (Public Officers Law, §§84-90; Ch. 933, Laws of 1977) in my view precludes the continuation of the practice described in the preceding paragraph.

It is emphasized that the Freedom of Information Law in no way affects rights of access to the transcripts, for disclosure of the transcripts to all but the parties would likely constitute an unwarranted invasion of personal privacy [see Freedom of Information Law, §87(2)(b) and §89(2)(b)]. Similarly, although §87(1)(b)(iii) prescribes a maximum fee of twenty-five cents per photocopy, "except when a different fee is otherwise prescribed by law," the higher fee assessed by the Workmen's Compensation Board may remain in effect due to the specific statutory direction regarding fees appearing in §122 of the Workmen's Compensation Law.

However, the Freedom of Information Law provides a vehicle for termination of the practice of selling

transcripts for the personal gain of hearing reporters. Specifically, §86(4) of the amended Freedom of Information Law defines "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..."

In view of the definition, virtually all information kept by or produced for an agency constitutes a record subject to the Freedom of Information Law, whether or not the information is accessible to the general public.

The Workmen's Compensation Board is an "agency" as defined by §86(3) of the Freedom of Information Law. Consequently, since transcripts constitute "information... produced...for an agency..." they are "records" that fall within the scope of the Freedom of Information Law. Due to the definition of "record," it is clear that the transcripts in question are the property of the agency, rather than the property of a hearing reporter who might maintain physical custody of a transcript but who lacks legal custody. Further, §89(3) of the Law directs that "[U]pon payment of, or offer to pay, the fee prescribed therefore, the entity shall provide..." copies of accessible records. Thus, an entity, i.e. an agency or the State Legislature, is responsible for providing copies upon payment or offer to pay a prescribed fee.

Section 122 of the Workmen's Compensation Law tends to bolster the contention that transcripts are the property of the Board as opposed to its employees. The cited provision states:

> "[A] copy of the testimony, evidence, and procedure of any investigation, or a particular part thereof, transcribed by a stenographer in the employ of the board and certified by such stenographer to be true and correct may be received in evidence with the same effect as if such stenographer were present and testifying to the facts so certified. A copy of such transcript shall be furnished to any party upon payment of the fee for transcripts or similar minutes in the supreme court."

The key phrase in the quoted provision relative to a determination regarding legal custody of transcripts is "in the employ of the board." In a manner consistent with the Freedom of Information Law, the phrase implicitly if not directly states that the transcripts are the property of the Board. Hearing reporters are not free agents; they prepare transcripts as agents or employees of the Board in the performance of their official duties. They do not prepare the transcripts for their personal gain--they prepare transcripts as employees on behalf of an employer.

The fact that hearing reporters have performed their duties pursuant to §122 "in the employ of the board" since that statute was enacted in 1922 but nevertheless have sold transcripts for personal gain is in my view anomalous. Although the amended Freedom of Information Law may be cited as a vehicle to preclude the practice, it would appear that §122 should have precluded the practice since its enactment more than fifty years ago.

In terms of philosophy, it would be ludicrous to suggest that public employees could as a general rule sell or otherwise dispose of records they produce or possess. As public employees, the records that we create and maintain are created and maintained for and on behalf of the people we serve. The sale of government records by government employees for personal gain is in my opinion contrary to basic principles upon which the relationship between government and the people is grounded.

Also significant are sections 175.20 and 175.25 of the Penal Law, which deal respectively with tampering with public records in the second and first degrees. I am not implying that any employee of the Workmen's Compensation Board may be guilty of a crime; contrarily, it appears that the practice in question has been established by means of custom and that consequently there is no willfulness or mens rea. Nevertheless, both provisions state in relevant part that:

> "[A] person is guilty of tampering with public records...when, knowing that he does not have the authority of anyone entitled to grant it, knowlingly removes...any record or other written instrument filed with, deposited it, or otherwise constituting a record of a public office or a public servant."

Again, while the knowledge of the commission of a crime is not present, it would appear that an employee of the Board has no unilateral authority to remove transcripts of the Board, a public office. It is also doubtful whether the Board itself could authorize a transfer of records from its legal custody to the legal custody of its employees (see State Finance Law, §186).

Finally, it could be argued that the practice is unconstitutional pursuant to Article 7 §8 of the New York Constitution, which states that:

> "[T]he money of the state shall not be given or loaned to or in aid of any private corporation or association, or private undertaking..."

If it can be assumed that the transcripts are not the personal property of hearing reporters, but the property of the Board, it follows that monies paid for providing copies of transcripts should be directed or returned to the Board. The Board's policy of relinquishing monies it should receive that are obtained personally by the reporters might be considered an unconstitutional "gift" of state monies. In a similar vein, the Board's transfer of the transcripts to hearing reporters, who reap the benefits of providing copies to the financial detriment of the Board, might constitute a gift in aid of a private undertaking.

In sum, the practice permitting hearing reporters of the Workmen's Compensation Board to sell transcripts for personal gain appears to violate principles underlying the Freedom of Information Law, §122 of Workmen's Compensation Law and the Constitution. Very simply, the transcripts are not the property of the hearing reporters to sell, but rather are legally the property of the Board by which they are employed.

RJF:nb

cc: Louis Choppy
Richard Lynch
Robert McDougal
Brendan Mooney

STATE OF NEW YORK
COMMITTEE ON PUBLIC ACCESS TO RECORDS

OML-AO-232
FOIL-AO-861

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

July 6, 1978

Mr. John P. O'Toole
[redacted]

Dear Mr. O'Toole:

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 and Open Meetings Law. Your inquiry pertains to the ability of a New York City community planning board to elect its officers by means of a secret ballot vote.

The first question that must be answered is whether a community planning board is a public body subject to the Open Meetings Law. Section 97(2) of the Open Meetings Law defines "public body" 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."

A community planning board is an entity that consists of more than two members, is required to act only by means of a quorum (see General Construction Law, §41), and performs a governmental function for a public corporation, in this instance the City of New York. As such, a community planning board is a public body subject to the Open Meetings Law.

Second, is a community planning board an agency subject to the provisions of the Freedom of Information

Law? Section 86(3) of the Freedom of Information Law defines "agency" to include:

> "...any state or municipal department, board, bureau, division, commission, committee, public authority, public corporation, council, office or other governmental entity performing a governmental or proprietary function for the state or any one or more municipalities thereof, except the judiciary or the state legislature."

Since §84 of the New York City Charter provides that community planning boards are created by the City Planning Commission and are comprised of both governmental officials and appointees of a borough president, a community board is a governmental entity that performs a governmental function for New York City. Therefore, a community planning board is an agency subject to the Freedom of Information Law.

Third, §87(3)(a) of the Freedom of Information Law states that each agency shall maintain:

> "a record of the final vote of each member in each proceeding in which the member votes..."

Stated differently, the cited provision of the Freedom of Information Law requires each agency to compile a voting record identifiable to each member in each instance in which a vote is taken. Consequently, the Freedom of Information Law precludes public bodies, including community planning boards, from voting by secret ballot.

In sum, a community planning board is in my opinion subject to both the Freedom of Information Law and the Open Meetings Law, and an election of its officers must be recorded in a manner which identifies each member and his or her vote.

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:nb

STATE OF NEW YORK
COMMITTEE ON PUBLIC ACCESS TO RECORDS FOIL-AO-862

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

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July 7, 1978

Neal D. Madden, Esq.
Harter, Secrest & Emery
700 Midtown Tower
Rochester, New York 14604

Dear Mr. Madden:

I have attempted to reach you on several occasions without success regarding your letter of June 23. Your inquiry seeks advice regarding the privacy provisions of the Freedom of Information Law and opinions rendered by this office relative to the substance of our conversation on June 22. Unfortunately, although I recall that we spoke, I have no recollection of the substance of the conversation.

Due to my inability to recall the nature of our conversation, I have enclosed all opinions concerning privacy rendered since the effective date of the amended Freedom of Information Law, January 1, 1978.

It is true that §89(2)(a) of the Freedom of Information Law enables the Committee to promulgate guidelines regarding privacy. However, after lengthy discussions regarding privacy, the Committee has opted not to issue guidelines. The rationale is that judgments regarding what may constitute a permissible as opposed to an unwarranted invasion of personal privacy can only be made subjectively. For example, while I might feel that disclosure of particular information would not result in an unwarranted invasion of personal privacy, you, a second reasonable man, might feel that disclosure would indeed constitute such an invasion. As such, the Committee believes that subjective judgments regarding the privacy provisions in the Law can be made more appropriately by the courts.

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:nb
Encs.

STATE OF NEW YORK
COMMITTEE ON PUBLIC ACCESS TO RECORDS FOIL-AO-863

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

July 7, 1978

Mr. Gary Decker
78-D-0005
135 State Street
Auburn, New York 13021

Dear Mr. Decker:

Thank you for your letter of June 24. Your inquiry pertains to a denial of access to a presentence report as well as an apparent failure by the Schoharie County Probation Department to comply with the procedural aspects of the Freedom of Information Law.

With respect to rights of access to a presentence report, §390.50 of the Criminal Procedure Law states that presentence reports are available by a court to a defendant. In relevant part, the cited statute states:

> "2. Presentence report; disclosure; general principles. The 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 of parts of the report or memoranda are not 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."

In view of the foregoing, it is suggested that you direct your request to the court in possession of the report.

Despite the fact that the Schoharie County Probation Department need not provide access to a presentence report, the Freedom of Information Law requires that a denial of access be given in writing, explain the reasons for denial, and apprise you of your right to appeal, and identify the person to whom an appeal should be directed. I have enclosed copies of the Freedom of Information Law, regulations promulgated by the Committee, which have the force and effect of law, and a pamphlet entitled "The New Freedom of Information Law and How to Use It." Copies of this opinion and the attached materials will be sent to the Schoharie County Probation 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

Robert J. Freeman
Executive Director

RJF:nb
Encs.

cc: Melvin Lynes

STATE OF NEW YORK
COMMITTEE ON PUBLIC ACCESS TO RECORDS FOIL-AO-864

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

July 7, 1978

Mr. Peter M. Sullivan
Member of Assembly
92nd District
Westchester County
South Broadway &
Martine Avenue
White Plains, New York 10601

Dear Mr. Sullivan:

Thank you for your letter of July 3. Your inquiry pertains to a situation in which one of your constituents has attempted without success to obtain records regarding her family genealogy from the Bureau of Vital Records of the State Health Department. Your letter also indicates that the genealogical service has been discontinued due to reductions in staff at the Health Department and seeks advice regarding a possible solution to the problem.

It is noted at the outset that rights of access to vital records, such as birth, death and marriage records are not governed by the Freedom of Information Law. Access to birth and death records is governed by §§4173 and 4174 of the Public Health Law; access to marriage records is governed by §19 of the Domestic Relations Law. Each of the cited statutes provides that access may be granted upon a showing of a "proper purpose." Unfortunately, however, none of the statutes defines the scope of the phrase "proper purpose."

To compound problems of interpretation, two sets of vital records are kept. The original records are maintained by the Health Department. Duplicates are maintained by local registrars of vital records. Despite the inability of the Health Department to deal with requests for genealogical searches, it has directed local registrars to transmit all requests for genealogical searches to the Health Department. Having contacted the Bureau of Vital Records on your behalf,

I was informed that in most instances it takes several months to process a request. In essence, it appears that the Health Department has created a "catch-22" by precluding local registrars from making genealogical searches while at the same time knowing that it cannot perform such searches within a reasonable period of time.

Although the Freedom of Information Law cannot be used as a solution to the problem, I believe that there are several means available, both legislative and administrative, that might serve to remove or diminish the problem. First, the directive given by the Bureau of Vital Records to local registrars precluding local registrars from making genealogical searches is in my view inappropriate and possibly illegal. I am unaware of any case law holding that a request for genealogical records constitutes other than a "proper purpose." If in fact a request for genealogical records is reflective of a proper purpose, I would contend that the directive by the Health Department goes beyond the scope of its authority and is "arbitrary and capricious." A change in policy permitting local registrars to perform genealogical searches would likely ease the problem to an extent. Second, the Public Health Law permits the Bureau of Vital Records to charge significant fees for copying and searching vital records. The fees for copying and search far exceed those permitted by the Freedom of Information Law, but may remain in effect due to their statutory basis. In my opinion, the fee structure within the Public Health Law should be reviewed to determine the sufficiency of the fees. For example, the Health Department is now permitted to charge $2.50 an hour for a search. In view of the cost of labor and technology, perhaps the fee should be raised. In any case, the substantial fees permitted to be charged by the Health Department should enable the Bureau of Vital records to become a money-making operation. The problem that now exists, however, is that monies received for copying and searching are transmitted to the general state fund; they do not remain in the Health Department. Either a directive from the Division of the Budget or legislation could alter current practice by insuring that the proceeds of genealogical searches remain in the Health Department, or more specifically, in the Bureau of Vital Records. A third possible solution would involve legislation to transfer genealogical records of historical value to the State Archives. After a period of years, vital records in my opinion become less than "vital," for they take on a value that is more historical in nature. As such, the State Archives might be a more appropriate custodian for vital

records of historical value. It is noted that, as a delegate to the Governor's Conference on Libraries, I proposed a resolution to consider legislation that would transfer genealogical and vital records of historical value to the State Archives. The resolution received a sufficient number of votes to be transmitted to the Governor and the Legislature as a recommendation for consideration.

In sum, although a serious problem now exists with regard to access to genealogical records, it is not in my opinion insoluble. Nevertheless, I feel that specific action should be taken either by means of legislation or administrative change.

I hope that I have been of some assistance. If you would like to discuss the matter, I am at your service.

Sincerely,

Robert J. Freeman
Executive Director

RJF:nb

cc: Cecilia J. Pfister

STATE OF NEW YORK
COMMITTEE ON PUBLIC ACCESS TO RECORDS FOIL-AO-865

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 11, 1978

Mr. Louis Goldberg
[redacted]

Dear Mr. Goldberg:

I am in receipt of your letter of July 10. Your inquiry once again pertains to a complaint regarding Dr. Isidore Rossman, a member of the Moreland Act Commission, and concerns records in possession of the Department of Health.

Your letter makes reference to §1401.1(d) of the regulations promulgated by the Committee, which states that conflicts of laws governing public access shall be construed in favor of the widest possible availability of public records. In this regard, I do not believe that there is a conflict between the Freedom of Information Law and the Public Health Law, §230(9). Section 87(2)(a) of the Freedom of Information Law states that an agency may deny access to records that are "specifically exempted from disclosure by state or federal statute." Since §230(9) specifically refers to non-disclosure of records in possession of the Board for Professional Medical Conduct, there is in my view no conflict.

Secondly, you have requested a hearing by the Committee with regard to the controversy. Please be advised that the Committee has no statutory authority to hold hearings, for it is not quasi-judicial but rather solely advisory. The Committee has no greater rights to records in possession of government than any member of the public.

Without knowing more about the controversy in relation to your allegations, it is difficult to recommend

the action that might appropriately be taken. If, however, you believe that criminal acts have occurred, perhaps the controversy should be reported to a law enforcement agency.

I regret that I cannot be of further assistance.

Sincerely,

Robert J. Freeman

Robert J. Freeman
Executive Director

RJF:nb

STATE OF NEW YORK
COMMITTEE ON PUBLIC ACCESS TO RECORDS FOIL-AO-866

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

July 11, 1978

Mr. John J. Sheehan
[redacted]

Dear Mr. Sheehan:

Thank you for your letter of July 7. Your inquiry pertains to a requirement by the Binghamton Police Department that a form be completed in order to request records and also whether the Department may require that requests be made in writing.

Relevant to your inquiry, §89(3) of the Freedom of Information Law states that an agency must respond upon "receipt of a written request for records reasonably described..." As such, an agency may require that a written request for records be submitted. In addition, §1401,5(a) of the regulations promulgated by the Committee (see attached) provides that "an agency may require that a request be made in writing or may make records available upon oral request." Consequently, while an agency may respond to an oral request, it need not.

Further, upon submission of a written request, an agency need not respond to the request immediately. Section 89(3) of the Law states that records must be made available within five business days of the receipt of a written request, deny the request in writing or furnish a written acknowledgment that the request has been received and the approximate date when a response will be given. Due to the open-endedness of the language regarding the acknowledgment of a request, §1401.5(d) of the Committee's regulations clarifies the duties of government as follows:

> "If the agency does not provide or deny access to the record sought within five business days of receipt

> of a request, the agency shall furnish a written acknowledgment of receipt of the request and a statement of the approximate date when the request will be granted or denied. If access to records is neither granted nor denied within ten business days after the date of acknowledgment of receipt of a request, the request may be construed as a denial of access that may be appealed."

Finally, the Committee has consistently advised that a failure to complete a form prescribed by an agency cannot be a valid ground for denial of access. Any written request that reasonably describes the records sought should suffice, whether or not it is on a specific form.

I hope that I have been of some assistance.

Sincerely,

Robert J. Freeman

Robert J. Freeman
Executive Director

RJF:nb
Enc.

STATE OF NEW YORK
COMMITTEE ON PUBLIC ACCESS TO RECORDS FOIL-AO-867

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

July 11, 1978

Mr. Richard J. Agnusich
[redacted]

Dear Mr. Agnusich:

Thank you for your letter of July 6. Your inquiry pertains to a denial of access by the New York City Police Department to medical records in its possession identifiable to you. You are also seeking an investigation of the matter by the Committee.

First, the Committee on Public Access to Records has only the power to give advice. It has neither the statutory authority not the staff capability to investigate.

Second, rights of access to medical records are at best unclear. Nevertheless, the Freedom of Information Law is based upon a presumption of access. Stated differently, all records in possession of government are accessible except to the extent that the records fall within one or more enumerated categories of deniable information listed in §87(2) through (h) of the Freedom of Information Law (see attached). In addition, §89(2)(c) of the Law states that records pertaining to an individual are accessible to him when he presents reasonable proof of identity, so long as the records are not otherwise deniable under §87(2).

As such, under the circumstances it would appear that medical records identifiable to you may be accessible. However, due to the special nature of medical records, rights of access have not clearly been established. In many instances, medical records have been made available through a third party. For example, although the Police Department may be unwilling to provide access to you, it may be willing to provide access to the doctor of your choice, who can use his best judgment to interpreting the records on your behalf.

Enclosed is a copy of the regulations adopted by the Committee, which govern the procedural aspects of the Freedom of Information Law. After reviewing the regulations, it is suggested that you submit a request in writing to the appropriate party and cite the Freedom of Information Law. Inform the recipient of your request that he or she has five business days from the receipt of the request to respond in writing. If the records are denied, reasons for the denial must be given, and in addition, you must be given the name of the person to whom an appeal should be directed. Also enclosed is an explanatory pamphlet on the Freedom of Information Law which I believe will be useful 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:nb
Encs.

STATE OF NEW YORK
COMMITTEE ON PUBLIC ACCESS TO RECORDS FOIL-AO-868

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

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GILBERT P. SMITH
EXECUTIVE DIRECTOR
ROBERT J. FREEMAN

July 12, 1978

Mr. John J. Sheehan
[redacted]

Dear Mr. Sheehan:

This is in response to your letter of June 30. Your inquiry deals with the preparation of records, fees for copying and the requirement of a personal appearance for the purpose of obtaining records.

I have reviewed the letter addressed to you by Assistant Chief DiNardo and agree with his contentions. The first request dealt with a review of accident reports for 1950. Since the records do not exist, they need not be created. Similarly, the third request pertains to names, code numbers, places of accidents and the like. Since it appears that records are not kept in the form in which the information was sought, a record in that form is not required to be created. Under the circumstances, the direction or suggestions contained in response to the second and third requests appear to be the only responses that could have appropriately been given.

With respect to the fees for copying, there may be instances in which portions of records are accessible or deniable in part. To provide access to the accessible portions of a record, it may be incumbent upon the custodian of the record to photocopy it and then delete those portions which are deniable. In such a case I believe that a copy, and therefore a fee for the copy, would be required in order to provide access to the accessible portions of a particular record. If, on the other hand, a fifty page report is accessible in its entirety but you want only the first ten pages, you should be charged only for the ten pages requested.

The requirement that an individual be present at

an office to gain access to records may constitute a constructive denial of access. A request to receive copies of records by mail should in my opinion be honored when the fees for copying and the costs of postage are remitted in advance.

I hope that I have been of some assistance.

Sincerely,

Robert J. Freeman

Robert J. Freeman
Executive Director

RJF:nb

cc: Assistant Chief DiNardo

STATE OF NEW YORK
COMMITTEE ON PUBLIC ACCESS TO RECORDS

FOIL-AO-869

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

July 12, 1978

Mr. Lawrence W. Cregan
Senior Administrative Assistant
Office of John J. Flanagan
103 Broadway
Greenlawn, New York 11740

Dear Mr. Cregan:

Thank you for your interest in the Freedom of Information Law. Your inquiry pertains to the availability of correspondence, memoranda and other records regarding a situation in which school district officials are discussing a proposed lease with a state agency. Your letter further indicates that the school district owns the property that may be leased and that there are currently no potential leasors other than the state agency with which the negotiations are being conducted.

It is noted at the outset that the amended Freedom of Information Law, effective January 1, 1978, is based upon a presumption of access. Unlike the original statute which stated that certain categories of records were accessible to the exclusion of all others, the new statute provides that all records in possession of government are accessible, except those records or portions thereof specifically enumerated as deniable [see attached, Freedom of Information Law, §87(2)(a) through (h)].

Relative to your inquiry, it appears that §87(2)(g) may constitute an appropriate ground for denial with respect to portions of records in question. The cited provision states that an agency may deny access to records or portions thereof that:

> "are inter-agency or intra-agency materials 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..."

It is emphasized that the quoted provision contains what in effect is a double negative. Although an agency may withhold inter-agency and intra-agency materials, it must provide access to statistical or factual tabulations or data, instructions to staff that affect the public, or agency policy or determinations that are found within such materials. Consequently, if, for example, a memorandum transmitted by either the school district or the state agency to the other contains factual data regarding the property, but also contains advice or opinion, the factual data is accessible while the advice or opinion may be deleted.

If there have been written communications between the school board or the state agency and third parties, consultants, for instance, the consultants' reports would in my view be accessible, for a consultant is not an agency and there would likely be no applicable grounds for denial. Further, although §87(2)(c) states that an agency may withhold records which "if disclosed would impair present or imminent contract awards or collective bargaining negotiations," that ground for denial could not be appropriately raised, for neither contract awards nor collective bargaining negotiations are in any way involved.

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:nb
Enc.

STATE OF NEW YORK
COMMITTEE ON PUBLIC ACCESS TO RECORDS FOIL-AO-870

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

July 14, 1978

A. Reid King
Wyoming County Attorney
2 Main Street
Attica, New York 14011

Dear Mr. King:

Thank you for your interest in complying with the Freedom of Information Law and for sending a copy of the rules and regulations recently enacted by Wyoming County.

I believe that the regulations follow those promulgated by the Committee in all respects but one. Please understand that my comment is not intended to be interpreted as an error. Nevertheless, §9 of the County's regulations pertaining to denial of access and appeal incorporates by reference the provisions of §1401.7 of the Committee's regulations. While the incorporation by reference is not in my view erroneous or crucial, I believe it would have been preferable to provide more specifity by essentially reiterating §1401.7.

I hope that I have been of some assistance.

Sincerely,

Robert J. Freeman

Robert J. Freeman
Executive Director

RJF:nb

STATE OF NEW YORK
COMMITTEE ON PUBLIC ACCESS TO RECORDS FOIL-AO-871

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

July 14, 1978

Board of Supervisors
Steuben County
P.O. Box 710
Bath, New York 14810

Dear Members of the Board:

Thank you for your interest in complying with the Freedom of Information Law and for transmitting a copy of a resolution regarding rules adopted by Steuben County prusuant to the Law.

Having reviewed the regulations, I believe that they fully comply with those promulgated by the Committee.

Thank you for your cooperation.

Sincerely,

Robert J. Freeman

Robert J. Freeman
Executive Director

RJF:nb

STATE OF NEW YORK
COMMITTEE ON PUBLIC ACCESS TO RECORDS

FOIL-AO-872

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

August 2, 1978

Paul S. Hudson, Esq.
State of New York
Executive Department
Crime Victims Compensation Board
875 Central Avenue
Albany, New York 12206

Dear Mr. Hudson:

Thank you for transmitting a copy of the rules adopted by the Crime Victims Compensation Board.

Having reviewed the rules relevant to the Freedom of Information Law, I believe that they are in substantial compliance with those promulgated by the Committee.

Once again, I thank you for your cooperation.

Sincerely,

Robert J. Freeman
Executive Director

RJF:nb

STATE OF NEW YORK
COMMITTEE ON PUBLIC ACCESS TO RECORDS FOIL-AO-873

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

August 2, 1978

Morton Greenspan
Deputy Superintendent and
General Counsel
State of New York
Insurance Department
Two World Trade Center
New York, New York 10047

Dear Mr. Greenspan:

I am in receipt of a copy of your determination on appeal regarding a request for records by Gerald A. Rosenberg, Esq.

Having reviewed the determination, once again I urge you and the Insurance Department to study the provisions of the amended Freedom of Information Law and reconsider its interpretation.

The request by Mr. Rosenberg dealt with:

> "(1) Managing Agency Agreements between NACPAC and "others" (2) any guarantees given by or in favor of NACPAC (3) "fronting fees" paid to NACPAC and (4) any orders or opinions of the Department limiting NACPAC's authority to do an insurance business in New York."

Your letter states that no records exist relevant to the fourth item, but that the first three were denied on the ground that the records were compiled for law enforcement purposes and that disclosure would interfere with law enforcement investigations or judicial proceedings [Freedom of Information Law, §87(2)(e)(i)]. Although the records sought may have relevance to investigations carried out by the Insurance Department, the descriptive portions of your denial appear to indicate that none of the records in question was compiled for law enforcement purposes.

Consequently, I do not believe that the ground for denial cited in your letter to Mr. Rosenberg was appropriate. I would appreciate a response from you which in some manner demonstrates that the records withheld were indeed compiled for law enforcement purposes.

To reiterate, I urge you to review the Department's position regarding the interpretation of the Freedom of Information Law. I await your reply.

Sincerely,

Robert J. Freeman
Executive Director

RJF:nb

cc: Gerald A. Rosenberg, Esq.

STATE OF NEW YORK
COMMITTEE ON PUBLIC ACCESS TO RECORDS

FOIL-AO-874

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

August 2, 1978

Ms. Martha Healy
Catholic Charities of Oswego
219 W. First Street
Oswego, New York 13126

Dear Ms. Healy:

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

Having reviewed your letter to the Health Department and the denial by Oswego County, I agree in great measure with your contentions.

Enclosed is a copy of the regulations promulgated by the Committee. The regulations govern the procedural aspects of the Freedom of Information Law and have the force and effect of law. Each agency in the state, including Oswego County, is required to adopt regulations no more restrictive than those promulgated by the Committee. Relevant to your inquiry, §1401.7 of the regulations includes several requirements on the part of government regarding denials of access. When a denial is made, the reasons therefor must be stated in writing. According to the form appended to your letter no reasons were given. Assuming that you have appealed the denial to Mr. Nicholson, the County Attorney, as the appeals officer, he is obligated to fully explain reasons for further denial within seven business days within his receipt of your appeal.

With respect to rights of access, it appears that the records requested should be made available. The denial of access indicates that you requested inspection reports regarding mobile home parks and correspondence to mobile home owners containing notification of violations. In my opinion, the records in which you are interested are in

great measure available pursuant to both the Freedom of Information Law and case law [see e.g., Alberghini v. Tizes, 328 NYS 2d 272, 274-275 (1972); C. Van Deusen, Inc. v. NYS Liquor Authority, 263 NYS 2d 984 (1965)].

Also enclosed for your perusal are the Freedom of Information Law and an explanatory pamphlet on the subject.

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:nb
Encs.

cc: Robert J. Nicholson

Stephen P. Krill

STATE OF NEW YORK
COMMITTEE ON PUBLIC ACCESS TO RECORDS

FOIL-AO-875

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

August 3, 1978

Mr. Henry W. Haug
[redacted]

Dear Mr. Haug:

Thank you for your letter of July 30. Your inquiry concerns rights of access to the name or names of a person or persons who registered complaints with the Suffolk County Department of Health regarding your summer hot dog business.

In my opinion, although the substance of complaints is accessible, the names of the persons who made the complaints may be deleted.

The Freedom of Information Law states that all records in possession of government in New York are accessible, except records or portions of records that fall within one or more of eight categories of deniable information listed in the Law [see attached, Freedom of Information Law, §87(2)(a) through (h)]. Relevant to your inquiry, §87(2)(b) states that portions of records may be withheld when disclosure would result in an unwarranted invasion of personal privacy. Further, §89(2)(b) of the Law lists five examples of unwarranted invasions of personal privacy. Several of the examples make reference to relevance to the ordinary work of the agency. In the case of complaints, the Committee has advised and the courts have tended to uphold the notion that the substance of a complaint is relevant to the agency in receipt of a complaint, and that the identity of the complainant is largely irrelevant [see Church of Scientology v. State, 403 NYS 2d 224, ___ Ad 2d ___ (1978)]. On that basis, it has been advised that the name of a complainant may be deleted, but that the substance of the complaint be made available.

In sum, I believe that the Suffolk County Department of Health must furnish records of complaints to you, but that the names of complainants may be deleted from 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
Executive Director

RJF:nb
Encs.

STATE OF NEW YORK
COMMITTEE ON PUBLIC ACCESS TO RECORDS

FOIL-AO-876

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

August 3, 1978

Mr. Alfred O. Kuhnle
[redacted]

Dear Mr. Kuhnle:

I am in receipt of your letter of July 21. Your inquiry and the correspondence appended to it pertain to a failure on the part of the New York City Police Department to comply with both the procedural and substantive aspects of the Freedom of Information Law.

As you are aware, the Freedom of Information Law as originally enacted in 1974 was significantly amended. In contrast to the original statute which granted access to specific categories of records to the exclusion of all others, the new Law, effective January 1, 1978 presumes that all records are accessible except to the extent that records or portions thereof fall within one or more enumerated categories of deniable information [see Freedom of Information Law, §87(2)(a) through (h)]. Moreover, while a member of the public had the burden of proving that a denial was unreasonable under the original Law, the new Law requires that the government prove that records withheld indeed fall within one or more categories of deniable information listed in the Law.

In view of the alterations in the Freedom of Information Law, it is clear that the New York City Police Department is not cognizant of its provisions and has denied access based upon provisions of the 1974 statute. In addition, it appears that the procedural requirements contained in §89(4) of the Law have not been followed.

It is noted that an agency is not required to transmit to the Committee copies of denials of access. However, when a denial is appealed, the appeal and the determination that ensues must be transmitted to the Committee.

Since the Committee has no power to enforce the Freedom of Information Law, but rather only has the power to advise, there is little that I can do to assist you directly. Nevertheless, copies of my response to you will be sent to the Police Department. Copies of the regulations promulgated by the Committee, which have the force and effect of law, and an explanatory pamphlet on the subject will be sent to you and the Police Department.

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:nb
Enc.

cc: Police Department

Police Commissioner

STATE OF NEW YORK
COMMITTEE ON PUBLIC ACCESS TO RECORDS FOIL-AO-877

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

July 13, 1978

Ms. Marilyn E. Ough
Town Clerk
Town of Ulysses
Elm Street
Trumansburg, New York 14886

Dear Ms. Ough:

Thank you for your interest in complying with the Freedom of Information Law. Enclosed are copies of the Freedom of Information Law, regulations governing the procedural aspects of the Law, and a pamphlet entitled "The New Freedom of Information Law and How to Use It."

With respect to the subject matter list required to be compiled by §87(3)(b) of the Law, it is noted that the list should make reference to all categories of records in your possession, whether or not the records are available. The purpose of the list is to apprise the public of the general nature of records in your possession.

For further information, it is suggested that you review §1401.6 of the regulations. In addition, you might review the schedules for retention and disposition of records issued by the Education Department. The schedules, which in my view are more detailed than a subject matter list must be, may be useful as a guide.

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:nb
Encs.

STATE OF NEW YORK
COMMITTEE ON PUBLIC ACCESS TO RECORDS FOIL-AO-878

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

August 3, 1978

Norman Kellar, Esq.
14 Pearl Street
U.P.O. 3536
Kingston, New York 12401

Dear Mr. Kellar:

Thank you for your interest in complying with the Freedom of Information Law. Your inquiry concerns rights of access to lists of clients of garbage collectors that are furnished to the Town of New Paltz. According to your letter, the lists in question are given to the Town in order to insure that the carters are complying with local law.

In my opinion, the decision by the Town Clerk to deny access to lists of customers of the carters may have been proper, depending upon the effects of disclosure.

Your letter indicates that access was denied on the ground that the lists constitute confidential business records. In my view, there is no such exception to rights of access in the Freedom of Information Law. Further, in view of the definition of "record" appearing in §86(4) of the Law, virtually any information in possession of government in New York is subject to rights of access. The only restrictions upon rights of access are found in §87(2), which specifies the categories of information that may be withheld.

Relevant to your inquiry, however, §87(2)(b) states that records or portions thereof may be withheld when disclosure would result in "an unwarranted invasion of personal privacy." In addition, §89(2)(b) lists five instances of unwarranted invasions of privacy. It is noted that the examples are merely illustrative and represent but five among conceivable dozens of unwarranted invasions of personal

privacy. Two of the examples may have relevance with respect to the lists. Section 89(2)(b)(iii) states that an unwarranted invasion of privacy includes the sale or release of names and addresses if such lists would be used for commercial or fund-raising purposes, and §89(2)(b)(iv) states that an unwarranted invasion includes disclosure of information of a personal nature that would result in economic or personal hardship to the subject party and such information is not relevant to the work of the agency maintaining it.

Under the circumstances, questions must be raised regarding the effects of disclosure. Would disclosure result in economic or personal hardship to either the carters or the persons named in the lists? For example, if there would be no economic or personal hardship, there may be no justification for denial. In view of the foregoing, it is suggested that you or the Town Clerk attempt to weigh the effects of disclosure to determine whether disclosure would in any way be harmful with respect to either the economic interests of the carters or to their clients.

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:nb

STATE OF NEW YORK
COMMITTEE ON PUBLIC ACCESS TO RECORDS

OML-AO-238
FOIL-AO-879

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

August 3, 1978

Mr. Wallace M. Vog
Executive Director
New York State Advisory
Council on Vocational Education
1610, 99 Washington Avenue
Albany, New York 12230

Dear Mr. Vog:

Thank you for your interest in complying with the Freedom of Information Law and the Open Meetings Law. Your inquiry pertains to the means by which notice should be provided, the status of committees which propose activities to be approved by the Advisory Council on Vocational Education, and the procedures adopted by the Council under the Freedom of Information Law.

With regard to notice, §99 of the Law requires that notice be given to the public and the news media prior to all meetings of public bodies. Since the Law distinguishes between the public and the news media, it is suggested that a notice be posted in one or more conspicuous locations in order to inform the public of a meeting. In addition, notice should in my opinion be given to at least two members of the news media who are likely to make contact with those interested in attending the meeting. However, it is noted that a newspaper in receipt of a request to publish a notice is not obligated to print the notice. Furthermore, public bodies are not required to pay to place legal notices in newspapers. Consequently, although a public body may fully comply with the Law by posting notice and by informing more than one member of the news media that a meeting will be held at a specific time and place, there is no guarantee that the members of the news media in receipt of the notice will in fact publicize the meeting.

The committees to which you referred, which have no power to act on behalf of the Council, are in my opinion public bodies that must comply with the Open Meetings Law.

Third, the committees in question perform a governmental function for the Education Department.

Fourth, the debate in the Assembly regarding the bill that later became the Open Meetings Law clearly indicates that it was the sponsor's intent to include "committees, subcommittees, and other subgroups" within the scope of "public body" (see transcript of Assembly debate, May 20, 1976, pages 6268 to 6270).

And fifth, two recent judicial decisions cited this Committee's contention that committees and advisory bodies are indeed public bodies subject to the Open Meetings Law in all respects (see Matter of NFY Legal Services, Supreme Court, New York County, NYLJ, January 17, 1978; Pissare v. City of Glens Falls, Supreme Court, Warren County, March 7, 1978).

Finally, based upon a review of the rules adopted by the Council under the Freedom of Information Law, I believe that they are in substantial compliance with 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:nb

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..." [§97(2)].

By separating the quoted definition into its elements, one can conclude that a committee is a public body subject to the Law.

First, a committee is an entity for which a quorum is required. Although there may neither be a statutory provision nor a by-law that requires the presence of a quorum, §41 of the General Construction Law states in relevant part that:

> "[W]henever...three or more persons are charged with any public duty to be performed or exercised by them jointly or as a board or similar body, a majority of the whole number of such persons...at any meeting duly held upon reasonable notice to all of them, shall constitute a quorum and not less than a majority of the whole number may perform and exercise such...duty."

Therefore, although committees may not be specifically required to act by means of a quorum, §41 of the General Construction Law mandates that all public bodies act only by means of a statutory quorum.

Second, does a committee "transact public business?" While it has been argued that committees do not take final action and therefore do not transact public business, this Committee has consistently advised that the term "transact" does not necessarily imply that action is to be taken. Rather, according to an ordinary dictionary definition, "transact" means merely "to discuss" or "to carry on business." This opinion has been ratified by a recent decision of the Appellate Division, Second Department (Orange County Publications v. Council of City of Newburgh, NYLJ, January 12, 1978, p. 1; 401 NYS 2d 84).

STATE OF NEW YORK
COMMITTEE ON PUBLIC ACCESS TO RECORDS

FOIL-AO-880

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

August 4, 1978

Mrs. Bernice F. Wilcox
Stuart Road
Chili Mills National Historic Site
Churchville, New York 14428

Dear Mrs. Wilcox:

Thank you for your interest in the Freedom of Information Law. Your inquiry pertains to a request for copies of a road dedication under the Freedom of Information Law that to date has been unanswered by the Town of Chili.

It is important to note at the outset that not all roads must be dedicated. Consequently, it is possible that the records in which you are interested do not exist. Nevertheless, pursuant to §89(3) of the Freedom of Information Law (see attached) and §1401.2(b)(6) of the regulations promulgated by the Committee (see attached), you may request a certification by the Town's records access officer that the records are not in the custody of the Town or that the records are in custody, but cannot be found after diligent search.

With respect to the failure of the Town to respond to your request, §89(3) of the Law requires that an agency must respond to a request within five business days after its receipt. If no response is given within that period, the request is considered a denial that may be appealed to the Town Board or whomever it has designated to hear appeals. On receipt of an appeal, the appeals person or body is required to transmit a copy of the appeal to this Committee. Further, the appeals person or body must determine the appeal within seven business days of its receipt and transmit a copy of the determination to the Committee.

Assuming that the dedication does indeed exist, it is in my opinion clearly accessible. Similarly, any maps, plats, plans or the like in possession of the Town regarding the road or roads in question are also accessible.

Enclosed for your consideration is a pamphlet entitled "The New Freedom of Information Law and How to Use It," which I believe will 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:nb
Encs.
cc: Town Board

STATE OF NEW YORK
COMMITTEE ON PUBLIC ACCESS TO RECORDS FOIL-AO-881

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

August 7, 1978

Peter L. Danziger, Esq.
O'Connell and Aronowitz, P.C.
100 State Street
Albany, New York 12207

Dear Mr. Danziger:

I am in receipt of your letter of August 2, Your inquiry pertains to rights of access to "written notes of what transpired at the open meetings" of the Board of Regents. According to your letter, the notes are used as the basis for compiling the official Journal of Minutes of the meeting of the Board of Regents. Since the Journal is not a verbatim record and often omits information that is found in the notes, you are interested in the written notes of the February, March, and April, 1977 meetings of the Board of Regents insofar as they pertain to the application of the Unification Theological Seminary.

In my opinion, if the notes in which you are interested exist, they are accessible. As you are aware, the Freedom of Information Law as amended is based upon a presumption of access. Section 87(2) of the statute provides that all records in possession of an agency are accessible, except records or portions thereof that are listed in specified categories of deniable information. In addition, while the original enactment failed to define the term "record," §86(4) of the amendments to the Law defines "record" to include "any information kept, held, filed, produced, or reproduced, by with or for an agency...in any physical form whatsoever..." Consequently, it is clear that the notes in question are records subject to rights of access.

Relevant to your inquiry, §87(2)(g) states that an agency may withhold records or portions thereof that:

> "are inter-agency or intra-agency materials 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..."

The quoted provision contains what in effect is a double negative. While an agency may deny access to inter-agency and intra-agency materials, statistical or factual data, instructions to staff that affect the public or final policy or determinations contained within such materials must be made available. Although the notes may be categorized as "intra-agency materials," their contents appear to consist of a factual rendition of events that transpired at open meetings. If the notes indeed constitute factual data, they are in my view accessible.

This contention is bolstered by a letter written to me by Mark Siegel, the Assembly sponsor of the amendments to the Freedom of Information Law (July 21, 1977). Siegel explained the intent of §87(2)(g) as follows:

> "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."

Since the notes are relied upon as the basis for compiling the official Journal of Minutes, they would appear to fall within the intended scope of accessible records envisioned by the sponsor of the legislation.

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:nb

STATE OF NEW YORK
COMMITTEE ON PUBLIC ACCESS TO RECORDS FOIL-AO-882

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

August 7, 1978

Mr. John Pauly
Editorial Department
4th Floor
Courier-Express
Buffalo, New York 14240

Dear Mr. Pauly:

I am in receipt of your letter of August 3. Your inquiry pertains to a denial of access to the Erie County Social Services file identifiable to a named individual and her deceased children.

In my opinion, the denial was justified. Section 87(2)(a) of the Freedom of Information Law states that an agency may deny access to records that "are specifically exempted from disclosure by state or federal statute." The records in question are confidential pursuant to the Social Services Law, §136(2), which provides that:

> "[A]ll communications and information relating to a person receiving public assistance or care obtained by any social services official, service officer, or employee in the course of his work shall be considered confidential and, except as otherwise provided in this section, shall be disclosed only to the commissioner of social services, or his authorized representative, the county board of supervisors, city council, town board or other board or body authorized and required to appropriate funds for

> public assistance and care in and for such county, city or town or its authorized representative or, by authority of the county, city or town social services official, to a person or agency considered entitled to such information."

Due to the statutory requirements of confidentiality found in the quoted provision, the Erie County Social Services Department is prohibited from disclosing the records in which you are interested.

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:nb

OML-AO- 240
FOIL-AO-883

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 8, 1978

Mrs. F. Marino
[redacted]

Dear Mrs. Marino:

Thank you for your interest in the Freedom of Information Law and the Open Meetings Law. Your question concerns the ability of the public to employ tape recorders at meetings of public bodies.

It is important to note that both the Open Meetings Law and the Freedom of Information Law are silent with regard to the ability of the public to tape record meetings of public bodies. To date, there have been two judicial decisions dealing with the subject. In Davidson v. Common Council of the City of White Plains [244 NYS 2d 385 (1963)], it was held that a public body has the authority to adopt reasonable rules to govern its own proceedings. Under the circumstances of that case, the court found that the presence of a tape recorder would detract from the deliberative processes of the Common Council. As such, the Court held that a rule prohibiting the use of tape recorders at the meeting was reasonable.

Nevertheless, the Davidson case was decided in 1963. As everybody is aware, technology in the area of tape recording devices has advanced markedly. In 1963, tape recorders were cumbersome and their presence was readily evident. However, in 1978, tape recorders are often small machines and their presence might not be detected in some instances. For example, there have been many situations in which I have given speeches and during which members of the audience have used tape recorders. In the majority of those cases, I was not aware that the tape recorders were being employed. The presence of the recorders did not detract from my ability or that of other participants to engage in our presentations. Similarly, if the presence of a tape recorder does not detract from the deliberative process of

a public body, I believe that a general rule prohibiting the use of all tape recorders might be found to be unreasonable by a court.

Despite my contentions, there is a recent decision of the Supreme Court, Suffolk County (see enclosed), which held that a school board has the power to adopt rules to prohibit the use of tape recorders at its meetings. However, it is noted that the decision declined to deal with constitutional issues due to the pendency of litigation on the subject.

With respect to a situation in which no minutes are taken, please be advised that §101 of the Open Meetings Law requires that minutes must be taken. Further, assuming that a public body has tape recorded its proceedings, the tape recording is in my view accessible under the Freedom of Information Law. Although the original Freedom of Information Law failed to define "record," the amendments to the Law, effective January 1, 1978, 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..." The amended Law is based on a presumption of access and an agency may deny access only under circumstances specified in the Law [see §87(2)]. Since a tape recording of an open meeting does not fall within any of the exceptions to rights of access, it should in my opinion be made available.

Enclosed for your consideration are copies of the Freedom of Information Law, the Open Meetings Law and a pamphlet entitled "The New 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

RJF:nb
Encs.

STATE OF NEW YORK
COMMITTEE ON PUBLIC ACCESS TO RECORDS

FOIL-AO-884

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

August 9, 1978

Ms. Alice Todd
[redacted]

Dear Ms. Todd:

Thank you for your interest in the Freedom of Information Law. Your inquiry pertains to fees for copies of records as well as rights of access to records.

According to your letter, the City of Peekskill assessed a fee of two dollars for a proposed local law consisting of five pages. In this regard, §87(1)(b)(iii) of the Freedom of Information Law provides that fees for copies of records "shall not exceed twenty-five cents per photocopy not in excess of nine inches by fourteen inches...except when a different fee is otherwise prescribed by law." As such the fee for copying assessed by the City violated the twenty-five cent limitation imposed by the Freedom of Information Law, unless a different fee had been established by law prior to September 1, 1974.

Although the twenty-five cent limitation appears in the amended Freedom of Information Law, which became effective January 1, 1978, the regulations promulgated by the Committee under the original Freedom of Information Law, effective September 1, 1974, stated that agencies could not charge in excess of twenty-five cents per photocopy except in cases in which an existing provision of law permitted the assessment of a higher fee. Therefore, if the City of Peekskill had adopted a fee for copying in excess of twenty-five cents by means of a local law or ordinance prior to September 1, 1974, such a fee would be proper. If, however, a higher fee was adopted after the effective date of the original Freedom of Information Law, it is in my opinion invalid to the extent that it exceeds the twenty-five cent limitation.

Second, your letter indicates that the City denied access to an appointing resolution that was listed on the

agenda for the meeting of July 17 but was withdrawn. Rights of access to the resolution are questionable. Although the Freedom of Information Law is based upon a presumption of access, it appears that the withdrawn resolution may have been justifiably denied. Section 87(2) of the Law provides that all records are available except to the extent that records or portions thereof fall within one or more of eight categories of deniable information.

Relevant to your inquiry, §87(2)(g) states that records or portions thereof may be denied that are:

> "inter-agency or intra-agency materials 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..."

Under the circumstances, it would appear that the withdrawn resolution might be categorized as "intra-agency material" and that in view of its status (i.e., withdrawn) that it does not constitute statistical or factual data, instructions to staff that affect the public or final agency policy or determinations. Since it was withdrawn, the resolution had no finality attached to it and would appear at this juncture to be deniable.

If the resolution could not be considered to be an intra-agency document, it is possible that the name of the potential appointee could be deleted on the ground that disclosure would constitute an unwarranted invasion of personal privacy pursuant to §87(2)(b) and §89(2)(b) of the Freedom of Information Law. Under such circumstances, the substance of the resolution would be accessible, but the name or other identifying details relative to the potential appointee could likely 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

Robert J. Freeman
Executive Director

RJF:nb

cc: Peekskill City Council

STATE OF NEW YORK
COMMITTEE ON PUBLIC ACCESS TO RECORDS FOIL-AO-885

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

COMMITTEE MEMBERS
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DOUGLAS L. TURNER
EXECUTIVE DIRECTOR
ROBERT J. FREEMAN

August 10, 1978

Mr. Earl Dominesey
Chairman
New York State Soil and Water
Conservation Committee
Cornell University
142 Emerson Hall
Ithaca, New York 14850

Attention Mr. William Croney

Dear Mr. Dominesey:

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

The question raised in your letter pertains to the status of a conservation plan developed for private property by a soil and water conservation district, and whether such a plan can be considered the landowner's personal and private property and therefore exempt from public review.

Based upon my conversation this morning with Mr. Croney, the Executive Secretary to the Committee, copies of the conservation plans, although transmitted to landowners, remain in the possession of government. As such, I believe that the plans are subject to rights of access granted by the Freedom of Information Law.

Relevant to your inquiry, the Freedom of Information Law, which was recently amended, defines "record" to include "any information kept, held, filed, produced or reproduced by, with or for an agency or the state l gislature, in any physical form whatsoever..." Therefore, the plans in question are clearly records under the Law.

With respect to rights of access, §87(2) of the Law provides that all records are available, except to the extent that records or portions thereof fall within one or more of eight enumerated categories of deniable information. In my

view, there is only one exception that may in any way be applicable.

Specifically, §87(2)(b) provides that records or portions thereof may be withheld when disclosure would result in an unwarranted invasion of personal privacy. Further, §89(2)(b) contains examples of unwarranted invasions of privacy. It is noted that the examples are merely illustrative and represent but five among conceivable dozens of such invasions. In this regard, it is suggested that you consider the contents of the plans in light of the privacy provisions of the Freedom of Information Law to determine which portions of the plan, if any, may justifiably be withheld 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:nb

STATE OF NEW YORK
COMMITTEE ON PUBLIC ACCESS TO RECORDS FOIL-AO-886

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

August 10, 1978

Mr. Gerald Stern
Administrator
State of New York
State Commission on Judicial
Conduct
801 Second Avenue
New York, New York 10017

Dear Mr. Stern:

Thank you for your interest in complying with the Freedom of Information Law (hereafter "the Law") and for sending a copy of the regulations adopted by the Commission on Judicial Conduct.

Having reviewed the regulations, I would like to offer the following comments.

First, §1 of the Commission's regulations defines "records" and "information." However, these definitions are inconsistent with the definition of "record" appearing in the Law. Section 86(4) of the Law defines "record" to include "any information kept, held, filed, produced or reproduced by, with or for an agency...in any physical form whatsoever..." Since the Commission is an agency as defined by §86(3) of the Law, the quoted provision is applicable to all information in its possession.

It is noted that the definition of "record" has no direct effect upon the ability to grant or deny access; it merely states that all information in possession of an agency is subject to the rights and limitations contained in the Law. Contrarily, "records" is defined in the Commission's regulations to mean "...a written determination filed in the Court of Appeals and served upon a judge in accordance with applicable provisions of law, and related findings of fact,

conclusions of law and the record of proceedings upon which such a determination is based, and other documents which may, by law, be made public." Further, "information" is defined to mean "information which may, by law, be provided." Both of the definitions in the Commission's regulations are based upon and limited by rights of access. To be consistent with the Freedom of Information Law, any definition of "record" or "information" should in my view be based only upon possession.

I am cognizant of the provisions of §45 of the Judiciary Law, which requires confidentiality of records in possession of the Commission. In view of its breadth, and the conflict between the two definitions appearing in §1 of the Commission's regulations and the definition of "record" appearing in the Law, it would appear that §1 as written is unnecessary. Consequently, it is suggested that the definitions of "records" and "information" in the Commission's regulations be excised.

Second, §8(b) of the regulations makes reference to §5(d) of the regulations. I believe that the reference to §5(d) should be changed to §6(d).

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

Sincerely,

Robert J. Freeman

Robert J. Freeman
Executive Director

RJF:nb

cc: Richard J. Bartlett

Mario M. Cuomo

Rolland E. Kidder

STATE OF NEW YORK
COMMITTEE ON PUBLIC ACCESS TO RECORDS FOIL-AO-887

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

August 11, 1978

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

Dear Ms. Stapley:

Thank you for your interest in complying with the Freedom of Information Law and for transmitting a copy of the rules and regulations adopted by the Village of Avon.

Having reviewed the resolution, I believe that it is consistent with the regulations promulgated by the Committee on Public Access to Records in all respects.

Once again, I thank you for your cooperation.

Sincerely,

Robert J. Freeman

Robert J. Freeman
Executive Director

RJF:nb

STATE OF NEW YORK
COMMITTEE ON PUBLIC ACCESS TO RECORDS FOIL-AO-888

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

August 11, 1978

Mr. Martin Wald
The Associated Press
Post Office Box 7165
Capitol Station
Albany, New York 12224

Dear Mr. Wald:

Thank you for your letter concerning a denial of access by the Board of Equalization and Assessment to a report regarding the decision in Levittown v. Nyquist.

I have contacted the Board on your behalf, and in an effort to cooperate with the Committee, Robert L. Beebe, Counsel to the Board, has agreed to permit me to inspect the contents of the report in order to write an informed opinion.

It is noted at the outset that the Freedom of Information Law as amended is based upon a presumption of access. The original enactment granted access to specified categories of records to the exclusion of all others. The amendments, however, reverse the logic of the original statute by stating that all records are accessible, except to the extent that they fall within one or more of eight enumerated categories of deniable information [see §87(2)].

The report consists of three documents, including a memorandum from Counsel to the Board, a memorandum from staff to Counsel, and a copy of an article that appeared in the International Assessor Newsletter. Having reviewed the three documents, two are in my view accessible in full and one in part.

Central to the controversy is §87(2)(g) of the Freedom of Information Law, which was cited by the Board's

Records Access Officer as the basis for its denial. Section 87(2)(g) provides that an agency may deny access to records or portions thereof that:

> "are inter-agency or intra-agency materials 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..."

The quoted provision contains what in effect is a double negative. Although an agency may deny access to inter-agency and intra-agency materials, to the extent that such materials contain statistical or factual tabulations or data, instructions to staff that affect the public, or agency policy or determinations, they are accessible.

The memoranda to which I referred were transmitted within an agency and are clearly intra-agency documents. Nevertheless, upon review of their contents, I believe that the memorandum from staff to Counsel regarding the Levittown decision is accessible in its entirety, for it merely apprises the Board in a factual manner of the contentions raised by the parties to the lawsuit and summarizes portions of the Court's rationale and the relief granted.

In sum, the memorandum is not reflective of the opinion of staff, but rather recites the issues and the determination rendered by the Court. As such, the memorandum in my opinion constitutes "factual data" that is accessible under the Freedom of Information Law.

The other memorandum, which was written by Counsel and transmitted to the Board, is in my view accessible in part. It is reemphasized at this juncture that the Freedom of Information Law is based upon a presumption of access and that the introductory language in §87(2), which enables an agency to withhold "records or portions thereof," is based upon the recognition by the Legislature that records might in some instances consist of accessible as well as deniable information.

The memorandum in question appears to be factual in some respects and purely advisory in others. The advisory portions of the memorandum may be deleted, while the remainder should be made available.

The legislative history relative to the enactment of the amendments to the Freedom of Information Law tends to bolster this contention. In a letter sent to me by Mark Siegel, the Assembly sponsor of the amendments to the Freedom of Information Law (July 21, 1977), Mr. Siegel expressed his intent regarding the interpretation of §87(2)(g) as follows:

> "[F]irst, 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."

Based upon Mr. Siegel's letter, several paragraphs in the memorandum from Counsel would be deniable, for they are expressions of opinion subject to acceptance or rejection by the Board. The remaining paragraphs, however, consist largely of a recitation of the Board's stance in the past. In my opinion, those paragraphs are reflective of "factual data" and therefore are accessible.

The third document within the report, a newsletter, can be categorized neither as inter-agency nor intra-agency. On the contrary, it is a publication which, in view of its title, is apparently circulated throughout the United States and Western Europe. Consequently, the newsletter does not

fall within any of the exceptions to rights of access listed in the Freedom of Information Law and is accessible in its entirety.

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:nb

cc: Robert L. Beebe

Board of Equalization and Assessment

William Ryan

STATE OF NEW YORK
COMMITTEE ON PUBLIC ACCESS TO RECORDS FOIL-AO-889

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

August 11, 1978

Mr. D. David Brandon
Acting Executive Director
Commission on Management and
Productivity in the Public Sector
State of New York
The Capitol
Albany, New York 12248

Dear Mr. Brandon:

Thank you for your interest in complying with the Freedom of Information Law and for transmitting a copy of the regulations adopted by the Commission.

Having reviewed the regulations, I believe that they are consistent with those promulgated by the Committee on Public Access to Records in all respects.

Once again, I thank you for your cooperation.

Sincerely,

Robert J. Freeman

Robert J. Freeman
Executive Director

RJF:nb

cc: Michael Dick

Robert Kurtter

STATE OF NEW YORK

COMMITTEE ON PUBLIC ACCESS TO RECORDS FOIL-AO-890

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

August 15, 1978

Mr. Mickey Mayes
[redacted]

Dear Mr. Mayes:

I am in receipt of your most recent letter. Your inquiry pertains to the propriety of a denial of access by the State Board of Elections.

First, your letter indicates that you appealed to the Board on June 12 and that the Board rendered its final determination on July 6. Your question is whether the time restrictions contained within the Freedom of Information Law (hereafter "the Law") were violated. Section 89(4)(a) of the Law requires that the person designated to respond to appeals must fully explain his rationale within seven business days of receipt of the appeal. Under the circumstances, it would appear that more than seven business days elapsed from the receipt of the appeal. Consequently, the Board in my view failed to comply with the time limitations for response to an appeal as required by the Law.

Second, you stated that the majority of your allegations and challenges were based upon certified copies of public records and ask how the Board could deny access to these records "when there was no confidential source." In this regard, based upon a discussion of the matter with Thomas Zolezzi, who authored the determination on appeal, the records in which you are interested are separate and distinct from the "public records" to which you referred. As stated by Mr. Zolezzi in the determination, release of the records would result in disclosure of non-routine criminal investigative techniques and procedures. In addition, disclosure might identify what are categorized in the determination as confidential sources but which in my view might also be withheld on the ground that

disclosure would result in an unwarranted invasion of personal privacy pursuant to §87(2)(b) of the Law. I agree with your contention that in many instances portions of records may be denied while the remainder should be made available. However, deletion of identifying details in some situations may be of limited utility. For example, in a small community, deletion of names might have little or no effect, for the context of a record might serve to identify the names that are deleted. Similarly, if the records are reflective of non-routine investigative techniques or procedures, disclosure could permit evasion of the Law in the future. Further, the opinion cited §87(2)(g), which permits agencies to deny access to communications among officials within an agency and between agencies. To the extent that such communications consist of statistical or factual tabulations or data, instructions to staff that affect the public or final agency policy or determinations, they are accessible. According to Mr. Zolezzi, the records are intra-agency and do not consist of any of the information deemed accessible within §87(2)(g). Moreover, since the determination characterizes the records as "intra-agency," it is implicit that they do not involve communication between the State Board and local government.

Third, you asked whether there are any opinions or precedent cases rendered under the Law that might support your request. Based upon my knowledge of the case law and a review of the opinions rendered by this office, I do not believe that there are any opinions or judicial determinations that would be relevant to the controversy.

The fourth question, which deals with the ability to grant or deny access to portions of records, was dealt with in a preceding paragraph. You also cited §1401.1(d) of the Committee's regulations, which states that "[A]ny conflicts among laws governing public access to records shall be construed in favor of the widest possible availability of public records." I assume that you are referring to records that are required to be made available under §3-212 of the Election Law. I have discussed the cited provision with Mr. Zolezzi, who informed me that you have received all records deemed available by §3-212.

Fifth, your letter cites §469 of the Elections Law. Please be advised that the cited provision was repealed by enactment of a new Election Law that became effective on December 1, 1977. In addition, you asked whether §89(2)(c)(ii), which states that an unwarranted invasion of

personal privacy does not include disclosure of information "when the person to whom a record pertains consents in writing to disclosure," may be of relevance. If the records were denied solely on the ground that disclosure would result in an unwarranted invasion of personal privacy, I would agree that the quoted language would result in disclosure. Nevertheless, the introductory phrase in §89(2)(c)(ii) removes the ability to consent to disclosure if the records are deniable pursuant to other provisions of the Law. Consequently, if the records in question are deniable under other provisions, §89(2)(c)(ii) has no effect.

Your last question concerning records in possession of the Board pertains to minutes which, according to your letter, do not include the votes of the members of the Board. Both the original Freedom of Information Law [§88(5)] and the amendments to the Law [§87(3)(a)] require that agencies compile a record of votes identifiable to each member in each proceeding in which the member votes. As such, you should in my view be provided with voting records on request.

And finally, since you have made a request, been denied, and appealed the denial, you have exhausted your administrative remedies. Therefore, you may initiate an Article 78 proceeding if you so desire. The statute of limitations for an Article 78 proceeding is four months. Therefore, you have four months from the date of the determination on appeal to initiate a judicial challenge to the appeal.

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:nb

cc: Thomas Zolezzi

STATE OF NEW YORK
COMMITTEE ON PUBLIC ACCESS TO RECORDS FOIL-AO-891

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

August 15, 1978

Mr. George Ravetti
[redacted]

Dear Mr. Ravetti:

I am in receipt of your letter of August 9. Your inquiry pertains to a denial of access to tickets written by a particular state trooper on a specific date.

According to your letter, the State Police denied access but directed you to the Wallkill Town Justice, who informed you that the matter was out of his jurisdiction. He in turn sent you to the County Clerk, who referred you to me.

In my opinion, the records sought are available, regardless of the office that possesses them. Stated differently, I believe that the records are available whether they are in possession of the State Police, the Town Justice or the County Clerk.

First, a traffic ticket may be considered similar to an arrest. In this regard, records of arrests by arresting agencies were held to be available by the courts even before the enactment of the Freedom of Information Law.

Second, the Freedom of Information Law is based upon a presumption of access. All records are accessible, except to the extent that records or portions thereof fall within specified categories of deniable information listed in the Law [see attached Freedom of Information Law, §87(2)]. Relevant to your inquiry, §87(2)(e) provides that an agency may deny access to records or portions thereof that:

> "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..."

While traffic tickets are compiled for law enforcement purposes, disclosure would not likely result in the harmful effects envisioned by the provision quoted above. For example, the issuance of a traffic ticket rarely results in an investigation, and there are no confidential informants, for a ticket is merely reflective of a single event.

Third, §370 of the General Municipal Law enables the legislative boards of cities, villages, or towns to authorize the creation of traffic violations bureaus. Section 373 of the General Municipal Law provides that such bureaus "shall keep records of all violations which each person has been guilty, whether such guilt was established in court, or in the bureau, and also a record of all fines collected and the disposition thereof." If a traffic violations bureau has been established in the Town of Wallkill, it is possible that other persons who received tickets may be identified in the records in possession of the bureau.

Fourth, if the records are in possession of the Town Justice, they are accessible pursuant to §2019-a of the Uniform Justice Court Act, which states that all records and dockets in possession of a justice are accessible during all reasonable hours.

Fifth, if the records are in possession of the County Clerk, they are accessible pursuant to §208 of the County Law.

And finally, if you decide to challenge the issuance of the ticket in a judicial proceeding, the records in question would be available to you in all likelihood by means of disclosure under the Civil Practice Law and Rules.

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:nb
Enc.

cc: State Police Department, Troop F

STATE OF NEW YORK
COMMITTEE ON PUBLIC ACCESS TO RECORDS

FOIL-AO-892

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

August 16, 1978

Peter L. Davis, Esq.
79 West 12th Street
New York, New York 10011

Dear Mr. Davis:

Thank you for your interest in the Freedom of Information Law. Your inquiry pertains to rights of access to directives or orders issued by the Office of Court Administration and the Office of the New York City Administrative Judge to court personnel.

In my opinion, the directives in which you are interested are accessible. The definition of "agency" appearing in §86(3) of the Freedom of Information Law specifically excludes "the judiciary." Nevertheless, the term "judiciary" is defined by §86(1) of the Law in such a manner that the Office of Court Administration and the Office of the Administrative Judge are agencies subject to the Freedom of Information Law. "Judiciary" is defined to include "the courts of the state, including any municipal or district court, whether or not of record." "Agency" is defined to include "any state or municipal department, board, bureau, division, commission, committee, public authority, public corporation, council, office or other governmental entity performing a governmental or proprietary function for the state or any one or more municipalities thereof, except the judiciary or the state legislature." While the Office of Court Administration and the office of an administrative judge are connected to courts, they are not courts themselves, they have no authority to interpret the law, as in the case of a court of record; they are not "judicial," but rather are the administrative arms that manage the court system. Consequently, the exemption in the Freedom of Information Law regarding the judiciary does not include administrative agencies such as the Office of Court Administration or the Office of the Administrative Judge.

In terms of substance, the Freedom of Information Law is based upon a presumption of access and provides that all agency records are accessible, except records or portions thereof that fall within one or more enumerated categories of deniable information appearing in §87(2).

Relevant to your inquiry, §87(2)(g) provides that an agency may deny access to records or portions thereof that:

> "are inter-agency or intra-agency materials 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..."

The quoted provision contains what in effect is a double negative. Although an agency may withhold inter-agency or intra-agency materials, statistical or factual data, instructions to staff that affect the public, or agency policy or determinations found within such materials must be made available. Under the circumstances, the directives may in my view be categorized as "instructions to staff that affect the public." Moreover, even if it is argued that the directives in question do not affect the public it appears that they are reflective of policy or an agency determination.

This contention is bolstered by a statement appearing in a letter sent to me by Mark Siegel, the Assembly sponsor of the amendments to the Freedom of Information Law. After having quoted §87(2)(g) of the Law, Mr. Siegel expressed his intent as follows:

> "[F]irst, 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."

The directives appear to be analogous to the "secret law" that the sponsor intended to be made available. Further, it is clear that employees of the court system rely on the directives in carrying out their official duties.

In sum, both the Office of Court Administration and the Office of the New York City Administrative Judge are in my opinion agencies subject to rights of access granted by the Freedom of Information Law and that the directives issued by those offices 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

Robert J. Freeman
Executive Director

RJF:nb

cc: Fred Miller

STATE OF NEW YORK
COMMITTEE ON PUBLIC ACCESS TO RECORDS

FOIL-AO-893

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

August 17, 1978

Calvin M. Berger
Counsel to the Comptroller
State of New York
Department of Audit and Control
Alfred E. Smith Office Building
Albany, New York 12244

Dear Mr. Berger:

Thank you for your interest in complying with the Freedom of Information Law. Your inquiry concerns the status of those portions of the payroll record required to be compiled by §87(3)(b) of the Freedom of Information Law that relate to persons "who are temporarily not being paid for reasons such as being on leave of absence without pay or maternity leave."

Section 87(3)(b) of the Freedom of Information Law requires that each agency maintain "a record setting forth the name, public office address, title and salary of each officer or employee of the agency..." Since the individuals in question, although not paid, continue to be employees, reference to such individuals should in my view remain in the payroll record.

This contention is bolstered by the holding in Gannett Co. v. County of Monroe [59 AD 2d 309]. In the cited case, the Appellate Division held that the payroll records that identified employees who had been terminated were accessible. Moreover, the Court stated that:

> "[T]he information sought is not of a 'personal nature,' 'economic or personal hardship' has not been documented and the type of records sought is certainly 'relevant and essential to the ordinary work of the agency.' To refuse disclosure would frustrate the intent of

> the statute. 'Access to such information should not be thwarted by shrouding it with the cloak of secrecy or confidentiality'" (id. at 312).

In view of the foregoing, disclosure of the names of employees on leave would not in my opinion result in an unwarranted invasion of personal privacy.

In sum, persons on leave remain employees who must be identified in the payroll record required to be compiled and made available by the Freedom of Information Law.

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

Sincerely,

Robert J. Freeman

Robert J. Freeman
Executive Director

RJF:nb

STATE OF NEW YORK
COMMITTEE ON PUBLIC ACCESS TO RECORDS FOIL-AO-894

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

August 17, 1978

Ms. Julia B. McGovern
[redacted]

Dear Ms. McGovern:

Thank you for your interest in the Freedom of Information Law. Your inquiry pertains to a denial of access to contracts into which Orange County had entered with former landowners.

In my opinion, the contracts are clearly accessible. First, the Freedom of Information Law, as amended, is based upon a presumption of access. Specifically, §87(2) of the Law provides that all records in possession of an agency are accessible, except to the extent that records or portions thereof fall within one or more among eight enumerated categories of deniable information listed in the Law [see attached Freedom of Information Law, §87(2)(a) through (h)]. Under the circumstances, I do not believe that any of the grounds for denial can appropriately be offered by Orange County.

Secondly, §89(5) of the Law states that nothing in the Freedom of Information Law shall be construed to limit or abridge rights of access to records accessible under other provisions of law or by means of judicial interpretation. In this regard, §51 of the General Municipal Law, which pertains to all public corporations including counties, has for decades granted access to contracts in possession of public corporations.

Third, the Freedom of Information Law grants not only the right to inspect records, but also requires agencies to make copies of records on request [see §89(3)].

In sum, I believe that the contracts to which access was denied are accessible under the Freedom of Information Law.

STATE OF NEW YORK
COMMITTEE ON PUBLIC ACCESS TO RECORDS FOIL-AO-895

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

August 18, 1978

Mr. Edd L. Suddith
[redacted]

Dear Mr. Suddith:

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.

It is noted at the outset that the provision of law that you cited in your requests, 5 USC §552, is the federal Freedom of Information Act. Since your requests are directed to units of government in New York, the federal Freedom of Information Act has no application. Nevertheless, the New York Freedom of Information Law does apply to your requests sent to the cities of Binghamton and Rochester. I have enclosed copies of the New York Freedom of Information Law and an explanatory pamphlet on the subject. In addition, if you were a student at State University College at New Paltz and you are seeking education records, such a request should be made pursuant to the Family Educational Rights and Privacy Act, which is commonly known as the "Buckley Amendment."

The New York Freedom of Information Law requires that agencies respond to requests within five business days of receipt of a request. In the case of a denial, a person denied access must be apprised of his or her right to appeal to the head or governing body of an agency.

Having reviewed your requests, it is suggested that, if possible, you provide more specificity regarding the nature of records sought. By so doing, the agencies in receipt of your requests will likely be able to respond more efficiently.

Please be advised that this Committee has no authority either to enforce the Freedom of Information Law or to investigate possible wrongdoing.

I hope that I have been of some assistance.

Sincerely,

Robert J. Freeman

Robert J. Freeman
Executive Director

RJF:nb
Encs.

STATE OF NEW YORK
COMMITTEE ON PUBLIC ACCESS TO RECORDS

FOIL-AO-896

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

August 21, 1978

Mr. Daniel J. Collins
[redacted]

Dear Mr. Collins:

I am in receipt of your letter regarding a request for a revised list for "Foreman of Mechanics" that was directed to the New York City Health and Hospitals Corporation.

Based upon your letter, it appears that the list in which you are interested is required to be published in the City Record. However, due to an oversight by the Health and Hospitals Corporation, the initial published list was erroneous and an updated list should have been created and published.

In my opinion, if the updated list that you are seeking is in existence, it is accessible, whether or not it has been published in the City Record. It is noted as a general matter that an agency need not create a record in response to a request. Therefore, in most cases, an agency has no obligation to prepare a new record upon receipt of a request for information. In the context of your letter, it would appear that the list in question is required to be compiled and published. Nevertheless, since I am unaware of any time limitations or requirements regarding the compilation of the list, I do not know whether the Health and Hospitals Corporation has failed to comply with any provision of law concerning the publication of such lists.

With respect to procedural compliance with the Freedom of Information Law, an agency must respond to a request within five business days of its receipt of the request. In the alternative, an agency may within five business days acknowledge receipt of the request and thereafter must respond within ten

business days of the acknowledgment. If there is a denial, it must be stated in writing and include the reasons therefor. Further, if there is no response within five business days after receipt of the request or within ten business days of the date of the acknowledgment of the request, the request is considered a denial that may be appealed. Upon receipt of an appeal, the appeals person or body must render a determination in writing fully explaining the reasons for further denial within seven business days of receipt of the appeal. If there is no response to the appeal within the statutory time limit, the agency has committed a "constructive" denial of access. At that point, you could initiate an Article 78 proceeding to compel compliance with the Freedom of Information Law.

Enclosed for your consideration are the regulations promulgated by the Committee, which govern the procedural aspects of the Freedom of Information Law, and an explanatory pamphlet on the subject.

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:nb
Encs.

cc: Joseph Erazo

STATE OF NEW YORK
COMMITTEE ON PUBLIC ACCESS TO RECORDS

FOIL-AO-897

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

August 22, 1978

Mrs. Ruth Lamkin
Town Clerk
Town of Pembroke
Corfu, New York 14036

Dear Mrs. Lamkin:

Thank you for your interest in complying with the Freedom of Information Law. Your inquiry concerns the ability to inspect building permits for the purpose of obtaining the names and addresses of persons building new homes in an effort to attempt to sell them kitchen equipment and other household goods. The question is whether disclosure under such circumstances constitutes an unwarranted invasion of personal privacy under the Freedom of Information Law.

As a general matter, the Committee has advised and the courts have held that if a record is accessible, it should be made equally available to any person, without regard to status or interest. Building permits were accessible under other provisions of law long before the enactment of the Freedom of Information Law. Nevertheless, there is one provision in the Freedom of Information Law which pertains to the purpose for which a record is sought.

Specifically, §89(2)(b)(iii) states that an unwarranted invasion of personal privacy includes:

> "sale or release of lists of names and addresses if such lists would be used for commercial or fund-raising purposes."

In view of the foregoing, if, for example, the Town created an unpublished list of persons issued building permits, I would advise that the list could justifiably be denied when sought for commercial purposes. However, your letter

indicates that a newspaper publishes similar information by means of your Clerk's report. Under the circumstances, once the permit information is released, there is no legal means by which it can be controlled.

Based upon our telephone conversation, it appears that salespeople do not use the information published in the newspaper, but rather review the permits in question in your office. As we discussed, the Department of State has faced a similar problem, for it possesses lists of various licensees as well as license information kept with respect to each licensee. Although the Department denies access to the lists when appropriate based upon the provision quoted earlier, a search of individual licenses has been permitted. While this Department's judgment cannot be substituted for your own, in an effort to provide consistent advice, it is suggested that, in view of legal precedents granting access to the permits, they remain available individually for search.

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:nb

STATE OF NEW YORK
COMMITTEE ON PUBLIC ACCESS TO RECORDS FOIL-AO-898

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

August 25, 1978

Mr. Kevin McCoy
Suffolk Life
Montauk Highway
Westhampton, New York 11977

Dear Mr. McCoy:

Thank you for your interest in the Freedom of Information Law (see attached). Your inquiry concerns a denial of an oral request for a list regarding the job titles and the identities of employees of the Suffolk County Off Track Betting Corporation (OTB).

Your letter indicates that Mr. Sydney Askoff, President of Suffolk OTB, claimed that disclosure of the identities of OTB branch managers and other employees could result in breaches of security.

First, it is clear that Suffolk OTB is subject to the Freedom of Information Law. The definition of "agency" appearing in §86(3) of the Freedom of Information Law includes within its scope public corporations. The term "public corporation" is defined by §66 of the General Construction Law to include public benefit corporations. Further, §8113 of the Unconsolidated Laws states that the regional corporations created pursuant to Article VII-A of the Unconsolidated Laws constitute public benefit corporations. As such, Suffolk OTB is an agency subject to rights of access granted by the Freedom of Information Law.

Second, although agencies generally need not create a record in response to a request, there are some instances in the Freedom of Information Law in which records must be compiled by agencies. Relevant to your inquiry, §87(3)(b) of the Law states that each agency shall maintain "a record setting forth the name, public office address, title and

salary of each officer or employee of the agency..." Consequently, each agency subject to the Law, including Suffolk OTB, is required to compile the payroll record envisioned by the cited provision.

Third, the Freedom of Information Law is based upon a presumption of access. Section 87(2) of the Law states that all records in possession of an agency are accessible, except to the extent that records or portions thereof fall within one or more among eight enumerated categories of deniable information [§87(2)(a) through (h)]. In my opinion, the only possible ground for denial would concern records or portions thereof which "if disclosed would endanger the life or safety of any person..." [§87(2)(f)].

Nevertheless, it is unlikely that all employees of Suffolk OTB personally have access to safes or the ability to open branch offices. Therefore, the identities of those without such ability must in my view be disclosed. Furthermore, it is clear that the Freedom of Information Law as amended does not require that home addresses of public employees be disclosed; rather, it is the public office address that is required to be included within the payroll record. In this regard, your letter states that Mr. Askoff denied your request on the ground that OTB employees "might be watched and at some time forced to open branch offices and safes." It is difficult to understand how disclosure of the payroll record would either add or detract from the ability of any person to "watch" OTB employees. If the disclosure of the information in question would significantly diminish the capacity of OTB to maintain security, I would agree that the portions of the payroll record identifying particular individuals might justifiably be denied. Nevertheless, without greater familiarity with the situation, I cannot envision the means by which disclosure of the payroll record could be used to hamper security.

Fourth, the burden of proof in the amended Freedom of Information Law differs from that required by the original statute enacted in 1974. Under the former, a person denied access had the burden of proving that a denial was unreasonable. The amendments to the Law, however, require that the agency prove that records withheld in fact fall within one or more categories of deniable records listed in the Law.

Finally, you indicated that the denial followed an oral request. In this regard, §89(3) of the Law enables

agencies to require that requests be made in writing. Therefore, if you renew your request, it is suggested that it be submitted in writing.

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:nb
Enc.

cc: Sydney Askoff

STATE OF NEW YORK
COMMITTEE ON PUBLIC ACCESS TO RECORDS

FOIL-AD-899

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

August 29, 1978

Leonard A. Weakley, Esq.
Taft, Stettinius & Hollister
Dixie Terminal Building
Cincinnati, Ohio 45202

Dear Mr. Weakley:

Thank you for your letter of August 23 regarding the status of the Ohio River Valley Water Sanitation Commission (ORSANCO) relative to the New York Freedom of Information Law. It is noted at the outset that I concur with your comments in full.

The letter that you received from the Administrative Regulations Review Committee (ARRC) is the result of a survey undertaken by that office to determine the extent to which state agencies have complied with both the State Administrative Procedure Act (SAPA) and the Freedom of Information Law. In my opinion, ORSANCO is not subject to either of the statutes. The definition of "agency" in SAPA specifically excludes "agencies created by interstate compact" [§102(1)]. The Freedom of Information Law defines "agency" more broadly than SAPA in that it includes any governmental entity performing a governmental function for the state of New York [Public Officers Law, §86(3)]. Nevertheless, in the case of interstate agencies, I believe that there is a constitutional impediment to the extension of the Freedom of Information Law to such agencies. Very simply, New York cannot enact statutes that reach beyond its borders or that affect the rights and duties of citizens or government in other states. Although I am unaware of any case law that specifically deals with ORSANCO, there are numerous cases dealing with access to records of the New York Port Authority, a bi-state agency. In brief, the courts have held that neither state nor federal access statutes are applicable to the records of the Port Authority.

In view of the foregoing, I do not believe that ORSANCO is in any way subject to the New York Freedom of Information Law or access statutes enacted by other states.

I hope that I have been of some assistance. If you have additional comments, please feel free to contact me.

Sincerely,

Robert J. Freeman
Executive Director

RJF:nb

cc: Rolland E. Kidder

Bernard C. Smith

FOIL-AO-900

State of New York
COMMITTEE ON PUBLIC ACCESS TO RECORDS
MEMORANDUM

TO : Bill Cabin

August 29, 1978

FROM : Bob Freeman

SUBJECT : Access to "Draft" Audits

Two questions are raised in your memo: first, to what extent is a "preliminary draft" or a "draft" audit accessible under the Freedom of Information Law, and; second, to what extent is a response from the subject of an audit available?

First, as you are aware, the amended statute is based upon a presumption of access. Unless records or portions thereof fall within one or more categories of deniable information listed in §87(2), they are accessible. In addition, the new Law defines "record" broadly to include virtually all information in possession of an agency, regardless of its physical form or characteristics. This is not to say that all records are accessible, but rather that all records are subject to rights of access.

With respect to a draft audit, the only exception to rights of access that might be cited is §87(2)(g), which states that an agency may deny access to records or portions thereof that:

> "are inter-agency or intra-agency materials 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..."

A preliminary audit would clearly be an intra-agency document. However, since the quoted provision contains what in effect is a double negative, "statistical or factual tabulations or data" contained within intra-agency materials, such as a preliminary draft audit, are accessible. The remaining portions of the draft that would be deniable would include opinions or impressions of auditors, proposed recommendations and the like. In essence, the meat of the audit, the factual

findings, which would presumably remain the same regardless of the comments of the subject of the audit, are accessible. The non-final recommendations would be deniable.

Second, comments transmitted to the auditing agency would appear to be accessible unless the agency in possession of the comments determines that disclosure would result in an unwarranted invasion of personal privacy. The comments would not fall within §87(2)(g), for they would not consist of either inter-agency or intra-agency materials. Nevertheless, §89(2)(b) of the Law lists examples of unwarranted invasions of personal privacy. It is emphasized that the examples are merely illustrative and represent but five among conceivable dozens of such invasions.

Section 89(2)(b)(iv) states that an unwarranted invasion of personal privacy includes:

> "disclosure of information of a personal nature when disclosure would result in economic or personal hardship to the subject party and such information is not relevant to the work of the agency requesting or maintaining it..."

It is questionable whether the information in question may be of a "personal nature," and the comments assuredly would be relevant to the work of the agency in possession of the comments. Nevertheless, disclosure might conceivably result in "economic or personal hardship" to the author of the comments if the comments are disclosed prior to the issuance of the final audit. As such, although the situation described is not exactly analogous to any of the examples of unwarranted invasions of personal privacy listed in the Law, disclosure by the agency prior to its final determination might in the judgment of some result in an unwarranted invasion of personal privacy.

In my opinion, disclosure would not result in an unwarranted invasion of personal privacy, for the comments are indeed relevant to the work of the auditing agency, and because "personal" privacy may not be invaded. If in fact the comments pertain to the functioning of an agency rather than the performance of a particular individual, privacy considerations in my opinion would be minimal.

If you would like to discuss the matter further, don't hesitate to call.

RJF:nb

STATE OF NEW YORK

COMMITTEE ON PUBLIC ACCESS TO RECORDS FOIL-AO-901

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

August 30, 1978

Mr. Henry Spira
[redacted]

Dear Mr. Spira:

Thank you for your letter of August 21. Your inquiry deals with the status of the Research Foundation of the City University of New York under the Freedom of Information Law. It is noted at the outset that there is no clear answer to your question, for there are no judicial determinations of which I am aware that have dealt with the issue. The question that must be answered is whether the Research Foundation is an agency as defined by the Freedom of Information Law.

Section 86(3) of the Law defines "agency" to include:

> "...any state or municipal department, board, bureau, division, commission, committee, public authority, public corporation, council, office or other governmental entity performing a governmental or proprietary function for the state or any one or more municipalities thereof, except the judiciary or the state legislature."

The City University of New York (CUNY) is clearly an agency subject to the Freedom of Information Law. Due to the relationship between the Research Foundation and CUNY, I believe that the former may be characterized as a "governmental entity performing a governmental...function" for a municipality, New York City, and for the State of New York.

Several phone calls were made on your behalf in an attempt to obtain information regarding the Research Foundation. I was told by a representative of the Foundation that it is a not-for-profit corporation. Nevertheless, a search for its

certificate of incorporation was made by the Division of Corporate Records in the Department of State, and no certificate identifiable to the Research Foundation was located. Additional calls were made to the Board of Regents and the State Education Department, which informed me that the Research Foundation is an "educational corporation" that obtained its charter pursuant to §216 of the Education Law. Although the Research Foundation is non-profit, it is not chartered under the Not-for-Profit Corporation Law. In a discussion with an attorney for the Education Department familiar with education corporations generally, it was the consensus between us that the Research Foundation is indeed a governmental entity that performs a governmental function, and as such, is an agency subject to rights of access granted by the Freedom of Information Law.

Its status as a governmental entity is bolstered by the portion of the Foundation's by-laws which describe its composition. The members of the Board of the Foundation include two members appointed by the Chairman of the New York City Board of Higher Education, three by the Chancellor of the State University, the Chairman of CUNY Faculty Council, a president of both a senior college and a community college within the SUNY system, and the presidents of colleges within the SUNY system that receive grants of more than a million dollars a year. It is clear, therefore, each and every member of the Board is a representative of government.

In sum, I believe that the Research Foundation is not separate and distinct from government, but rather is an arm thereof. Consequently, it is in my opinion subject 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:nb

cc: Herman Scheckner, Esq.

STATE OF NEW YORK
COMMITTEE ON PUBLIC ACCESS TO RECORDS FOIL-AO-902

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

September 5, 1978

Leo B. Harford, P.E.
[redacted]

Dear Mr. Harford:

Thank you for your continued interest in the Freedom of Information Law. Your inquiry concerns a denial of access to records, such as a work schedule, identifying a particular toll collector who allegedly gave you a "very difficult time" when you drove through her lane. Your letter further indicates that the toll collector in question had no identification on the side of her booth, which effectively made it impossible for you to make a complaint against a specific individual.

The Thruway Authority has denied access because two women worked as toll collectors on the day in question, and disclosure of the work schedule, therefore, would result in an unwarranted invasion of privacy relative to one of the women.

In my opinion, a work schedule is available. It is noted that the Freedom of Information Law is based on a presumption of access and that the reason for a request is irrelevant. The question that must be asked by agencies under the Law is whether records or portions thereof may be withheld in conjunction with the categories of deniable information listed in §87(2)(a) through (h). Work schedules, time sheets and similar documents are in my opinion accessible, for their disclosure would likely result in a permissible as opposed to an unwarranted invasion of personal privacy. Although the Freedom of Information Law enables agencies to protect personal privacy, as a general matter, the courts have held that records identifiable to public employees that are relevant to the performance of their official duties are accessible, for disclosure in such cases would result in a permissible rather than an unwarranted invasion of

personal privacy [see e.g., Farrell v. Village Bd., 372 NYS 2d 905; Matter of Wool, Sup. Ct., Nassau Cty., NYLJ, Nov. 22, 1977; Montes v. State, 406 NYS 2d 664]. Contrarily, the courts have held that records having no relevance to the performance of official duties of public employees are deniable on the ground that disclosure would indeed constitute an unwarranted invasion of personal privacy.

A work schedule, or a time sheet, for example, is in my view relevant to the performance of duties of both a public employee and his or her employer. Consequently, the record that was denied should in my opinion have been 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:nb

cc: Gerald Cummins

STATE OF NEW YORK

COMMITTEE ON PUBLIC ACCESS TO RECORDS FOIL-AO-903

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

September 6, 1978

Ms. Barbara Muller
[redacted]

Dear Ms. Muller:

Your letter addressed to the Secretary of State at the New York State Office Building in Hauppauge has been transmitted to the offices of the Committee on Public Access to Records, which is located at the Department of State in Albany.

Your inquiry concerns a request directed to the Superintendent of Schools of the East Islip School District for records indicating the number of students from each elementary school that are placed into "enriched" classes at the seventh grade level. According to our telephone conversation of yesterday afternoon, you are not interested in obtaining the identities of any students placed in enriched classes; it is only numbers of students placed from the various elementary schools that you are seeking. This point is significant for the Family Educational Rights and Privacy Act (20 USC §1232g) prohibits disclosure of records identifiable to students to third parties without the consent of the parents of the students. The statutory prohibition, however, is not applicable to your request, because no identities would be disclosed.

It was also noted in our conversation that the Freedom of Information Law grants access to existing records. Consequently, an agency, such as a school district, need not create a record in response to a request. Nevertheless, if the information in which you are interested is contained in one or more records in possession of the School District, it is accessible to you. Specifically, §87(2)(g)(i) provides that an agency must grant access to "statistical or factual tabulations or data." Therefore, if the information that you are seeking exists in a School District record or records, it must in my opinion be made available. It is also important

to emphasize that the Freedom of Information Law states that all records are available, except those records "or portions thereof" [§87(2)] that fall within one or more enumerated categories of records. As such, it is possible that a record may be accessible or deniable in part. In terms of your request, if, for example, names and statistical information appear on a page, the School District has the responsibility to delete the names, while granting access to the remaining statistical data.

Enclosed are copies of the Freedom of Information Law and an explanatory pamphlet on the subject.

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:nb
Encs.

cc: Dr. Arthur Ulrich

STATE OF NEW YORK
COMMITTEE ON PUBLIC ACCESS TO RECORDS FOIL-AO-904

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

September 6, 1978

Sgt. John Kapica
President
Police Association of the
Town of Greenburgh
P.O. Box 194
Elmsford, New York 10523

Dear Sgt. Kapica:

Your letter addressed to Lieutenant Governor Krupsak has been transmitted to the offices of the Committee on Public Access to Records. The Lieutenant Governor is a statutory member of the Committee, but the Committee is housed in the Department of State.

Your inquiry pertains to a request directed to the Police Department of the Town of Greenburgh for records regarding overtime, sick time, productivity analyses and a vehicle statistics report. Based upon the correspondence attached to your letter, a productivity report and a vehicle statistics report have been provided, but the remainder of your request was denied by Captain John J. Hahn, who wrote that "these requests are personnel matters and consequently exempt from the Freedom of Information Act" (sic).

It is important to note at the outset that the Freedom of Information Law provides access to existing records; it does not require an agency to create records in response to a request. The request involves various breakdowns by individual officer. If, however, no such breakdowns exist, the Police Department would have no obligation to prepare such records on your behalf. Nevertheless, if such records do exist, they are in my opinion accessible at least in part. It is also noted that the access section of the Freedom of Information Law [§87(2)] provides that all records in possession of an agency are available, except those records "or portions thereof" that fall within one or more enumerated categories of deniable information listed in paragraphs (a) through (h) of the cited provision. In my opinion, the

inclusion of the phrase "or portions thereof" indicates that the Legislature was cognizant of the notion that records may in some instances be both accessible or deniable in part. As such, it is the duty of an agency to determine which portions of records, if any, may justifiably be withheld.

Assuming that the information sought does indeed exist in the form of records, it consists of "statistical or factual tabulations or data" and therefore would appear to be available pursuant to §87(2)(g)(i) of the Law. Nevertheless, there are two grounds for denial listed in the Freedom of Information Law that may be relevant.

First, §87(2)(f) provides that an agency may withhold records or portions thereof which "if disclosed would endanger the life or safety of any person." If disclosure of the records sought would "endanger the life or safety" of undercover officers or officers involved in investigating organized crime, for example, such records might be justifiably denied. Second, §87(2)(b) provides that records or portions thereof may be denied when disclosure would result in an unwarranted invasion of personal privacy. The trend in case law is toward opening the personnel records of public employees when the records are relevant to the performance of employees' official duties [see e.g., Montes v. State, 406 NYS 2d 664 (1978); Walker v. City of New York, 394 NYS 2d 797 (1977)]. Nevertheless, the extent to which the records in question are accessible or perhaps deniable in part is currently somewhat unclear. Until rights of access to police officers' personnel records are established with certainty, determinations to grant or deny access must in my opinion be made on a case by case basis.

To further complicate matters, §50-a of the Civil Rights Law states that "[A]ll personnel records, used to evaluate performance toward continued employment or promotion, under the control of any policy agency...shall be considered confidential..." Although the records sought would not in my opinion fall within the confidentiality provisions quoted above in this situation, it is conceivable that the same records in other circumstances might be considered confidential.

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:nb

cc: Lieutenant Governor Krupsak

Captain John J. Hahn

Joel Sachs, Town Attorney

Donald Singer, Chief

STATE OF NEW YORK
COMMITTEE ON PUBLIC ACCESS TO RECORDS

FOIL-AO-905

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

September 8, 1978

Ms. Phyllis Teitelbaum
[redacted]

Dear Ms. Teitelbaum:

Your letter addressed to Elie Abel, Chairman of the Committee, has been transmitted to me. As Executive Director of the Committee, I generally respond to requests for advice and write advisory opinions.

Your inquiry describes a situation in which the New York City Board of Education has denied access to records and has failed to respond to appeals. In this regard, it is noted that the Committee does not have the authority to enforce the Law or compel agencies to comply with its provisions; it has only the power to advise. Nevertheless, your letter clearly indicates that the Board of Education has failed to comply with the Law.

Specifically, §89(4)(a) requires that agencies render determinations within seven business days of their receipt of appeals. In addition, agencies are required to transmit copies of the appeals to the Committee when the appeals are received. Similarly, when the determinations are made, they too must be transmitted to the Committee.

Since the failure to respond to the appeals represents a constructive denial of access, I believe that you may now initiate judicial proceedings to challenge the denials.

A copy of this letter will be sent to the Secretary to the Board of Education. Perhaps its receipt by Mr. Siegel will precipitate procedural compliance with the Freedom of Information Law.

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

Sincerely,

Robert J. Freeman

Robert J. Freeman
Executive Director

RJF:jm

CC: Harold Siegel

STATE OF NEW YORK
COMMITTEE ON PUBLIC ACCESS TO RECORDS FOIL-AO-906

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

September 8, 1978

Mr. John J. Sheehan
[redacted]

Dear Mr. Sheehan:

I am in receipt of your letter of August 30. Your inquiry deals with a denial of access by Chief DiNardo of the Binghamton Police Department. According to your letter, the correspondence attached thereto, and a conversation with Chief DiNardo, the record in question will remain denied until you obtain a release for its disclosure from the subject of the record.

In this instance, I agree with the point of view offered by Chief DiNardo. As I understand the situation, the record in which you are interested is not included within an accident report, but rather is an investigative report compiled by the Police Department. Although the exception contained in §87(2)(e) of the Freedom of Information Law, which pertains to records compiled for law enforcement purposes, is not applicable, another provision likely is applicable. Section 87(2)(b) states that an agency may withhold records when disclosure would result in an unwarranted invasion of personal privacy. While an accident report or records reflective of possible illegality, such as booking or conviction records would be available, the record in question appears to be distinguishable from those. As described to me by Chief DiNardo, the record in question could justifiably be withheld from the general public based upon the privacy provisions of the Law.

Nevertheless, as you are aware, §89(2)(c) of the Law states that "disclosure should not be construed to constitute an unwarranted invasion of personal privacy...when the person to whom a record pertains consents in writing to disclosure..."

Therefore, in order to obtain the record, it is suggested that you obtain a statement of consent in writing from the subject of the record. Upon receipt of such a statement of consent, Chief DiNardo has assured me that the record will be made available to you.

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:nb

cc: Chief DiNardo

STATE OF NEW YORK
COMMITTEE ON PUBLIC ACCESS TO RECORDS FOIL-AO-907

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

September 11, 1978

Mrs. William K. Mitchell
[redacted]

Dear Mrs. Mitchell:

Thank you for your interest in compliance with the Freedom of Information Law. Your inquiry pertains to your inability to inspect line item budgets adopted by the Garden City School District for fiscal years 1976-77 and 1978-79.

It is noted at the outset that I fully agree with your contention that the records in question must be made available for your inspection. As you noted in your letter to Mr. Gardner, the Superintendent of Schools, §1716 of the Education Law requires that a Board of Education must "present at the annual meeting a detailed statement in writing of the amount of money which will be required for the ensuing year for school purposes, specifying the several purposes and the amount for each". The cited section also requires that notice must be published to the effect that "a copy of such statement may be obtained by any taxpayer" during hours designated in the notice. In view of the foregoing, it is clear that the Education Law requires that the records in which you are interested by made available.

Notwithstanding the provisions of the Education Law, I believe that the budgets are also available under the Freedom of Information Law. Specifically, §87(g)(i) grants access to inter-agency and intra-agency materials that consist of statistical or factual tabulations or data. Further, §87(2)(g)(iii) grants access to "final agency policy or determinations..." A budget would in my view be reflective of both the policy of School District for a given fiscal year as well as a determination made by the District.

Finally, §89(5) of the Freedom of Information Law provides that nothing in the Law shall be construed to abridge reights of access granted by any other provision of law. Therefore, the restriction in the Freedom of Information Law regarding collective bargaining [§87(2)(c)] cannot in my opinion be cited as a means of denying access to records made available specifically under §1716 of the Education 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:jm

CC: Mr. Robert M. Gardner

STATE OF NEW YORK
COMMITTEE ON PUBLIC ACCESS TO RECORDS FOIL-AO-908

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

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EXECUTIVE DIRECTOR
ROBERT J. FREEMAN

September 11, 1978

Ms. Carol A. Snyder
Box 48 c/o YWCA
80 Hawley Street
Binghamton, New York 13901

Dear Ms. Snyder:

I am in receipt of your letter of September 2. Your inquiry concerns rights of access to medical records.

As requested, enclosed are copies of the Freedom of Information Law, the Open Meetings Law, regulations promulgated by the Committee which govern the procedural aspects of the Freedom of Information Law, an explanatory pamphlet and a pocket card regarding the Freedom of Information Law, and the Committee's latest report to the Legislature on the Open Meetings Law. Your letter seeks a complete set of the advisory opinions of the Committee. Since more than 1,100 opinions have been written, enclosed in their stead are indices to advisory opinions. Rather than sending all 1,100 opinions, it is suggested that you review the key phrases in the indices to determine which, if any, may be of interest. After review, if there are any opinions in which you have particular interest, please identify them in writing either by number or key phrase, and I will be happy to send them to you.

It is noted that the Freedom of Information Law is applicable only to governmental entities [see definition of "agency," Freedom of Information Law, §86(3)]. As such, records in possession of private hospitals or doctors are not subject to rights of access. Moreover, there is no provision of law which enables a patient to inspect and copy medical records pertaining to him or her. Nevertheless, §17 of the Public Health Law requires that a treating physician or hospital must release and deliver copies of medical records to another physician or hospital requesting the same. I

have enclosed a copy of §17 of the Public Health Law, which states implicitly that the patient herself has no property rights to medical records, but that the records must be transmitted to a second hospital or doctor, for example, who is treating a patient.

Finally, since private hospitals and doctors are not subject to the Freedom of Information Law, there are no standards for fees of copies of medical 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

Robert J. Freeman
Executive Director

RJF:nb
Encs.

STATE OF NEW YORK
COMMITTEE ON PUBLIC ACCESS TO RECORDS

FOIL-AO-909

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

September 12, 1978

Mr. Jeb Stuart Fries
#75-B-1422
Box 149
Attica, New York 14011

Dear Mr. Fries:

I am in receipt of your letter of September 7. As requested, attached are copies of the Freedom of Information Law, an explanatory pamphlet on the subject, and regulations promulgated by the Committee. The regulations govern the procedural aspects of the Law, and every agency in the state must adopt regulations no more restrictive than those promulgated by the Committee. In order to obtain the regulations adopted under the Freedom of Information Law by the agencies identified in your letter, it is suggested that you write to the agencies and request copies of the same. In the alternative, if you have access to the New York Code of Rules and Regulations, the regulations in which you are interested can be found in those volumes. It is further suggested that you use the Committee's regulations as a basis for making your requests. As noted previously, since other agencies' regulations must be consistent with those adopted by the Committee, I believe that your requests will be answered if you follow the procedure set forth in the Committee's regulations.

With respect to the protection of personal privacy, this Committee has not promulgated guidelines regarding the deletion of identifying details. Very simply, the Committee feels that it cannot impose its judgment in lieu of that of a court in determining when disclosure would result in a permissible as opposed to unwarranted invasion of privacy. As such, judgments concerning the protection of privacy must be made on a case by case basis.

STATE OF NEW YORK
COMMITTEE ON PUBLIC ACCESS TO RECORDS FOIL-AO-910

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

September 12, 1978

Mr. Harold Levy
[redacted]

Dear Mr. Levy:

I am in receipt of your letter of September 4th.

Your inquiry concerns the status of the State University of New York under the Freedom of Information Law. As you are aware §86(3) of the Law defines "agency" to include all governmental entities in the State of New York, except the courts and the State Legislature. The original Freedom of Information Law enacted in 1974 defined the term in a similar fashion. Consequently, this office has consistently advised that the State University is indeed an agency subject to the Freedom of Information Law in all respects. This stance is bolstered by a finding of the Attorney General that the members of the State University Board of Trustees and the Councils of state operated institutions within the University are "public officers" [see 1955, Op.Atty.Gen. 286]. Moreover, the administration of the State University has itself considered the SUNY system to be within the scope of the Freedom of Information Law. This office has had contact with and provided advice to SUNY for approximately four years, and SUNY has promulgated regulations under the Law.

Your second question concerns the procedure for requesting an advisory opinion. In this regard, there are no provisions for submitting briefs or holding hearings. Very simply, any person may request an advisory opinion by describing a problem whether, real or hypothetical, in writing and asking for advice.

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:jm

STATE OF NEW YORK
COMMITTEE ON PUBLIC ACCESS TO RECORDS FOIL-AO-911

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

September 12, 1978

Mrs. Doris Wenger
[redacted]

Dear Mrs. Wenger:

I am in receipt of your letter of September 7. Your inquiry concerns the propriety of the regulations adopted by the Islip School District under the Freedom of Information Law.

Having reviewed the regulations, I believe that they are deficient in several respects.

First, the introductory language refers to §§88(2) and 88(4) of the Freedom of Information Law. In this regard, the cited sections were found in the original Freedom of Information Law enacted in 1974. The new Freedom of Information Law effective January 1, 1978, requires that the initial regulations adopted by agencies in New York be updated to comply with the provisions of the amended Law. Copies of the new regulations have been sent to every agency in the state, including school districts.

Second, §1(b) of the policy statement includes the designation of a fiscal officer. The original statute and regulations made reference to a fiscal officer, but neither the amended Law nor the new regulations include such a reference. Therefore, although the School District may designate a person as a fiscal officer to perform particular duties under the amended Law, it need not.

Third, §2 states that records are available for public inspection between the hours of 9:30 a.m. to 11:30 a.m. and 1:00 p.m. to 3:00 p.m. Section 1401.4 of the Committee's regulations, a copy of which is attached, state that agencies shall accept requests and produce records "during all hours

they are regularly open for business." Since your cover letter indicates that regular business hours are 8:30 a.m. to 4:15 p.m., §2 should be altered accordingly.

Section 3(a) requires that a form prescribed by the District be completed. Although an agency may require that a request be made in writing, the Committee has consistently advised that a failure to complete a prescribed form cannot be a valid ground for denial of access. Any written request that reasonably describes the records sought should suffice [see attached, Freedom of Information Law, §89(3)]. Further, the Committee's regulations provide that if access is neither granted nor denied within five business days of the agency's receipt of the request, the request must be acknowledged in writing. The agency then has ten business days from the date of its acknowledgment to grant or deny access [see regulations, §1401.5(d)]. A failure to respond to a request within five business days of its receipt or to grant or deny access within ten business days of the acknowledgment of receipt of the request constitutes a constructive denial of access that may be appealed.

Section 4 of the regulations provides that an appeal must be made within ten working days of the date of denial of access. Section 1401.7(d) of the Committee's regulations states that a person may appeal a denial of access within thirty days of a denial.

Section 5(b) indicates that the School District may assess "the labor cost incurred to locate the record" when a search is initiated. Both the old and the new regulations preclude the assessment of a search fee.

Section 6, which pertains to the subject matter list, makes reference to the requirements of the original Freedom of Information Law. That section should be updated in accordance with §87(3)(c) of the Freedom of Information Law and §1401.6 of the regulations.

There are several other areas which in my opinion should be dealt with more fully in the School District policy. For example, both the amended Law and regulations require that agencies transmit to this Committee copies of all appeals and the determinations that ensue. Consequently, copies of this letter as well as regulations and model regulations that may be used as an aid to comply will be sent to the superintendent of the Islip 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
Executive Director

RJF:nb
Encs.

cc: Superintendent of Schools

STATE OF NEW YORK
COMMITTEE ON PUBLIC ACCESS TO RECORDS

FOIL-AO-912

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

September 19, 1978

Mr. Marvin Datz
[redacted]

Dear Mr. Datz:

I am in receipt of your letter of September 15 and the correspondence attached thereto.

The Board of Education of the City of New York has transmitted copies of your appeals and their determination to this office. In addition, sometime ago, I believe that I discussed the appeals with Harold Siegel, Secretary and Counsel to the Board.

Rather than dealing with each appeal individually, the ensuing paragraphs will give general advice concerning the Freedom of Information Law.

First, it is important to note that the Law provides access to existing records. Therefore, an agency need not create a record in response to a request [see attached, Freedom of Information Law, §89(3)]. Nevertheless, the Law as amended is based upon a presumption of access. Section 87(2) of the Law states that all records in possession of an agency are accessible, except to the extent that records or "portions thereof" fall within enumerated categories of deniable information listed in the Law. As such, there may be situations in which records may be accessible or deniable in part. In such cases, it is the responsibility of the agency to provide the accessible portions of records while deleting the remainder. In terms of your requests, it is possible that the information in which you are interested does not exist in the form of a record or records. However, to the extent that it does exist in records, the Board of Education has the responsibility of making the accessible portions available to you.

Several of your requests deal with what may be characterized as "payroll information" in conjunction with §87(3)(b) of the Freedom of Information Law. The cited provision states that each agency must compile a payroll record indicating the name, public office address, title and salary of each officer or employee of the agency.

With respect to privacy, as a general matter, the Committee has advised and the courts have upheld the notion that records relative to the performance of the official duties of public employees are accessible, for disclosure would constitute a permissible as opposed to an unwarranted invasion of privacy [see Farrell v. Board of Trustees, 372 NYS 2d 905 (1975); Montes v. State, 406 NYS 2d 664 (1978); Walker v. City of NY, 397 NYS 2d 797 (1977)]. Contrarily, records that have no relevance to the performance of official duties may be denied on the ground that disclosure would constitute an unwarranted invasion of privacy (see Matter of Wool, NYLJ, November 22, 1977).

In connection with your requests, I believe that a final determination concerning a grievance, for example, is accessible pursuant to §87(2)(g)(iii), and that disclosure would not result in an unwarranted invasion of privacy. Contrarily, it is possible that a court would determine that the seniority of a particular public employee may have no relevance to the manner in which he performs his duties and therefore would be deniable on the ground that disclosure would indeed constitute an unwarranted invasion of personal privacy.

A copy of this response will be sent to the Appeals Designees and Mr. Siegel.

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:jm

Enclosure

cc: Mr. Siegel
Dr. Ashe
Mr. Rivera

STATE OF NEW YORK
COMMITTEE ON PUBLIC ACCESS TO RECORDS FOIL-AO-913

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

September 25, 1978

Mr. Guy D. Paquin
Albany County Clerk
County of Albany
Office of the County Clerk
Albany, New York 12207

Dear Mr. Paquin:

Thank you for your continued interest in complying with the Freedom of Information Law. Your inquiry concerns "the policy of the Committee with regard to the necessity of creating records in response to a request for access."

Due to the clarity of the Freedom of Information Law, the Committee has not established "policy" with respect to the question raised. Specifically, §87(3) of the Law states that:

> "[N]othing in this article shall be construed to require any entity to prepare any record not possessed or maintained by such entity except the records specified in subdivision three of section eighty-seven and subdivision three of section eighty-eight."

In view of the quoted provision, it is clear that an agency need not create a record in response to a request, except in those circumstances cited in the provision quoted 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:jm

STATE OF NEW YORK
COMMITTEE ON PUBLIC ACCESS TO RECORDS

OML-AO-259
FOIL-AO-914

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

September 27, 1978

Ms. Dorothy Getman
[redacted]

Dear Ms. Getman:

I am in receipt of your letter of September 21. Your inquiry raises a series of questions regarding both the Freedom of Information Law and the Open Meetings Law and seeks a "ruling" with respect to each.

It is noted at the outset that the Committee does not have the authority to issue "rulings". Rather, the Committee has the capacity only to give advice.

The ensuing paragraphs will seek to respond to your questions in the order in which they appear in your correspondence.

1. According to your letter, the Gloversville School Board gathers privately as a "committee of the whole" or holds closed "work sessions" prior to scheduled public meetings. At those private gatherings, the Board discusses its business, but does not take action. In this regard, I have enclosed copies of both the leading judicial decision interpreting the Open Meetings Law and the Committee's second annual report to the Legislature on the Open Meetings Law, which is consistent with the judicial decision. In Orange County Publications v. Newburgh, the Appellate Division held that work sessions and similar gatherings, regardless of their characterization, are indeed meetings that must be open to the public under the Open Meetings Law (60 AD 2d 409). The decision discusses the definition of "meeting" in some detail and will serve to answer many of the questions that you might have regarding the scope of the term and the Open Meetings Law itself. In brief, the Committee has advised and the decision cited above has held that the definition of "meeting" [see attached Open Meetings Law, §97(1)] includes any situation in which a quorum of public body convenes, following reasonable notice given to each of its members, for the purpose of discussing its business. There need not be an intent to take action, but rather only an intent to discuss public business.

By designating itself as a "committee as a whole" the Board does not in any way alter its status or its duties under the Open Meetings Law. In my opinion, the phrase "committee of the whole" is synonymous with the Board itself. As such, it is required to comply with the Open Meetings Law and any other provisions of law, irrespective of the manner in which it characterizes itself or its meetings.

With respect to minutes of the so-called "work sessions", §101 of the Open Meetings Law sets forth the minimum requirements concerning the extent to which minutes must be compiled by public bodies. As I read the law, if there are no motions, proposals, resolutions or votes taken, minutes need not be compiled. Furthermore, although public bodies may generally vote during a properly convened executive session, school boards are precluded from so doing and in my view may vote only during an open meeting. Section 105(2) of the Open Meetings Law states that:

> "[A]ny provision of general, special or local law...less restrictive with respect to public access than this article shall not be deemed superseded hereby."

In this instance, §1708(3) of the Education Law, which pertains to meetings of school boards, states that:

> "[T]he meetings of all such boards shall be open to the public but the school boards may hold executive sessions, at which sessions only members of such boards or the persons invited shall be present."

While the provision quoted above does not state specifically that school boards must vote publicly, case law has held that:

> "...an executive session of a board of education is available only for purposes of discussion and that all formal, official action of the board must be taken in general session open to the public" [Kursch et al v. Board of Education, Union Free School District #1, Town of North Hempstead, Nassau County, 7 AD 2nd 922 (1959)].

Moreover, in a more recent decision construing subdivision (3) of §1708 of the Education Law, the Appellate Division invalidated action taken by a school board during an executive session [United Teachers of Northport v. Northport Union Free School District, 50 AD 2d 897 (1975)]. Consequently, according to judicial interpretations of the Education Law, §1708(3), school boards may take action only during meetings open to the public.

Since §1708(3) of the Education Law is "less restrictive with respect to public access" then the Open Meetings Law, its effect is preserved. Therefore, in my view, school boards can act only during an open meeting.

2. Next, the committees that that you described are in my opinion public bodies subject to the Open Meetings Law in all respects. 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..." [§97(2)].

By separating the quoted definition into its elements, one can conclude that a committee is a public body subject to the Law.

First, a committee is an entity for which a quorum is required. Although there may neither be a statutory provision nor a by-law that requires the presence of a quorum, §41 of the General Construction Law states in relevant part that:

> "[W]henever...three or more persons are charged with any public duty to be performed or exercised by them jointly or as a board or similar body, a majority of the whole number of such persons...at any meeting duly held upon reasonable notice to all of them, shall constitute a quorum and not less than a majority of the whole number may perform and exercise such...duty."

Therefore, although committees may not be specifically required to act by means of a quorum, §41 of the General Construction Law mandates that all public bodies act only by means of a statutory quorum.

Second, does a committee "transact public business"? While it has been argued that committees do not take final action and therefore do not transact public business, this Committee has consistently advised that the term "transact" does not necessarily imply that action is to be taken. Rather, according to an ordinary dictionary definition, "transact" means merely "to discuss" or "to carry on business." This opinion has been ratified by the Orange Publications decision cited earlier.

Third, the committee in question perform a governmental function for a public corporation, the Gloversville School District.

Fourth, the debate in the Assembly regarding the bill that later became the Open Meetings Law clearly indicates that it was the sponsor's intent to include "committees, subcommittees, and other subgroups" within the scope of "public body" (see transcript of Assembly debate, May 20, 1976, pages 6268 to 6270).

And fifth, two recent judicial decisions cited this Committee's contention that committees and advisory bodies are indeed public bodies subject to the Open Meetings Law in all respects (see Matter of MFY Legal Services, 402 NYS 2d 510; Pissare v. City of Glens Falls, Supreme Court, Warren County, March 7, 1978).

3. Your letter indicates that during the course of open meetings, the school board adjourns and enters into executive session without offering a motion to do so or a vote. In this regard, §100(1) of the Law specifies the procedure for entry into executive session and limits the areas of discussion appropriate for executive session. In relevant part, the cited 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 for the below enumerated purposes only..."

As such, it is clear that an executive session is not separate and distinct from an open meeting, but rather is a portion thereof, that a public body may enter into executive session only when a motion is made to do so during an open meeting, that the motion must be carried by a majority vote of the total membership of the body, and that the subject matter intended to be discussed must be identified. The "closed sessions of the board" that precede the regular meetings should also be open to the public, for those gatherings fall within the definition of "meeting", which was discussed previously.

4. Your fourth question states that there are no minutes regarding executive sessions or meeting of the "committee of the whole". For the reasons discussed earlier, a school board may not vote during executive sessions.

5. Your fifth question also deals with the ability to enter into executive session and the status of the work session. Both areas were discussed in preceding paragraphs.

6. With respect to public participation at meetings, the Open Meetings Law is silent. As such, I believe that a public body may adopt reasonable rules to permit public participation. Nevertheless, it need not permit public participation.

7. Your seventh question concerns a discussion among board members by telephone. In my opinion no law precludes such a conversation.

8. Although the Open Meetings Law does not specifically require that a record of votes be compiled, the Freedom of Information Law does indeed require that a record of votes be compiled that identifies the manner in which individual members cast their votes in any situation in which a vote is taken [see attached, Freedom of Information Law, §87(3)(a)].

9. The policy adopted by the Board that requires Board members to refer the public to the Superintendent appears to be permissible. Nevertheless, while I agree that a School District is a "corporate body" whose board of directors is a school board, members of the Board of Education may seek information under the Freedom of Information Law. When board members are acting individually

and not on behalf of that Board, they have the same rights as any member of the public and should use the same vehicles to gain access to records. Specifically, each agency must have one or more records access officers to deal with requests. Also enclosed for your consideration is a copy of the Committee's regulations which govern the procedural aspects of the Freedom of Information Law and with which each agency in the state must comply.

Your tenth and eleventh questions deal with matters unrelated to the Freedom of Information Law or the Open Meetings Law. Therefore, I believe that it would be inappropriate to comment with respect to those matters.

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:jm

Enclosure

cc: A. Glen Everhart, Superintendent

STATE OF NEW YORK
COMMITTEE ON PUBLIC ACCESS TO RECORDS

FOIL - AO-915

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

September 28, 1978

Ms. Maria L. Green
[redacted]

Dear Ms. Green:

I am in receipt of your letter of September 22. Your inquiry concerns the fees sought to be assessed by the Cooperative Extention Association of Ontario County for records under the Freedom of Information Law.

Please be advised that §87(1)(b)(iii) of the Freedom of Information Law (see attached) and §1401.8 of the regulations promulgated by the Committee (see attached) provide that an agency may charge no more than twenty-five cents per photocopy up to 9 by 14 inches. In cases in which records cannot be reproduced by conventional photocopying means, an agency may charge the actual cost of reproduction. For example, if computer information is sought, the agency may charge on the basis of computer time for reproduction of the records.

Since I am unaware of the volume of records in which you are interested, it would be inappropriate to conjecture with respect to the fee to which you referred in your letter. I have contacted Mr. Rodney Lightfoote of the Cooperative Extention Association, and I believe that he will be in touch with you in an attempt to eradicate the problems that may now exist regarding your request.

Also enclosed for your perusal is an explanatory pamphlet entitled "The New 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

RJF:nb
Enc.

cc: Rodney Lightfoote

STATE OF NEW YORK
COMMITTEE ON PUBLIC ACCESS TO RECORDS

FOIL-AO-916

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

September 28, 1978

Miles W. Rehor, Esq.
158 Fourth Avenue
Bay Shore, New York 11706

Dear Mr. Rehor:

Thank you for your interest in complying with the Freedom of Information Law. Having reviewed the procedures regarding public access to records of the Islip Union Free School District, I offer the following comments.

Section 3(a) of the procedures requires that a prescribed application be completed as a condition precedent to granting access to records. In this regard, the Committee has consistently advised that a failure to complete a form prescribed by an agency cannot be a valid ground for denial of access. Any request in writing that reasonably describes the records sought should suffice [see Freedom of Information Law, §89(3)]. Moreover, §1401.4 of the Committee's regulations, which have the force and effect of law, state that agencies shall accept requests "and produce records during all hours they are regularly open for business." The cited provision in the procedures states that the application must be completed "at least five business days prior to the date upon which the individual wishes to inspect or obtain copies..." In my opinion, the five day time limit for a response appearing in §89(3) of the Freedom of Information Law is intended to be an outer limit. In situations in which records are readily available and easily produced, I believe that they should be made available as soon as possible. An applicant should not in my view be required to wait a minimum of five days for a response to a request.

I realize that subdivision (f) of §3 of the procedures reiterates the requirements contained in §1401.5(d) of the Committee's regulations. Nevertheless, it appears that subdivision (f) is somewhat inconsistent with subdivision (a) of §3.

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:jm

Attachment

Section 5(a) pertaining to fees indicates that a search fee may be assessed for the labor cost incurred to locate records. Please be advised that §1401.8(a)(2) of the Committee's regulations specifically provides that an agency cannot charge for a search. The only fees that may be assessed by a school district involve the cost of copying. When copies are requested, the maximum fee that may be assessed is twenty-five cents per photocopy [see Freedom of Information Law, §87(1)(b)(iii)].

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:nb
Enc.

STATE OF NEW YORK
COMMITTEE ON PUBLIC ACCESS TO RECORDS

FOIL-AO-917

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

September 28, 1978

Ms. Batya Miller, Esq.
Brooklyn Legal Services Corp. "A"
Williamsburg Office
260 Broadway
Brooklyn, New York 11211

Dear Ms. Miller:

I am in receipt of your letter of September 22 and the correspondence appended thereto. In brief, your communication indicates that the Community School Board of District #14 in New York City and the Board of Education have failed to comply with the Freedom of Information Law.

As you are aware, the Freedom of Information Law as originally enacted in 1974 has been substantially altered. Rather than listing accessible records to the exclusion of all others, the amendments to the Law, effective January 1, 1978, provide that all records in possession of an agency, such as a school district, are accessible except to the extent that records or portions thereof fall within one or more categories of deniable information listed in the Law [see attached, Freedom of Information Law, §87(2)(a) through (h)].

Moreover, the procedural requirements imposed upon agencies subject to the Law have also been expanded. Specifically, §89(3) of the Law requires that an agency respond to a request within five business days of its receipt. In a situation in which no response can be given within five business days, the agency must acknowledge receipt of the request. The regulations promulgated by the Committee, which have the force and effect of law, further provide that an agency has ten additional business days from the date of its acknowledgment to respond to a request [see attached regulations, §1401.5(d)]. If no response is given within five business

of receipt of a request or within ten business days of an acknowledgment, the request is considered a denial that may be appealed. In addition, when an agency receives an appeal, §89(4)(a) of the Law requires that the appeal and the determination that ensues be transmitted to the Committee. Having reviewed my files, I believe that the appeal that you transmitted to the Chancellor of the Board of Education on September 13 has not yet been received by the Committee.

With respect to the request made by Ms. Linda Fox on August 4, I believe that the records sought are available to the extent that they exist. It is noted that the Freedom of Information Law grants access to existing records. Therefore, an agency need not create a record in response to a request [see Freedom of Information Law, §89(3)]. The records in which Ms. Fox is interested consist largely of statistical information, minutes of meetings and biographical data regarding school board members and the Superintendent of Schools. In this regard, §87(2)(g)(i) specifically grants access to "statistical or factual tabulations or data." Minutes are required to be compiled and made available pursuant to §101 of the Open Meetings Law, a copy of which is attached. The biographical data in which you are interested may, depending upon its nature, be withheld at least in part on the ground that disclosure would constitute an unwarranted invasion of personal privacy.

A copy of my response will be sent to the Chancellor of the Board of Education and the President of the Community School Board of District #14. Perhaps its contents will have the effect of moving the School District and the Board of Education to review the Freedom of Information Law and seek to comply with its provisions.

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:jm

Enclosure

cc: Linda Fox
M. Laskowski
Frank J. Macchiarola

STATE OF NEW YORK
COMMITTEE ON PUBLIC ACCESS TO RECORDS FOIL-AO-918

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

September 29, 1978

Mr. Richard E. Gillman
Acting Vice Chancellor of
University Affairs
State University of New York
State University Plaza
Albany, New York 12246

Dear Mr. Gillman:

Thank you for your interest in complying with the Freedom of Information Law. Your inquiry pertains to a request for a computer tape by the New York Educators Association. According to your letter, the Office of Employee Relations has suggested that providing access to the tape is not required by the Freedom of Information Law.

I disagree with the contention made by the Office of Employee Relations. Although the status of items such as computer tapes and discs was questionable prior to the enactment of the amendments to the Freedom of Information Law, §86(4) of the amendments to the Law in my view removes any such questions. Specifically, the cited provision defines "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."

In view of the foregoing, it is clear that the Law envisions information "in any physical form whatsoever," including "computer tapes or discs," within its scope. Consequently,

I believe that a computer tape is a record subject to rights of access granted by the Freedom of Information Law.

The substance of the information sought, however, may not in its entirety be accessible. While your letter makes reference to "employee names, titles, addresses and salaries," which would in great measure be available, the request attached to your letter by Alan D. Willsey indicates that he is seeking information regarding "male or female status" and whether employees "are agency fee payers or dues payers." In this regard, the Freedom of Information Law provides that an agency may withhold records or portions thereof the disclosure of which would constitute an unwarranted invasion of personal privacy [see Freedom of Information Law, §87(2)(b)]. Further, §89(2)(b) of the Law lists five examples of unwarranted invasions of personal privacy. Several of the examples pertain to the relevance of information to the work of an agency. When dealing with similar controversies, the courts have generally held that records relevant to the performance of official duties of a public employee would if disclosed constitute a permissible as opposed to an unwarranted invasion of personal privacy. Consequently, such records would be available. Contrarily, if records have no relevance to the manner in which a public employee performs his or her duties, they may based upon case law be justifiably withheld.

Moreover, in a situation in which a payroll record was sought that included a column for union dues check-off, it was held that the portion of the record indicating membership or non-membership in a union could be withheld (see Matter of Wool, Sup. Ct., Nassau Cty., NYLJ, Nov. 22, 1977). The determination was based upon a finding that union membership has no bearing upon the performance of official duties and therefore disclosure would constitute an unwarranted invasion of personal privacy. Similarly, it might be argued that the sex of public employees might have no relation to the performance of official duties.

It is noted, however, that the Freedom of Information Law is permissive. Stated differently, the Law provides that certain records or portions of records may be withheld; nowhere in the Law is there a requirement that deniable records must be withheld. Therefore, if in your judgment, disclosure of the items sought would not under the circumstances constitute an unwarranted invasion of personal privacy, they may be disclosed.

In closing, I would like to emphasize that my opinion is based solely on the Freedom of Information Law. It does not in any way deal with the rights or responsibilities imposed by other provisions of law, such as the Taylor 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:nb
Enc.

cc: Joseph M. Bress

STATE OF NEW YORK
COMMITTEE ON PUBLIC ACCESS TO RECORDS

FOIL-AO-919

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

September 29, 1978

Mr. Samuel A. Weissmandl
Executive Director
Yeshiva and Talmud Torah of
New Square
15 Roosevelt Avenue
New Square
Spring Valley, New York 10977

Dear Mr. Weissmandl:

I am in receipt of your letter of September 25. Your inquiry concerns rights of access to tape recordings of meetings of the East Ramapo School Board. According to your letter, the Assistant Superintendent, Dr. Louis Orazio, denied access, stating that granting access would violate school board policy.

In my opinion, the policy of the School Board is contrary to the Freedom of Information Law. First, although the status of items such as tape recordings, microfilm, computer discs and the like was questionable under the Freedom of Information Law as originally enacted in 1974, the amendments to the Law, effective January 1, 1978, remove those questions. Specifically, §86(4) of the amended statute defines "record" to mean:

> "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, records, 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."

In view of the definition, the Freedom of Information Law includes any information "in any physical form whatsoever," including tape recordings, within its scope. Therefore, a tape recording is a record subject to rights of access granted by the Freedom of Information Law.

Second, the Law is based upon a presumption of access. Section 87(2) provides that all records in possession of an agency, such as a school district, are accessible, except to the extent that records or portions thereof fall within one or more categories of deniable information listed in the Law. Under the circumstances, it would appear that none of the grounds for denial appearing in §87(2) could be appropriately raised with respect to tape recordings of open meetings. Consequently, the tape recordings are in my view accessible.

With regard to fees, §87(1)(b)(iii) provides that a fee of no more than twenty-five cents per photocopy may be assessed. The cited provision also states that the cost of reproducing any other records, such as tape recordings may be assessed on an actual cost basis. Therefore, listening to tape recordings or making your own recordings should not involve any costs. If, on the other hand, a copy of a tape recording is requested, the School District may charge the actual cost of reproduction.

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:nb

cc: Louis Orazio

School Board

STATE OF NEW YORK
COMMITTEE ON PUBLIC ACCESS TO RECORDS

FOIL-AO-920

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

October 4, 1978

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

Dear Mr. Sheehan:

I am in receipt of your letter of September 29. Your inquiry concerns a request directed to Mayor Alfred Libous.

First, it is important to note that the regulations promulgated by the Committee, which have the force and effect of law, require that the head or governing body of an agency designate one or more records access officers to respond initially to requests. If a record is denied by the records access officer, an appeal may be directed to the head, governing body or whomever has been directed to determine appeals. The regulations also state that the records access officer and the appeal officer cannot be the same person. Consequently, I would suggest that in the future your requests should be directed not to the Mayor of Binghamton, but rather to a designated records access officer. By so doing, I believe that the administration of government might be more efficient and you would maintain the ability to appeal to someone other than the person to whom a request is originally directed.

Second, with respect to the substance of your request, you are seeking "names of all department heads, dates they were employed, their starting salary and the dates of each and every raise they received." As I have written on several occasions, the Freedom of Information Law does not require an agency to create a record in response to a request. Therefore, if, for example, your request would

involve a compilation of a record or records, the city need not prepare such records on your behalf. Nevertheless, as you are aware, the Law requires that each agency maintain a payroll record consisting of names, public office addresses, titles and salaries of all officers or employees of an agency [§87(3)(b)]. A similar provision existed in the Freedom of Information Law as originally enacted in 1974, and virtually the same information was found to be available by means of judicial determination long before the enactment of the original Freedom of Information Law [see e.g. Winston v. Mangan, 338 NYS 2nd 654, 661 (1972)]. Consequently, it would appear the information which you are interested is available to the extent that it exists in the form of a record or 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:jm

cc: Mayor Alfred Libous

STATE OF NEW YORK
COMMITTEE ON PUBLIC ACCESS TO RECORDS

FOIL-AO-921

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

October 5, 1978

Mr. Robert A. Ferrette
[redacted]

Dear Mr. Ferrette:

I am in receipt of your letter regarding a denial of access to records by the New York City Department of Investigation.

Having read the correspondence attached to your letter, I contacted the Department of Investigation on your behalf to obtain additional information regarding the denial. First, it is noted that a letter addressed to you dated June 16, 1978 by Wilbur Epstein states specifically that the testimony you requested could be reviewed at the Department at a time convenient to you. Consequently, it appears that the testimony in which you are interested has been offered for inspection.

Second, the other area of inquiry concerns a letter transmitted by the Department of Investigation to the New York City Corporation Counsel. I have discussed the contents of the letter with a representative of the Office of Counsel of the Department of Investigation. Based upon the description of the letter given to me, it appears to be deniable. As you are aware, the Freedom of Information Law provides access to all records except those records or portions thereof that are enumerated as deniable [see attached, Freedom of Information Law, §87(2)(a) through (h)]. Under the circumstances, the letter transmitted from the Department of Investigation to the Corporation Counsel falls within the scope of §87(2)(g), which permits an agency to withhold inter-agency and intra-agency materials, except to the extent that such materials consist of statistical or factual data, instructions to staff that affect the public, or final agency policy or determinations. Since, according to Counsel, the letter is reflective of opinions that may be accepted or

rejected by the Corporation Counsel, it does not in any way constitute a final determination. Further, it appears that the investigation to which the letter relates is ongoing. And finally, although there may be factual data contained within the letter, its disclosure would identify persons who testified and therefore would likely result in an unwarranted invasion of personal privacy at this juncture.

In sum, I believe that the testimony you have sought has been offered for inspection and that the letter, based upon my knowledge of its contents, was denied justifiably.

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:nb
Enc.

STATE OF NEW YORK
COMMITTEE ON PUBLIC ACCESS TO RECORDS

FOIL-AO-922

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

October 6, 1978

Ms. Harriet Katz
Associate Attorney
Department of Health
Office of Health Systems
Management
Tower Building
Empire State Plaza
Albany, New York 12237

Dear Ms. Katz:

Thank you for your interest in complying with the Freedom of Information Law. Your inquiry pertains to rights of access to memoranda and similar materials exchanged between policy-making individuals, such as internal guidelines used by staff in setting prospective rates of reimbursement for nursing homes, or records reflective of the means by which audits are conducted.

It is noted at the outset that the Committee long ago resolved and the courts have ratified the notion that accessible records should be made equally available to any person, without regard to status or interest [see e.g., Burke v. Yudelson, 51 AD 2d 673 (1976)]. As such, the contents of records determine the extent to which they may be withheld, if any; the interest of an applicant is irrelevant. Therefore, the intimation in your letter that a distinction may be made between a request by a representative of the nursing home industry and a person with no "interest" in records could not in my view be justified.

With regard to the records in question, the Freedom of Information Law is based upon a presumption of access. Specifically, the Law states that all records in possession of an agency are accessible, except to the extent that records or portions thereof fall within one or more categories of deniable information enumerated in §87(2)(a) through (h).

Relevant to your inquiry, §87(2)(g) of the Law states that an agency may withhold records or portions thereof that:

> "are inter-agency or intra-agency materials 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..."

The quoted provision contains what in effect is a double negative. While an agency may withhold inter-agency or intra-agency materials, statistical or factual data, instructions to staff that affect the public, or final agency policy or determinations found within such materials must be made available. Under the circumstances, internal guidelines used by staff for setting prospective rates of reimbursement or a manual or similar compilation used by auditors to perform their duties would in my view constitute instructions to staff that affect the public. Although the instructions to staff might not have direct effect upon the public generally, I believe that their impact would be sufficiently significant to bring the materials within the scope of accessible records. Further, one might also argue that the guidelines and audit manuals are reflective of the policy or "secret law" of an agency and therefore would be available.

The intent of the Assembly sponsor of the amended Freedom of Information Law tends to bolster this contention. In a letter addressed to me (see attached), Assemblyman Siegel cited §87(2)(g) and stated:

> "[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 or 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."

During our discussion last week, reference was made to Fink v. Lefkowitz [404 NYS 2d 610, AD 2d (1978)]. In the Fink decision, which will be finally determined by the Court of Appeals, it was held that portions of a manual compiled by the Special Prsecutor for Nursing Homes, Health and Social Services could justifiably be denied. However, I believe that the situation in Fink may be distinguished from that of the Office of Health Systems Management. In Fink, the manual was compiled for law enforcement purposes and disclosure of portions of the manual would in the opinion of the court enable "wrongdoers to evade the law". Consequently, Fink held that portions of the manual could be withheld on the ground that the manual was compiled for law enforcement purposes and disclosure would reveal non-routine criminal investigative techniques and procedures. Here, however, the records were not compiled for law enforcement purposes. Therefore, the ground for denial upon which the court relied in Fink could not apparently be cited by the Office of Health Systems Management.

In sum, it appears that the Freedom of Information Law does not offer grounds for denial of access to the records that are the subject of your inquiry.

Nevertheless, your letter suggests that awareness by the nursing home industry of the means by which auditors conduct their audits and the items upon which auditors will focus "may enable unscrupulous operators to subvert the system."

It is emphasized at this juncture that the courts have consistently held that the enactment of the Freedom of Information Law does not abolish the governmental privilege [see Cirale v. 80 Pine Street Corp., 35 NY 2d 113, 117 (1974)]. In a case in which the governmental privilege is asserted, the agency must prove that disclosure would on balance be detrimental to the public

interest. I cannot appropriately conjecture as to the propriety of an assertion of the privilege in this instance. However, it is conceivable that a demonstration that disclosure of the records in question would enable the nursing home industry to "subvert the system" and thereby claim unnecessary reimbursement might justify an argument that disclosure would indeed be detrimental to the public interest.

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

Enclosure

STATE OF NEW YORK
COMMITTEE ON PUBLIC ACCESS TO RECORDS FOIL-AO-923

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

October 6, 1978

Dr. Bernard Eisenberg
[redacted]

Dear Dr. Eisenberg:

I am in receipt of your letter regarding various denials of access to records by Kingsborough Community College. As requested, a review will be made of your requests to advise you of the extent to which the City University has in my view complied with the Freedom of Information Law.

It is noted at the outset that the Freedom of Information Law grants access to records, and the Law does not require an agency to create a record in response to a request [see attached, Freedom of Information Law §89(3)]. However, it is also noted that the Freedom of Information Law as amended is based upon a presumption of access. All records in possession of an agency are accessible except to the extent that records or portions thereof fall within one or more enumerated categories of deniable information listed in §87(2)(a) through (h).

Your request of May 25 deals with expenditures of travel funds of Kingsborough Community College, receipts and expenditures regarding parking fees and association funds, a subject matter list and a "record of faculty data which will be the result of the recent survey undertaken by the administration." It would appear that to the extent that records reflective of receipts and expenditures exist, they are accessible, for they constitute "statistical or factual tabulations or data," which are clearly accessible pursuant to §87(2)(g)(i) of the Freedom of Information Law. With respect to the subject matter list, §87(3)(c) of the Law requires that each agency maintain:

> "a reasonably detailed current list by subject matter, of all records in the possession of the agency, whether or not available under this article."

It is emphasized that the list must make reference by category to all records, whether they are accessible or deniable. However, it is noted that judicial determinations have held that a subject matter list need not include a breakdown of topics or components within a particular classification [see D'Alessandro v. Unemployment Insurance Appeal Board, 56 AD 2d 762]. Therefore, it would appear that the subject headings such as "audit" and "affirmative action reports" would be sufficient. Since I have no knowledge of the contents of the survey to which you referred, it would be inappropriate to conjecture as to its status.

Second, the memorandum of August 1 addressed to you by Bryant Miller indicates that information you requested "does not appear as specific items" in reports. As noted previously, an agency need not create a record in response to a request. Nevertheless, the Law grants access to records "or portions thereof..." Consequently, to the extent that the information that you sought does exist within a record or records, it would in my view be available.

Third, your memorandum to Mr. Miller dated August 2 concerns the appeal process and the time limits for response to a request. In this regard, I agree with the contents of your memorandum. To insure that Mr. Miller is also familiar with the Freedom of Information Law, specifically §89(3), and the regulations promulgated by the Committee, which have the force and effect of law, copies of both documents will be sent to him.

According to your memorandum of August 23 to Vice-President Glasser, you were informed that the records sought were "internal working documents" and therefore deniable. In my opinion, if internal working documents fall within rights of access granted by the Law, they are accessible. It is noted at this juncture that the amended Freedom of Information Law defines "record" to include virtually any information in possession of an agency "in any physical form whatsoever" [§86(4)]. Consequently, the classification of records as "internal" or "unofficial," for example, has no bearing upon rights of access.

The letter of August 29 to you by Bryant Miller concerns a request for statistics. Mr. Miller's letter indicates

that the statistics sought apparently have not been compiled. If that is the case, I would agree with Mr. Miller's contention.

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:nb
Enc.

cc: Bryant Miller

STATE OF NEW YORK
COMMITTEE ON PUBLIC ACCESS TO RECORDS

FOIL-AO-924

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

October 10, 1978

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

Dear Mr. Sheehan:

I am in receipt of your letter of September 27, which indicates that I wrote that the police are not required to permit a review of anything "they turned up during an investigation."

For purposes of clarification, I would like to emphasize that the impression upon which you based your statement is in my view erroneous. The Freedom of Information Law is based upon a presumption of access and the grounds for denial are based largely upon the effects of disclosure. Specifically, §87(2)(e) provides that an agency may withhold records or portions thereof that:

> "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 adjucication;
>
> 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..."

In view of the quoted provision, if an investigation has been completed, there may be situations in which records related to the investigation would be available, depending upon the effects of disclosure. Contrarily, if an investigation is ongoing and disclosure would impede the investigation, a police department would likely have justification for denial.

Your other point concerns an article appearing in Time Magazine concerning developments that have arisen under the Federal Freedom of Information Act. In this regard, your question is whether it is possible that the federal act is "more liberal" than the New York State statute. I would not want to classify either statute as being more liberal or conservative than the other. However, the structure of the New York State Law is similar to that of the Federal Act, which has been in effect since 1967 and the recent amendment of the New York Freedom of Information Law is based to a great extent upon the federal statute. Nevertheless, I would hope that the State Legislature benefitted from the experience, both good and bad, under the Federal Act and that the state law is more sensible in some areas.

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:jm

STATE OF NEW YORK
COMMITTEE ON PUBLIC ACCESS TO RECORDS

FOIL-AO-925

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

October 10, 1978

Ms. Florence M. Thomas
Municipal Civil Service Commission
City of Lockport
Lockport Municipal Building
One Locks Plaza
Lockport, New York 14094

Dear Ms. Thomas:

Thank you for your interest in complying with the Freedom of Information Law. Your inquiry concerns rights of access to personnel records of a former police officer sought by an insurance carrier involved in a claim for workmen's compensation.

I would like to emphasize at the outset that my response deals only with the interpretation of the Freedom of Information Law. Since I have no expertise with respect to the Workmen's Compensation Law, this opinion does not in any way deal with the procedures or the rights granted by that Chapter.

Although the Freedom of Information Law is based upon a presumption of access, I believe that the records in question may be denied. Section 87(2)(b) of the Law states that an agency may withhold records or portions thereof which if disclosed would constitute "an unwarranted invasion of personal privacy." Moreover, §89(2)(b) of the Law lists five examples of unwarranted invasions of personal privacy. Relevant to your inquiry, §89(2)(b)(i) and (ii) provide that an unwarranted invasion of personal privacy includes:

> "i. disclosure of employment, medical or credit histories or personal references of applicants for employment;

ii. disclosure of items involving the medical or personal records of a client or patient in a medical facility..."

It appears that the information sought falls within the examples of unwarranted invasions of personal privacy quoted above. Consequently, the records may in my view be withheld under the Freedom of Information Law.

It is noted, however, that §89(2)(c) states that unless records are otherwise deniable, an unwarranted invasion of personal privacy cannot be cited as a basis for denial "when the person to whom a record pertains consents in writing to disclosure." Therefore, if for example, the records can be denied only on the ground of privacy, and the subject of the records consents in writing to disclosure, the records should be disclosed.

I would also like to direct your attention to §50-a of the Civil Rights Law, which provides that personnel records of police officers that are used to evaluate toward continued employment or promotion are confidential. To the extent that the records fall within the purview of §50-a of the Civil Rights Law, a court order must be obtained for production of such records.

Again, it is emphasized that while the Freedom of Information Law appears to permit a denial of access to the records sought, it is suggested that a careful review of the Workmen's Compensation Law be made to determine the extent to which the records must be produced pursuant to that Chapter.

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:nb

cc: Morgan L. Jones, Jr.

STATE OF NEW YORK
COMMITTEE ON PUBLIC ACCESS TO RECORDS

FOIL-AO-926

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

October 10, 1978

Mr. Steven M. Schapiro
Attorney at Law
4180 Sunrise Highway
Massapequa, New York 11758

Dear Mr. Schapiro:

I am in receipt of your letter of September 27. Your inquiry concerns a denial of access by the Assessor of the Town of Babylon to records reflective of the assessments of buildings similar to a building that is being constructed by your client. Further, the Assessor has indicated that he considers your request to be part of an "adversary process" and therefore has asserted that the records sought cannot be available until the commencement of a lawsuit.

I agree with your contention that situation as described constitutes a violation of the Freedom of Information Law.

First, it is important to note that the Freedom of Information Law as amended is based upon a presumption of access. Specifically, §87(2) provides that all records in possession of an agency are accessible except to the extent that records or portions thereof fall within enumerated categories of deniable information.

Relevant to your inquiry, §87(2)(g) states that an agency may deny access or portions thereof that:

> "are inter-agency or intra-agency materials 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..."

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:jm

Enclosures

cc: Town Attorney
Town Assessor

The provision quoted above contains what in effect is a double negative. Although an agency may deny access to inter-agency or intra-agency materials, statistical or factual data, instructions to staff that affect the public, or final agency policy or determinations found within such records must be made available. The assessment records in which your client is interested may be characterized as "intra-agency materials"; nevertheless, they are reflective of both factual data and final determinations made by the Assessor. Consequently, they are in my view available.

Second, the Freedom of Information Law, §89(5), preserves rights of access to records previously granted by means of judicial determination or by statute. In this regard, there are several cases in which it was decided that records concerning real estate assessments and the means by which real property is assessed are accessible [see e.g., Sears and Roebuck Co. v. Hoyt, 107 NYS 2d 756 (1951); Sanchez v. Papontas, 303 NYS 2d 711 (1969)]. In addition to case law, §51 of the General Municipal Law has for decades granted rights of access to the records sought.

And third, although your client may eventually become and adversary, or if some of the records sought indeed relate to litigation, those arguments in my opinion have no effect upon rights of access. The assessment records were created in the ordinary course of business; they cannot in my opinion be characterized as "material prepared for litigation." Moreover, this Committee has consistently advised and the courts have upheld the notion that accessible records must be made equally available to any person, without regard to status or interest [see e.g., Burke v. Yudelson, 51 AD 2d 673 (1976)]. Therefore, even if individuals are involved in litigation, their status as litigants does not detract from rights of access granted by the Freedom of Information Law.

With respect to procedures, I have included a copy of the Committee's regulations, which govern the procedural aspects of the Law, and a pamphlet entitled "The New Freedom of Information Law and How to Use It." Copies of the Freedom of Information Law and the regulations will also be sent to the Town Attorney and the Town Assessor. Also enclosed are the opinions cited in your letter.

STATE OF NEW YORK

COMMITTEE ON PUBLIC ACCESS TO RECORDS

FOIL - AO-927

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

October 10, 1978

Ms. Joan McKinnley
[redacted]

Dear Joan:

Thanks for the "house history". I should tell you that my wife and I continue to be enamored with the house. I hope that your labors are bearing fruit and that you to are as happy with your new abode as we are with ours.

Down to business. First, with respect to agendas, there is no statute of which I am aware that requires the creation of an agenda, comprehensible or otherwise. However, the Committee has consistently advised that an agenda is accessible as soon as it exists. Consequently, if, for example, an agenda has been prepared for a meeting scheduled for tonight, it is accessible prior to the meeting under the Freedom of Information Law.

Second, should copies of a budget be available during or before a discussion regarding the budget? Numerous questions in the same general area have arisen during the past four years. At the local government level, there are several provisions which require that a preliminary budget be made available or that a proposed budget be discussed at a public hearing. However, the case law on the subject is unclear at best. In one case in which budget worksheets were sought after the adoption of a budget, it was held that the data contained within the worksheets is accessible [see attached, Dunlea v. Goldmark, which was affirmed with no opinion by the Court of Appeals]. However, in another case which has not yet been decided by the Court of Appeals, preliminary budget data sought prior to the adoption of a county's budget was held to be deniable (see attached Delaney v. DelBello). I believe that the DelBello decision

is wrong for several reasons. First, the contents of a budget in my view constitute "statistical or factual tabulations or data" and therefore are clearly available under §87(2)(g)(i). Second, the Open Meetings Law requires that deliberations by a public body concerning a budget be open to the public. It would in my opinion be ludicrous to discuss a docoment publicly but assert that the document itself is deniable.

In sum, I believe that a tentative, preliminary or final budgets are accessible under the Freedom of Information Law. It is emphasized, however, that the case law at this juncture is somewhat conflicting.

If you need me, I am at your service. Keep in touch.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

Enclosure

STATE OF NEW YORK
COMMITTEE ON PUBLIC ACCESS TO RECORDS FOIL-AO-928

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

October 18, 1978

Mr. Casey Jones
At the Gate House
24 East Main Street
Norwich, New York 13815

Dear Mr. Jones:

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

Your inquiry pertains to the legality of a secret ballot vote taken by the Norwich Board of Education regarding the election of its officers.

First, in my opinion, the Board of Education cannot act by means of a secret ballot. The Freedom of Information Law, §87(3)(a) states that each agency shall maintain:

> "a record of the final vote of each member in every agency proceeding in which the member votes..."

Therefore, the quoted provision of the Freedom of Information Law clearly prohibits secret ballot voting and requires the Board of Education 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 officers by the Board of Education was in my view contrary to law.

Second, assuming that the Board 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 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.

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:nb

cc: Board of Education

STATE OF NEW YORK
COMMITTEE ON PUBLIC ACCESS TO RECORDS FOIL-AO-929

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

October 18, 1978

Mr. Ronald Hambleton
[redacted]

Dear Mr. Hambleton:

Thank you for your letter of October 3. Your inquiry concerns what to date have been unsuccessful efforts to obtain records regarding one Henrietta Robinson, "a woman who in 1853 committed a murder in Troy, N.Y. for which she was committed to Sing Sing State Prison in 1855, and from there committed to the Matteawan State Hospital in 1873, where she died in 1905."

Please be advised that the Committee has the authority only to give advice with respect to the Freedom of Information Law. It does not have the authority to give you "permission" to inspect the records in which you are interested. Furthermore, records identifiable to patients in facilities of the New York State Department of Mental Hygiene are generally required to remain confidential. However, the confidentiality provisions of the Mental Hygiene Law, a copy of which is enclosed, contain exceptions.

I would like to direct your attention to subdivision (c)(4)(ii) of §33.13 of the Mental Hygiene Law. In sum, the cited provision states that information about patients may be made available with the consent of the Commissioner of Mental Health. I have contacted the Commissioner's office on your behalf and was advised that a request for the records in question should be directed to William Carnahan, Counsel, Office of Mental Health, 44 Holland Avenue, Albany, New York, 12229. It is suggested that you explain in detail to Mr. Carnahan the reasons for your request.

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:nb
Enc.
cc: William Carnahan

STATE OF NEW YORK
COMMITTEE ON PUBLIC ACCESS TO RECORDS

FOIL-AO-930

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

October 18, 1978

Ms. Elizabeth B. Kryston
[redacted]

Dear Ms. Kryston:

Thank you for your interest in the Freedom of Information Law. Your inquiry concerns a request for "[T]he most recent mathematics and reading scores for Grade 3, Eldorado School, for the school year 1977-78 as tabulated by class by the testing agency (company) with pupil identification deleted."

According to your letter, various district officials have informed you orally that it is "illegal to release the record and that the record is confidential." I disagree with the contentions of the officials with whom you have spoken.

The interpretation of two statutes is involved in providing a response to your inquiry. First, the New York Freedom of Information Law provides that all records in possession of an agency are accessible, except to the extent that records or portions thereof fall within one or more enumerated categories of deniable information. Relevant to your inquiry, the Freedom of Information Law provides that an agency may withhold records or portions thereof the disclosure of which would constitute an unwarranted invasion of personal privacy. Consequently, under the Freedom of Information Law, the school district has the ability to delete identifying details from the record in which you are interested, while granting access to the remainder.

Secondly, the Freedom of Information Law provides that an agency may withhold records that are specifically exempted from disclosure by statute. In this regard, the federal Family Educational Rights and Privacy Act (FERPA), which is commonly known as the "Buckley Amendment," provides

that education records that include information identifiable to students are confidential to all but the parents of the students. However, I have contacted the United States Department of Health, Education and Welfare and its FERPA office on your behalf to determine whether the information you are seeking is in its opinion accessible. I was informed that the confidentiality provisions of the Buckley Amendment may appropriately be cited as a ground for denial when students may be identified by means of disclosure. Nevertheless, I was advised that if identifying details can be deleted from the record and if "90 numbers" remain after the deletions are made, the record is accessible.

By reading the New York Freedom of Information Law and the Buckley Amendment in conjunction with one another, the identifying details which may be deleted under the former must be deleted under the latter. However, the scores themselves which appear as numbers are in my opinion and in the opinion of the FERPA office 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:nb

cc: Jack Anderson, Superintendent

Robert Urovsky, President

STATE OF NEW YORK
COMMITTEE ON PUBLIC ACCESS TO RECORDS FOIL-AO-931

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

October 18, 1978

Mr. Jerry Tomenga
[redacted]

Dear Mr. Tomenga:

I have received a copy of your letter to the Port Byron Central School District Board of Education.

Having reviewed its contents, it appears that the information in which you are interested is accessible under both the Freedom of Information Law and §2116 of the Education Law. It is noted, however, that the Freedom of Information Law grants access to records, and that an agency, such as a school district, need not create a record in response to a request. Therefore, to the extent that the information sought exists in the form of a record, I believe that it should be available to you.

Further, I agree with your contention that a failure to respond or acknowledge receipt of your request within five business days of its receipt constituted a constructive denial of access that under the circumstances was properly appealed.

If the Committee can be of any assistance to you, please feel free to contact me.

Sincerely,

Robert J. Freeman

Robert J. Freeman
Executive Director

RJF:nb

cc: School Board

David Van Scoy

STATE OF NEW YORK
COMMITTEE ON PUBLIC ACCESS TO RECORDS

OML-AO-263
FOIL-AO-932

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

October 20, 1978

Ms. Doris Wenger
[redacted]

Dear Ms. Wenger:

Thank you for your letter of October 10. Once again, your inquiry deals with the manner in which the Islip School District has responded to the requirements of the Freedom of Information Law.

Your letter indicates that the school district requires you to wait five days after its receipt of your written request for any sort of response. In this regard, §89(3) of the Law provides time limitations for a response to a request. Specifically, the cited provision states that an agency shall make records available or deny access to records in writing within five days of receipt of a written request. To reiterate a statement made in my initial letter to you, the "five day" provision is not intended to be used to stall responses to requests; on the contrary, it is intended to be an outer limit for responding.

Second, according to your letter, School Board minutes are not made available until they are approved, which is approximately 30 days after a meeting. Here I direct your attention to §101 of the Open Meetings Law, a copy of which is attached. The Open Meetings Law generally permits public bodies to vote during a properly convened executive session, and minutes reflective of action taken during an executive session must be made available to the public within one week of the executive session. However, while the Open Meetings Law generally permits public bodies to vote during executive session, school boards cannot take action during executive session, except in the case of a tenure proceeding (see Education Law, §3020-a).

This distinction between the obligations of the public bodies generally and school boards is based upon the following rationale. Section 105(2) of the Open Meetings Law states that:

> "[A]ny provision of general, special or local law...less restrictive with respect to public access than this article shall not be deemed superseded hereby."

In this regard, §1708(3) of the Education Law, which pertains to regular meetings of the school boards, states that:

> "[T]he meetings of all such boards shall be open to the public but the said boards may hold executive sessions, at which sessions only the members of such boards or the persons invited shall be present."

While the provision quoted above does not state specifically that school boards must vote publicly, case law has held that:

> "...an executive session of a board of education is available only for purposes of discussion and that all formal, official action of the board must be taken in general session open to the public" [Kursch et al v. Board of Education, Union Free School District #1, Town of North Hempstead, Nassau County, 7 AD 2nd 922 (1959)].

Moreover, in a more recent decision construing subdivision (3) of §1708 of the Education Law, the Appellate Division invalidated action taken by a school board during an executive session [United Teachers of Northport v. Northport Union Free School District, 50 AD 2d 897 (1975)]. Consequently, according to judicial interpretations of the Education Law, §1708(3), school boards may take action only during meetings open to the public.

Since §1708(3) of the Education Law is "less restrictive with respect to public access" than the Open Meetings Law, its effect is preserved. Therefore, in my view, school boards can only act during an open meeting.

There is no time limit in the Open Meetings Law concerning the compilation and availability of minutes of open meetings. Nevertheless, this Committee has consistently advised that minutes are accessible as soon as they exist, whether or not they have been approved. It has also been suggested that the clerk or other person in possession of unapproved minutes may write or stamp "unapproved, "draft", or "non-final" on unapproved minutes when making them available. By so doing, the public is apprised that the minutes are subject to change, and the public body is given a measure of protection.

Your third area of inquiry concerns your inability to know how members of the School Board voted. In this regard, §87(3)(a) of the Freedom of Information Law requires that each agency maintain:

> "...a record of the final vote of each member in every agency proceeding in which the member votes..."

In view of the foregoing, agencies, such as the School Board, are precluded from taking action by means of secret ballot and are required to compile a record of votes that identifies each member and the manner in which he or she voted in each instance in which a vote is taken.

Fourth, your letter makes mention of the efforts of an attorney who has made two requests of the Board, to which the Board has neither replied nor offered an acknowlegment of their receipt. Again, I would like to direct your attention to §89(3) of the Freedom of Information Law and §1401.7 of the Committee's regulations, a copy of which is attached. The regulations, which have the force and effect of law and with which each agency in the state must comply, state that a failure to respond to a request or acknowlege its receipt within five business days of its receipt constitutes a constructive denial of access that may be appealed to a governing body or head of an agency. Consequently, the attorney who made the request may within thirty days appeal these constructive denials of access.

And finally, I am cognizant of the efforts of the Suffolk County Legislature to enact a search fee under the Freedom of Information Law. As reported in Newsday, I believe that the enactment of such fees would subvert the clear intent of the Freedom of Information Law and may constitute a violation of 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:jm

Enclosures

cc: School Board

STATE OF NEW YORK
COMMITTEE ON PUBLIC ACCESS TO RECORDS FOIL-AO-933

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

October 23, 1978

Ms. Alice Murray
[redacted]

Dear Ms. Murray:

Thank you for your interest in the Freedom of Information Law. It is noted at the outset that your letter dated September 17 was not received by this office until October 19.

Several questions raised in your letter have been answered in other letters directed to Ms. Doris Wenger, who has also made inquiries regarding the implementation of the Freedom of Information Law by the Islip School Board. Rather than restating my responses, I have enclosed copies of the opinions sent to Ms. Wenger for your consideration. I believe that those opinions are responsive to many of your questions.

With respect to the initiation of a lawsuit challenging denials of access by the School Board, it would appear that the information that you are seeking is accessible to the extent that it exists in the form of a record or records. Since the Committee has only the capacity to advise, it could not assist directly in a lawsuit. However, in many instances, opinions of the Committee transmitted to the courts have been given substantial weight in reaching determinations. If you decide to initiate a challenge, it would be commenced in the Supreme Court, Suffolk County. The proceeding would be brought under Article 78 of the Civil Practice Law and Rules.

Your letter indicates that you have requested a "breakdown of classes," including the number of students for this term. In response you received a breakdown for 1977. In this regard, it is emphasized that the Freedom of Information Law does not require an agency to create a record in response to a request. Therefore, if no breakdown exists as

yet, the School District has no obligation to create such a record on your behalf. Nevertheless, if the statistical information that you are seeking does exist in the form of a record or records, it is in my opinion accessible.

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:nb
Encs.

cc: School Board

STATE OF NEW YORK
COMMITTEE ON PUBLIC ACCESS TO RECORDS FOIL-AO-934

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

October 23, 1978

W. Douglas Call, Esq.
East Morganville Road
Stafford, New York 14143

Dear Mr. Call:

Thank you for your interest in complying with the Freedom of Information Law and for sending a copy of the rules adopted by the Stafford Volunteer Fire Department.

Having reviewed the rules, I believe that they comply with those promulgated by the Committee in all respects.

Thank you for your courtesy.

Sincerely,

Robert J. Freeman

Robert J. Freeman
Executive Director

RJF:nb

STATE OF NEW YORK
COMMITTEE ON PUBLIC ACCESS TO RECORDS

FOIL-AO-935

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

October 24, 1978

Mr. Richard F. Heller
Phelps-Clifton Springs Central School
District Office
Route 488 - R.D. No. 2
Clifton Springs, New York 14432

Dear Mr. Heller:

Your letter addressed to Dean Abel, Chairman of the Committee, has been transmitted to me. As Director, I generally respond to requests for advice.

Your inquiry concerns a situation in which the Phelps-Clifton Springs School District received copies of an audit performed by the Department of Audit and Control, and on approximately the same date as the receipt of the audit by the District, it was sought by a reporter for the Finger Lakes Times. After discussion with the reporter lasting a period of days, the audit was made available to him prior to its receipt and review by the Board of Education. Your question deals with when and where a report such as the audit in question must be made available to the public.

First, it is noted that the Freedom of Information Law as originally enacted in 1974 was substantially revised. The amended Law, which became effective January 1, 1978, contains numerous distinctions from the original statute. The original Law provided access to certain categories of records to the exclusion of all others; the amended Law reverses the logic of the original Law by stating that all records are accessible, except to the extent the records or portions thereof fall within one or more enumerated categories of deniable information [see attached, Freedom of Information Law, §87(2)(a) through (h)].

Second, the new Law defines "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..." [§86(4)]. In view of the definition of "record," it is clear that any infor-

mation in possession of an agency, such as a school district, is subject to rights of access. Therefore, in the situation that you described, it would appear that the audit was subject to rights of access as soon as it was in your possession. Further, it would also appear that the lack of receipt or review of the audit by the members of the School Board would have no bearing on rights of access.

With respect to time limitations for a response to a request, please be advised that the Law does not require that records be made available at the moment they are requested. Although I am not suggesting that the time limitations within the Law be used for the purpose of delay, §89(3) provides that an agency must respond to a request within five business days of receipt of 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:jm

Enclosure

STATE OF NEW YORK
COMMITTEE ON PUBLIC ACCESS TO RECORDS

FOIL-AO-936

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

October 24, 1978

Mr. Maurice Sieradzki
Legislative Office of Budget Review
225 Broadway
New York, New York 10007

Dear Mr. Sieradzki:

Thank you for your interest in the Freedom of Information Law. Your inquiry concerns rights of access to "budgetary records prepared at the request of both the Mayor and the Director of Office of Management and Budget of the City of New York." Your letter also describes the budget process in New York City, explains the nature of the duties and responsibilities of your office, the Legislative Office of Budget Review, and includes as attachments memoranda directed to agency heads by Mayor Koch, the Director of the Office of Management and Budget and an outline for improvement of the City's budget and financial management systems.

As you are aware, the Freedom of Information Law as amended, effective January 1, 1978, is based upon a presumption of access. Unlike the original Freedom of Information Law which granted access to specified categories of records to the exclusion of all others, the new Law provides that all records in possession of government in New York are accessible, except to the extent that records or portions thereof fall within one or more enumerated categories of deniable information appearing in §87(2)(a) through (h).

In my opinion, the only ground for denial that may be offered with respect to the records sought is §87(2)(g). The cited provision states that an agency may withhold records or portions thereof that:

> "are inter-agency or intra-agency materials 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..."

The quoted provision contains what is in effect a double negative. Although an agency may deny access to inter-agency or intra-agency materials, statistical or factual tabulations or data, instructions to staff that affect the public or final agency policy or determinations found within such materials must be made available. Therefore, to the extent that the records sought consist of statistical or factual tabulations or data, or are reflective of agency policy or determinations, they are in my opinion accessible. At this juncture, none of the records could likely be characterized as final determinations. Portions of the records, however, might contain agency policy adopted in the past, and substantial portions of the records likely contain "statistical or factual tabulations or data."

I am cognizant of the fact that two decisions rendered to date have dealt with budget information that may be somewhat analogous to the information you are seeking. In Dunlea v. Goldmark, [54 AD 2d 446, affirmed without opinion, 43 NY 2d 754 (1977)], the Appellate Division, Third Department, held that budget worksheets containing advice in the form of numbers were accessible. The Court noted that although the figures contained in the worksheets may not have been reflective of "objective reality," they were nonetheless accessible. The worksheets were sought after the adoption of the executive budget.

The second determination that dealt with similar subject matter was rendered this year by the Appellate Division, Second Department. In Delaney v. DelBello (62 AD 2d 281), it was held that budget estimates submitted by agency heads to the County Executive were deniable. In Delaney, the court found that only "supporting" statistical or factual tabulations relative to a budget are accessible. In order to discern whether such tabulations are "supporting," the budget obviously must pass to make such a determination. Consequently, Delaney was distinguished from Dunlea on the basis that the information was sought in Delaney prior to the adoption of the budget, while it was sought after the adoption of the budget in Dunlea. Both decisions were handed down under the Freedom of Information Law as originally enacted.

I disagree with the holding in Delaney for several reasons. First, the amended Freedom of Information Law, as noted earlier, is based upon a presumption of access. Further, the new Law defines "record" to include any information in possession of an agency "in any physical form whatsoever" [§86(4)]. Therefore, the nature of the contents of records determines the extent to which records or portions thereof may be withheld. A distinction in terms of time cannot in my view justifiably be made under the new Law. For example, if a factual tabulation appears in a record, it is accessible, whether or not it relates to a proposed or an adopted budget. Its nature alone determines rights of access under §87(2)(g). Therefore, I believe that the distinction made in Delaney based upon the time of submission of the records sought would be irrelevant under the amended Freedom of Information Law.

Second, Delaney relied heavily upon 9 NYCRR 145.1(2). Reliance upon that section of the New York Code of Rules and Regulations was in my view misplaced. The cited provision constituted a portion of the regulations adopted under the original Law by the State Division of the Budget, which exempted "opinions, policy options and recommendations" from the coverage of the Freedom of Information Law. It may have been relevant to the Dunlea case, but it had no connection whatsoever to the controversy in Delaney. The Freedom of Information Law requires this Committee to promulgate regulations regarding the procedural aspects of the Law, and all agencies in the state must in turn adopt regulations no more restrictive than those promulgated by the Committee. The regulations adopted by the Division of the Budget, however, pertained not only to procedures, but to rights of access as well. In this regard, it is my contention that an agency cannot adopt regulations more restrictive in terms of rights of access than a statute [see Zuckerman v. Board of Parole 53 AD 2d 405]. If an agency could adopt regulations more restrictive than the statute, the statute would be of no effect. In short, 9 NYCRR 145.1(2) should in my opinion have had no relevance to the Delaney determination.

Third, the phrase "statistical or factual tabulations or data" is subject to conflicting interpretations. The phrases "factual tabulations" or "factual data" in my view would not result in substantial questions regarding their interpretation. But what constitutes "statistical tabulations" or "statistical data"? In my opinion, there must be a difference between "factual" tabulations or data and "statistical" tabulations or data, or the Legislature would not have included the word "statistical" within the Law. In this regard, if the phrase "statistical tabulations or data" does not include items such as proposed budget estimates, the word "statistical" appearing in §87(2)(g)(i) would have no apparent meaning.

Fourth, the legislative declaration contained in §84 of the Freedom of Information Law states that the people must have the right "to review the documents and statistics leading to determinations..." The statement of legislative intent makes clear that statistical or factual findings that precede the making of determinations are intended to be available. The Delaney decision appears to have passed over a relevant portion of the Freedom of Information Law, its statement of intent. Although the phrase "statistical or factual tabulations" may be subject to conflicting interpretations, the courts have long held that in cases in which the specific language of a statute is unclear but the statute's legislative intent is clear, the statement of intent should be used as a guide to appropriate interpretation. Further, the rules of construction have long held that remedial legislation, such as the Freedom of Information Law, should be construed liberally.

In sum, I believe that the phrase "statistical or factual tabulations or data" should be construed broadly to include within its scope statistical or factual data that may be developed prior to the submission of budget estimates to the Director of Management and Budget by December 15. Therefore, to the extent that the records in question consist of statistical or factual data or contain statements of policy, they are in my opinion available.

It is emphasized that descriptive explanations of accessible information, such as statistical tabulations, would in my opinion be deniable under §87(2)(g). For example, while a chart consisting of statistical projections should be made available, descriptive or deliberative explanations or rationales reflective of the thought process used in the compilation of the chart would in my view be deniable.

It is noted that this opinion does not pertain in any way to §45(c) of the City Charter, which provides the Office of Budget Review with the power to compel "the production of books, accounts, papers and other evidence relative to its duties, responsibilities and assignments."

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:nb
cc: Ken Fiorello
James Greilsheimer
Allen G. Schwartz

STATE OF NEW YORK
COMMITTEE ON PUBLIC ACCESS TO RECORDS

FOIL-AO-937

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

October 24, 1978

Paul M. Rosen, Esq.
Natale & Rosen
748 Yonkers Avenue
Yonkers, New York 10704

Dear Mr. Rosen:

I am in receipt of both of your communications to this office, one of which seeks an advisory opinion and the second of which is correspondence between your client and the Division of State Police.

As I understand the situation, your client sought to become a state trooper, but his application for employment was rejected by the Division of State Police. He has now requested "copies of all files and documents" in possession of the State Police that are identifiable to him.

The determination on appeal by the Division of State Police denied access on the ground that disclosure would constitute an unwarranted invasion of personal privacy and that release of the records in question "would interfere with law enforcement investigations..."

In my opinion, the denial by the Division of State Police may have been appropriate in part. The Freedom of Information Law is based upon a presumption of access. All records in possession of an agency are accessible, except to the extent that records or portions thereof fall within one or more enumerated categories of deniable information [see attached, Freedom of Information Law, §87(2)(a) through (h)].

Relevant to your inquiry, §87(2)(b) provides that an agency may withhold records or portions thereof which if disclosed would constitute "an unwarranted invasion of personal privacy..." The cited provision makes reference to §89, which in subdivision (2)(b) lists examples of unwarranted

invasions of personal privacy. It is noted that the examples are in my opinion merely illustrative and represent but five among conceivable dozens of unwarranted invasions of personal privacy.

In terms of the request, I believe that the Division of State Police may withhold portions of records identifiable to your client which if disclosed would constitute an unwarranted invasion of personal privacy with respect to others identified in the records. For example, if in its pre-employment check, the Division of State Police interviewed members of the public concerning your client, the names, addresses, or other information which would identify them could in my opinion be withheld on the ground that disclosure would constitute an unwarranted invasion of personal privacy.

However, §89(2)(c) states that:

> "[U]nless otherwise provided by this article, disclosure shall not be construed to constitute an unwarranted invasion of personal privacy pursuant to paragraphs (a) and (b) of this subdivision:
>
> i. when identifying details are deleted;
>
> ii. when the person to whom a record pertains consents in writing to disclosure;
>
> iii. when upon presenting reasonable proof of identity, a person seeks access to records pertaining to him."

Under the quoted provision, it would appear that your client may inspect portions of records pertaining to him if the records are not otherwise deniable and if identifying details are deleted. Consequently, while the State Police may have appropriate grounds for denial with respect to portions of the records sought, I believe that the remainder should be made available to him.

The determination on appeal states that "public release" of the information "would interfere with law enforcement investigations." In my view, a denial based upon the preceding could not properly be asserted. Section 87(2)(e) protects against disclosures which would in some

way interfere with law enforcement activities. However, the cited provision states that the ability to deny pertains only to records "compiled for law enforcement purposes." I doubt that a pre-employment inquiry concerning an applicant for the position of state trooper would result in the compilation of records for law enforcement purposes. On the contrary, it would appear that such records would be obtained or compiled by the State Police in the ordinary course of business. In this regard, it is possible that records created by the Division of State Police might be deniable pursuant to §87(2)(g) of the Law, which provides that an agency may withhold inter-agency or intra-agency materials except to the extent that such materials consist of statistical or factual data, instructions to staff that affect the public or final agency policy or determinations. Stated differently, advice or impressions transmitted from one official of the Division of State Police to another would be 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:nb
Enc.

cc: Charles LaBelle

STATE OF NEW YORK
COMMITTEE ON PUBLIC ACCESS TO RECORDS

FOIL-AO-938

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

October 24, 1978

Mr. Albert Heitzer
76-A-3860
Box 149
Attica, New York 14011

Dear Mr. Heitzer:

I am in receipt of your letter of October 9. Your inquiry concerns rights of access to a voucher regarding personal property in possession of the New York City Police Department property clerk in Queens.

Based upon the information that you have given, I agree that the voucher would likely fall outside the categories of deniable information listed in the Freedom of Information Law and therefore should be made available.

It is suggested that you direct requests in writing to the custodian of the record and to the New York City Police Department at One Police Plaza, New York, New York. In the request, identify the record sought to the extent possible, including dates, description and the like. You should also offer to pay the requisite fees for photocopying. It is further advised that your letter advise the Police Department of its responsibility to respond within five business days of its receipt of your request. It should also be noted that reasons for denial should be given in the event that a record or portion thereof is withheld. If you are denied, you should be apprised in writing of your right to appeal and be given the name of the person to whom an appeal should be directed. Finally, it is also suggested that you mark on the outside of your envelope "Freedom of Information Law Request."

I have enclosed for your perusal a pamphlet entitled "The New Freedom of Information Law and How to Use It" and

STATE OF NEW YORK
COMMITTEE ON PUBLIC ACCESS TO RECORDS

FOIL-AO-939

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

October 25, 1978

Mr. R. Gagné
[redacted]

Dear Mr. Gagné:

I am in receipt of your letter of October 12. You have raised several questions regarding the status of the Freedom of Information Law and rights granted by the Family Educational Rights and Privacy Act (FERPA).

It is noted at the outset that several of your questions pertain to matters that are outside the area of my expertise. Consequently, I feel that it would be appropriate to respond only to those questions which deal with the Freedom of Information Law.

First, you have asked whether New York is a "common law state" and whether persons having a special need or interest may seek certain information under common law, notwithstanding the Freedom of Information Law or other statutes that grant access. I believe that New York Law contains a mixture of statutory and common law. Prior to the enactment of the Freedom of Information Law there were several cases that dealt with records which would ordinarily be deniable, but which were made available due to the "interest" of the applicant. Nevertheless, I know of no cases decided after the enactment of the Freedom of Information Law that have been grounded upon common law or a demonstration of "interest". Certainly if there are statutes that grant access to specific information, a court would in my view render an opinion based upon the statutory law rather than common law.

The second question concerns the use of either common law or the Freedom of Information Law to inspect or copy records "housed" by an agency even though an agency may not be required by law to make or keep those records. In terms of this question, I believe that the common law is irrelevant. The amended Freedom of Information Law defines "record" in

§86(4) 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...". In view of the definition of "record", the possession of records by an agency in New York brings the records within the scope of rights of access granted by the Freedom of Information Law. Although an agency may not be required by law to make or keep particular records, if it does indeed possess such records, they are subject to rights of access granted by the Freedom of Information Law.

The third question concerns Article 78 proceedings and presents a factual situation. In all honesty, I do not understand the facts as presented. Further, since I am not a practicing attorney, it is suggested that questions dealing with Article 78 be directed to a practicing attorney who is more familar with the initiation of such proceedings.

Your fourth question concerns the statute of limitations for initiation of an Article 78 proceeding, which is four months. Specifically, you have asked whether a person may renew a request if the statute of limitations has expired. In this regard, there is nothing in the Freedom of Information Law that precludes a person from renewing a request. Consequently, as you have suggested, I am aware of no reason why an individual may not submit a request de novo, even though a statute of limitations may once have expired.

The remainder of your questions deal with the interpretation of the Family Educational Rights and Privacy Act. Although this office has provided general advice concerning FERPA, it would be more appropriate for you to contact the agency that administers the Act. Therefore, it is suggested that questions regarding the interpretation of the Family Educational Rights and Privacy Act be directed to the United States Department of Health, Education and Welfare, FERPA Office, Room 526 F. Hubert Humphrey Building, Washington, D.C. 20201. I am sure that a representative of that office would be able to provide a better answer to questions regarding the Family Educational Rights and Privacy Act than I.

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:jm

the regulations promulgated by the Committee, which have the force and effect of law and with which all agencies 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
Executive Director

RJF:nb
Encs.

STATE OF NEW YORK
COMMITTEE ON PUBLIC ACCESS TO RECORDS

FOIL-AO-940

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

October 26, 1978

Officer Robert Houlihan
[redacted]

Dear Officer Houlihan:

I am in receipt of your letter of October 15, which was delivered to this office on October 25. Your inquiry concerns unsuccessful attempts to obtain records in possession of the New York City Police Department that are contained in your personnel folder.

The Freedom of Information Law is based upon a presumption of access. All records in possession of an agency are accessible, except to the extent that records or portions thereof fall within one or more enumerated categories of deniable information [see attached, Freedom of Information Law, §87(2)(a) through (h)]. Relevant to your inquiry, there are two grounds for denial which in my opinion may be appropriately raised be the police department.

First, §87(2)(a) of the Freedom of Information Law states that an agency may withhold records that "are specifically exempted from disclosure by state or federal statute." In this regard, §50-a of the Civil Rights Law provides that personnel records of police officers that are used to evaluate performance toward continued employment or promotion are confidential, except as otherwise provided. Although subdivision (4) of the cited provision, a copy of which is attached, states that the confidentiality requirements do not apply to certain governmental officials, the exception does not apply to a situation in which a police officer seeks to inspect his own personnel files. Consequently, under §50-a of the Civil Rights Law, a court order would be required to gain access to the records in question.

Second, the Freedom of Information Law, §87(2)(g), states that an agency may deny access to records or portions thereof that:

"are inter-agency or intra-agency materials which are not:

i. statistical or factual tabulations or data;

ii. instructions to staff that affect the public; or

iii. final agency policy or determination."

Under the circumstances, an evaluation would constitute "intra-agency" material and its contents would not likely consist of statistical or factual data, instructions to staff that affect the public, or final agency policy or determinations.

In view of the foregoing, it appears that the records in which you are interested are confidential under the Civil Rights Law and, even if there were no such confidentiality provisions, the records would be deniable in great measure under §87(2)(g) of the Freedom of Information Law.

There may, however, be another avenue worth exploring. Specifically, I am aware of collective bargaining agreements which grant rights of access to the subject of records which go far beyond rights granted by law. Consequently, it is suggested that you attempt to review your collective bargaining agreement to determine whether you may have rights to the records in question, notwithstanding the provisions of the Freedom of Information Law or the Civil Rights 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

Robert J. Freeman
Executive Director

RJF:jm

Enclosure

STATE OF NEW YORK
COMMITTEE ON PUBLIC ACCESS TO RECORDS

FOIL-AO-941

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

October 30, 1978

Mr. Francis D. Monterosso
Assistant Executive Officer
Board of Cooperative Educational
Services
1015 Watervliet Shaker Road
Albany, New York 12205

Dear Mr. Monterosso:

Thank you for your interest in complying with the Freedom of Information Law. Your inquiry concerns a request for a list of teacher aides and the number of leave days accumulated by individual aides. Your letter also indicates that several members of your non-teaching staff believe that the release of the information in question would constitute an infringement of their rights.

It is noted at the outset that the Freedom of Information Law provides access to existing records and that an agency need not create a record in response to a request [see attached Freedom of Information Law, §89(3)]. Therefore, if, for example, there is no list of teacher aides, your office need not create such a list in response to the request. However, under the circumstances, the question concerning teacher aides is academic, for §87(3)(b) of the Law requires that each agency maintain a payroll record consisting of the name, public office address, title and salary of all officers or employees of the agency. Therefore, even if no list of teacher aides exists, the same information would be found in the payroll record, which must be maintained by every agency subject to the Freedom of Information Law.

Second, it is emphasized that there is no "right to privacy" per se in New York that could appropriately be cited in conjunction with disclosure of the records sought. The only instance in New York law in which a right of privacy exists is in the Civil Rights Law (§§50-51), which pertains to the unauthorized use of a person's name or likeness for commercial purposes. Further, while the Freedom of Information

Law provides that an agency may withhold records or portions of records the disclosure of which would result in an unwarranted invasion of personal privacy [see §§87(2)(b) and 89(2)(b)], there is no requirement in the Law that an agency must act to protect against such disclosures.

Third, if breakdowns concerning leave days accumulated per individual exist, they are subject to rights of access granted by the Law. Consequently, the question is whether the disclosure of such information would constitute an unwarranted invasion of personal privacy. Although the privacy standards in the Freedom of Information Law are vague, this Committee has recommended and the courts have tended to uphold the notion that records relevant to the performance of official duties of public employees are accessible, for disclosure in such instances would constitute a permissible as opposed to an unwarranted invasion of personal privacy [see e.g., Farrell v. Village Bd. of Trustees, 372 NYS 2d 905, 908; Montes v. State, 406 NYS 2d 664 (Court of Claims, 1978)]. Contrarily, the courts have also held that records identifiable to public employees that have no relevance to the manner in which they perform their duties may be withheld on the ground that disclosure would indeed constitute an unwarranted invasion of personal privacy (see, e.g., Matter of Wool, Sup. Ct., Nassau Cty., NYLJ, Nov. 22, 1977). As such, the question is whether the information in question is relevant to the performance of official duties of the individuals identified in the records. If you feel that the number of leave days accumulated is not relevant to the performance of the official duties, I believe that you may withhold the information. However, if you feel that the information is relevant to the performance of duties, it should in my view be made available.

I realize that this response does not answer your inquiry as fully as possible. However, I feel that it would be inappropriate to offer my subjective judgment in lieu of your own or that of a court under the circumstances.

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:nb
Enc.

STATE OF NEW YORK
COMMITTEE ON PUBLIC ACCESS TO RECORDS FOIL-AO-942

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

October 31, 1978

Mr. William F. Barnes
Director of Administration
Department of Public Service
Empire State Plaza
Albany, New York 12223

Dear Bill:

Thank you for your continued interest in the Freedom of Information Law. Your inquiry concerns the relationship between the Freedom of Information Law and the Copyright Act, and you have asked for a "ruling" on the subject.

It is noted at the outset that the Committee cannot issue "rulings"; it has only the capacity to advise.

As you are aware, the Freedom of Information Law is applicable to all records in possession of government in New York [see definition of "record," §86(4)]. Further, the Law is based upon a presumption of access and states that all records are accessible, except to the extent that records or portions thereof fall within one or more enumerated categories of deniable information [§87(2)(a) through (h)]. Finally, §89(3) of the Law provides in relevant part that an agency shall "provide a copy" of an accessible record on request. As such, the Freedom of Information Law grants a right not only to inspect records, but also to have photocopies made. The Copyright Act, however, provides that a person may read copyrighted material, but he or she cannot reproduce the material, except in accordance with the "Fair Use Doctrine."

Although copyrighted material in many instances would not likely fall within any of the exceptions to rights of access granted by the New York Freedom of Information Law, I believe that the Law must be interpreted in a manner consistent with the clear intent of Congress and the Copyright Act, which was recently amended and became effective on January 1, 1978.

The new Copyright Law defines "Fair Use" as follows:

> "[I]n determining whether the use made of a work in any particular case is a fair use the factors to be considered shall include --
>
> "(1) The purpose and character of the use, including whether such use is of a commercial nature or is for non-profit educational purposes;
>
> "(2) The nature of the copyrighted work;
>
> "(3) The amount and substantiality of the portion used in relation to the copyrighted work as a whole; and
>
> "(4) The effect of the use upon the potential market for or value of the copyrighted work." 17 U.S.C. Section 107 (1978).

Despite the standards described above, I believe that subjective judgments concerning the extent to which copyrighted materials may be reproduced can only be made on a case by case basis, for the federal courts have to date rendered seemingly contradictory decisions and have not yet determined how much reproduction of copyrighted materials is too much (see e.g., Williams and Wilbins Co. v. U.S., 487 F. 2d 1345, aff'd by an equally divided court, 420 U.S. 376 (1975); Encyclopaedia Britannica v. Crooks, 3 Med. Law Rptr. 1945 (W.D.N.Y. 1978)].

In sum, I believe that the federal Copyright Act precludes the reproduction of copyrighted materials in possession of an agency, except in accordance with the standards concerning "fair use" contained in the Act. However, it would be inappropriate at this juncture to conjecture with respect to the amount of reproduction permissible under the Fair Use Doctrine.

I hope that I have been of some assistance and regret that a more specific response could not be given.

Sincerely,

Robert J. Freeman
Executive Director

RJF:nb

STATE OF NEW YORK
COMMITTEE ON PUBLIC ACCESS TO RECORDS

FOIL-AO-943

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

November 1, 1978

Mr. Anthony B. Cataldo
[redacted]

Dear Mr. Cataldo:

I am in receipt of your letter of October 27, which pertains to unsuccessful attempts to gain access to records relative to your daughter's employment with the State.

It is noted at the outset that the Freedom of Information Law does not "permit parties in interest" to inspect and copy all records in possession of government identifiable to them. However, I believe that rights of access granted by the Freedom of Information Law (see attached) are substantial.

In terms of rights of access, the Freedom of Information Law as amended is based upon a presumption of access. Section 87(2) provides that all records in possession of an agency are accessible, except to the extent that records or portions thereof fall withon one or more among eight enumerated categories of deniable information. It is emphasized that the Legislature recognized that there may be situations in which a single record may be accessible or deniable in part. Therefore, in some instances, a portion of a record may justifiably be withheld while the remainder must be made available.

Without greater knowledge of the nature of the records sought, it is difficult under the circumstances to conjecture as to rights of access. Nevertheless, there are two grounds for denial which may be applicable. First, §87(2)(b) states that an agency may withhold records or portions thereof which if disclosed would result in an "unwarranted invasion of personal privacy." Further, §89(2)(b) lists five examples of such invasions. The examples are in my opinion merely illustrative and represent but five among conceivable dozens of unwarranted invasions of personal privacy.

In the context of records relating to public employees, the Committee has advised and the courts have tended to uphold the notion that records relevant to the performance of the official duties of a public employee are accessible, for disclosure in such instances would constitute a permissible as opposed to an unwarranted invasion of personal privacy [see e.g. Farrell v. Village Bd. of Trustees, 372 NYS 2d 905, 908; Montes v. State, 406 NYS 2d 664 (Court of Claims, 1978)]. Conversely, if records have no relevance to the manner in which a public employee performs his or her duties, the records may be withheld on the ground that disclosure would constitute an unwarranted invasion of personal privacy (see Matter of Wool, Sup. Ct., Nassau Cty., NYLJ, Nov. 22, 1977).

The second exception that may be relevant to a request for personnel records, is §87(2)(g), which states that an agency may deny access to records or portions thereof that:

> "are inter-agency or intra-agency materials 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..."

The quoted provision contains what in effect is a double negative. While inter-agency or intra-agency materials may be withheld, statistical or factual data, instructions to staff that affect the public or final agency policy or determinations found within such materials are available. Therefore, if your daughter was the subject of a grievance, for example, the determination of the grievance would be accessible. However, impressions or advice stated in writing concerning your daughter would likely be deniable.

Finally, I would like to point out that §89(2)(c) of the Law states that, unless otherwise provided by §87(2), disclosure shall not be construed to constitute an unwarranted invasion of personal privacy:

> "i. when identifying details are deleted;
>
> ii. when the person to whom a record pertains consents in writing to disclosure

iii. when upon presenting reasonable proof of identity, a person seeks access to records pertaining to him."

Therefore, if the only ground for denial that may be offered is based upon the privacy provisions, the records must be made available.

It may also be worthwhile to obtain a copy of the collective bargaining agreement to which your daughter was a party. In some cases, collective bargaining agreements grant rights of access to employees that exceed those granted by the Freedom of Information Law. Further, since the initial requests were made some months ago, it is suggested that they be renewed.

Enclosed are copies of regulations promulgated by the Committee, which govern the procedural aspects of the Freedom of Information Law and with which all agencies must comply, and an explanatory pamphlet.

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:jm

Enclosure

STATE OF NEW YORK
COMMITTEE ON PUBLIC ACCESS TO RECORDS

OML-AO-269
FOIL-AO-944

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

November 3, 1978

Mr. Eugene J. Corsale
Room 5 City Hall
Assessment Office
Saratoga Springs, New York 12866

Dear Mr. Corsale:

Thank you for your interest in complying with the Freedom of Information Law. Your inquiry concerns rights of access to minutes taken at your Assessor's Association meeting.

In my opinion, the minutes are deniable. Section 86(3) of the Freedom of Information Law defines "agency" to include governmental entities performing a governmental function. Section 97(2) of the Open Meetings Law defines "public body" in an analogous manner. In view of those provisions, a private association of assessors would constitute neither an agency subject to the Freedom of Information Law nor a public body subject to the Open Meetings Law. Consequently, I do not believe that the minutes in question are accessible as of right.

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:jm

STATE OF NEW YORK

COMMITTEE ON PUBLIC ACCESS TO RECORDS FOIL-AO-945

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

November 6, 1978

Mr. Theodore Maniatis
[redacted]

Dear Mr. Maniatis:

Secretary of State Cuomo has requested that I respond to your inquiry concerning payroll information. This Committee, of which the Secretary is a member, is responsible for giving advice regarding the interpretation of the Freedom of Information Law.

In my opinion, the information in which you are interested is clearly available. Specifically, §87(3)(b) of the Freedom of Information Law states that each agency must maintain a payroll record setting forth the name, public office address, title and salary of all officers or employees of the agency. As such, a review of the payroll record of a particular agency will enable you to learn the salaries of its employees.

It is suggested that you direct your inquiry to the state agency that employs the individuals whose salaries you are interested in knowing. Please be further advised that your request should be made in writing and addressed to the "records access officer" of the agency, who has five business days from the receipt of your request to respond. If you wish to inspect the records, you may do so at no cost. If, however, you want photocopies, the agency may assess a fee of up to twenty-five cents per page.

Enclosed are copies of the Freedom of Information Law and an explanatory pamphlet which I believe will 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

RJF:nb
Encs.

STATE OF NEW YORK
COMMITTEE ON PUBLIC ACCESS TO RECORDS

FOIL-AO-946

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

November 8, 1978

Ms. Doris Ann Zicari
Resource Mobilizer
Delaware Opportunities, Inc.
129 Main Street
Delhi, New York 13753

Dear Ms. Zicari:

Thank you for your kind words and your interest in the Freedom of Information Law. As requested, your name will be placed on the mailing list to receive materials of general interest regarding both the Freedom of Information Law and the Open Meetings Law.

Your inquiry concerns whether an agency may require "stricter procedures" for some people than others. In this regard, the Committee has long advised and the courts have upheld the notion that if records are accessible, they must be made equally available to any person, without regard to status or interest. Moreover, each agency subject to the Freedom of Information Law is required to adopt regulations consistent with and no more restrictive than those promulgated by the Committee. Enclosed are copies of the Committee's regulations, which have the force of law and model regulations, which were devised in order to assist agencies in their efforts to comply with the procedural requirements of the Law. In sum, procedures that differentiate among individuals based upon their status or interest would in my opinion be violative 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:jm

Enclosure

STATE OF NEW YORK
COMMITTEE ON PUBLIC ACCESS TO RECORDS

FOIL-AO-947

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

November 9, 1978

Ms. Sally Fox
Courier-Express
785 Main Street
Buffalo, New York 14203

Dear Ms. Fox:

I am in receipt of your letter of November 3. Your inquiry concerns a request for "the details of an agreement" between the City of Buffalo and David Kelly, an assistant to the Parks Commissioner, who is the subject of departmental charges. According to your letter, the Assistant Corporation Counsel is unwilling to disclose due to a prior agreement with Mr. Kelly requiring confidentiality with respect to the terms of the settlement.

I agree with your contentions that the City had no authority to enter into the confidential agreement under the circumstances, and that the terms of the settlement are accessible.

It is noted at the outset that the word "confidential" in my view has only two meanings under New York law. First, a record is confidential when a statute specifically prohibits disclosure. Second, a record may be deemed confidential if in the opinion of a court disclosure would result in detriment to the public interest [see e.g., Cirale v. 80 Pine Street Corp., 35 NY 2d 113 (1974)]. In this regard, there is no statute of which I am aware that would prohibit disclosure in this case. Moreover, the courts in similar situations have held that disclosure would not harm the public interest [see e.g., Farrell v. Village Board of Trustees, 372 NYS 2d 905 (1975); Montes v. State, 406 NYS 2d 664 (Court of Claims, 1978)].

The Freedom of Information Law as amended is based upon a presumption of access; all records in possession of an agency, such as the City of Buffalo, are accessible, except to the extent that records or portions thereof fall within one or more categories of deniable information listed in §87(2)(a) through (h) of the Law. Although one of the

exceptions might be raised here, it would not in my opinion constitute an appropriate ground for denial of access.

Section 87(2)(b) of the Law states that an agency may withhold records or portions of records when disclosure would result in "an unwarranted invasion of personal privacy." While the settlement identifies a public employee, this Committee has consistently advised and the courts have tended to uphold the notion that disclosure of records relative to the official duties of a public employee would constitute a permissible as opposed to an unwarranted invasion of personal privacy (see Farrell and Montes, supra.) Consequently, based upon your letter and our discussion, disclosure would not in this instance constitute an "unwarranted" invasion of personal privacy, but rather a permissible invasion.

Finally, I do not believe that an agreement to ensure confidentiality in the nature of a contractual provision can be cited to supersede a statute, or in this instance to detract from rights of access granted by the Freedom of Information Law. As such, an agreement between the City and the subject of the charges to maintain confidentiality would in my view be void to the extent that it abridges rights granted by the Freedom of Information Law.

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

Sincerely,

Robert J. Freeman

Robert J. Freeman
Executive Director

RJF:jm

cc: Joseph P. McNamara

STATE OF NEW YORK

COMMITTEE ON PUBLIC ACCESS TO RECORDS FOIL-AO-948

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

November 13, 1978

Mrs. Morris M. Cohn
[redacted]

Dear Mrs. Cohn:

Thank you for your letter and your interest in compliance with the Freedom of Information Law. Your inquiry raises several questions concerning rights of access to records in possession of Glenridge Hospital as a member of the public and as a member of the Hospital Board. The ensuing paragraphs will explore the questions and seek to provide answers to each of them.

The first problem pertains to the manner in which a request should be made and to whom a request should be directed. In this regard, each agency is required to adopt rules and regulations no more restrictive than those promulgated by the Committee (see attached). Further, each public corporation is required to adopt uniform rules for all agencies within its jurisdiction. Therefore, Schenectady County is required to adopt a procedure for making requests which identifies one or more "records access officers" to whom requests should be directed. The requirement that particular records access officers be designated is intended to enable the public to know which officials may appropriately be contacted to facilitate the process of making a request. As such, a member of the public should not be required to go from one official to another, for the County must designate specific individuals to respond to requests such as yours.

Second, your letter indicates that you have made numerous requests for the hospital payroll, including a breakdown by department and shift submitted to the comptroller of the hospital by department heads. It is noted that the Freedom of Information Law provides access to existing records and does not require an agency to create a record in response to a request, except as otherwise specified in the Law.

In this instance, §87(3)(b) of the Freedom of Information Law requires that agencies compile a payroll record consisting of the name, public office address, title and salary of all officers or employees of the agency. Further, your letter implies that department heads within the hospital must submit a record to the comptroller of their payrolls and shifts. If such records are in existence, they are available, for they constitute factual data and therefore would be available under §87(2)(g)(i) of the Freedom of Information Law.

Similar in nature is your request for a breakdown of telephone charges regarding the location of telephones in the departments, the basic charges under the centrex system, charges for the phones in the Diagnostic Clinic, charges assessed with respect to phones in cottages, and all long distance charges. Again, the charges assessed with respect to the use of a particular phone would be accessible on the ground that such information would constitute factual data. With regard to the location of phones, if there is a map or other diagram indicating where phones are located, it would be accessible. Again, however, a map or similar record would not have to be created in response to a request.

According to your letter, Mr. Ryan has stated that the telephone information and other records would be denied due to your initiation of a lawsuit for waste. The Committee resolved long ago and the courts have upheld the notion that the status or interest of an individual making a request is irrelevant. If records are accessible, they must be made equally available to any person, without regard to status or interest. This principle was confirmed in an Appellate Division decision in which a litigant sought information that was otherwise accessible. In that case, the Court cited the Committee's resolution stating that records could not be denied because the person making the request was a litigant [see Burke v. Yudelson, 51 AD 2d 673 (1975)]. In sum, the Freedom of Information Law is based upon a presumption of access and the only question that can be raised when a request is made concerns the extent to which records may be denied, if any; the status or interest of the applicant has no bearing upon rights of access.

Historically, rights of access have been substantial in relation to actions for waste. Specifically, §51 of the General Municipal Law has for decades 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..."

As such, it is clear that books of "entry or account," bills, contracts and the like have long been accessible.

Your third question concerns a refusal by Mr. Ryan to honor your request for payroll information on the basis of "his orders from Dr. Franklyn Hayford, the Medical Director, who had resigned." To reiterate a point made earlier, Schenectady County is required to adopt a procedure for responding to requests made under the Freedom of Information Law. Your letter appears to indicate that either a procedure does not exist, or if it does exist, it was not followed. Specifically, a records access officer is responsible for making an initial determination to grant or deny access. If access is denied, an appeal may be directed to a person or body designated by the governing body of the County. Under the Freedom of Information Law, "taking orders" from a person outside the scope of the procedural rules that must be adopted would appear to be contrary to the clear intent of the Law.

The fourth question concerns a refusal by Mr. Albert Shapiro, the Commissioner of Finance, to inspect a "grey ledger" which you believe lists debits and credits of the hospital. As mentioned previously, if your description of the ledger is accurate, it contains factual data which would clearly be available. Also, under §51 of the General Municipal Law, the ledger would appear to be a book of "entry or account" which the Legislature years ago determined to be accessible.

Your fifth question concerns a refusal by Theodore Picazio to grant access to records of the inventory of equipment purchased from a particular physician or the total inventory of purchases of equipment and furnishings bought or donated to the hospital. Based upon the same rationale as offered in the previous paragraph, such records are in my opinion accessible.

Sixth, contracts for malpractice insurance for physicians employed by the County are also accessible, for they are reflective of determinations made by the County

[see §87(2)(g)(iii)], and are accessible under §51 of the General Municipal Law.

Seventh, your letter indicates that Dr. Hayford has instructed Mr. Ryan to withhold records concerning an expense account for payment to himself. The records in question deal with charges accumulated for postage, lunch, care of a vehicle, and the like. The records as described would constitute factual data accessible under the Freedom of Information Law. Although §87(2)(b) of the Law provides that an agency may withhold records when disclosure would result in "an unwarranted invasion of personal privacy," the records in my opinion are available. With regard to privacy, the Committee has advised and the courts have upheld the notion that records relevant to the performance of duties of public employees would if disclosed constitute a permissible as opposed to an unwarranted invasion of personal privacy. Since the expenses in this case were incurred in the performance of Dr. Hayford's duties, disclosure would not constitute an unwarranted, but rather a permissible invasion of privacy. Consequently, the records should in my view be made available.

Finally, the correspondence attached to your letter indicates that you have sought to appoint yourself chairperson of committees that perhaps should exist but do not exist. I have reviewed the provisions of the regulations promulgated by the New York State Health Department, Title 5 §405.1021 (c)(4). The cited provision concerns hospital committees and mentions certain types of committees specifically. The last sentence of the cited provision states that "[I]f such other committees are not appointed, a member or members of the governing body assume those duties normally assigned to such committees." It would be inappropriate to conjecture with respect to the propriety of claiming a committee for yourself. However, if you can indeed appoint yourself chairperson of a committee, it would appear that your requests might not be restricted to the Freedom of Information Law, which is based upon a right to know that is granted to any person, but rather upon a need to know as a public official seeking the records in the performance of your 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:nb
Enc.
cc: Board of Managers
William A. Hall
John F. Ryan, Jr.

STATE OF NEW YORK
COMMITTEE ON PUBLIC ACCESS TO RECORDS

FOIL-AO-949

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

November 13, 1978

James J. Farrell, Esq.
[redacted]

Dear Mr. Farrell:

I am in receipt of your letter, which was transmitted to me by Mr. Earl F. Kent, Jr., Director of Administration of the Office of General Services.

As requested, enclosed are copies of the Freedom of Information Law, explanatory pamphlets on the subject, regulations governing the procedural aspects of the Law, a case summary and an index to advisory opinions rendered by the Committee. If there are any opinions in which you are interested, please identify them by number or by key phrase and I will send them to you.

As a general matter, in making a request, an applicant must merely submit a request in writing reasonably describing the records sought to a designated records access officer, who has five business days from the receipt of a request to respond. If you do not know who a "records access officer" is for a particular agency, the outside of your envelope should be marked "Freedom of Information request." Further, if for any reason any record or portion thereof is denied, the reasons for the denial must be stated in writing and you must be apprised of the right to appeal and be given the name and address of a person to whom an appeal should be directed. In addition, when an agency receives an appeal, it is obliged to transmit a copy of the appeal and the determination that ensues to the Committee. In instances in which there is disagreement with the determination, I will contact the appropriate agency in an attempt to mediate.

It is noted that rights of access to death records are not governed by the Freedom of Information Law, but rather by §4174 of the Public Health Law. The cited provision states that death certificates can be made available for "judicial or other proper purposes." Unfortunately, the scope of the

judicial or proper purpose is undefined. Original death certificates are in possession of the Bureau of Vital Records at the State Health Department; local registrars of vital statistics have duplicates. It is suggested that you contact Mr. Joseph Sterzinger, Director of the Bureau of Vital Records, Health Department, Tower Building, Empire State Plaza, Albany, New York 12224. He may be reached by phone at (518) 474-3038.

With respect to records compiled during an investigation of a death, I would like to direct your attention to §87(2)(e) of the Freedom of Information Law. That provision states that records compiled for law enforcement purposes may be denied only if the harmful effects listed within the provision would occur by means of disclosure. In my opinion, unless there is a criminal investigation, it would appear that many records relating to an investigation would be available (see e.g., Westchester Rockland Newspapers v. Mosczydlowski, 58 AD 2d 234).

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:jm

Enclosures

cc: Earl F. Kent, Jr.

STATE OF NEW YORK
COMMITTEE ON PUBLIC ACCESS TO RECORDS

FOIL-AO-950

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

November 13, 1978

Pauline F. Rogers, Esq.
Roemer and Featherstonhaugh
The Twin Towers
99 Washington Avenue
Albany, New York 12210

Dear Ms. Rogers:

I am in receipt of your letter of November 3. Which concerns the propriety of a denial of access to records sought by your client, Mr. Adelbert J. Potter. Specifically, Mr. Potter was denied a copy of the monthly report for July, 1978, prepared by the Bureau of Radiological Health of the Health Department.

Having reviewed the correspondence appended to your letter, the denial was based upon the provisions of §87(2)(g) of the Freedom of Information Law. In the determination rendered following an appeal of an initial denial, Mr. Kearney Jones wrote that:

> "[I]n our opinion, the monthly reports requested by Mr. Potter are purely intra-agency materials that are not statistical or factual tabulations, or instructions to staff that affect the public, or final agency policy determinations. On the contrary, such reports are merely summaries highlighting activities during the reporting period."

While I concur with Mr. Jones' contention that the report constitutes intra-agency material, §87(2)(g) in my view requires that the report in question be made available.

Section 87(2)(g) of the Freedom of Information Law states that an agency may withhold records or portions thereof that:

> "are inter-agency or intra-agency materials 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..."

The quoted provision contains what in effect is a double negative. Although inter-agency and intra-agency materials may be denied, statistical or factual tabulations or data, instructions to staff that affect the public or final agency policy or determinations found within such materials are accessible. In the words of Mr. Jones, "such reports are merely summaries highlighting activities of the reporting period." Based upon his characterization of the reports, it would appear that they consist of factual data that must be made available.

It is noted that the original Freedom of Information Law granted access to "statistical or factual tabulations" [§88(1)(d)]. However, the amended Freedom of Information Law grants access to "statistical or factual tabulations or data" (emphasis added). Under the original statute, questions often arose concerning the nature of a "tabulation." For example, are tabulations restricted to items appearing in vertical rows on a printed page, or does the term include more? To remove difficulties of interpretation, the phrase "or data" was added to the amended Freedom of Information Law.

Moreover, the intent of the Assembly sponsor of the amendments to the Law, Mark Siegel, would appear to bolster a contention that the report in question is accessible. In a letter to me dated July 21, 1977 (see attached), in which Mr. Siegel discussed the intent of §87(2)(g), he wrote that:

> "[F]irst, 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."

Under the circumstances, I believe that a summary of activities would constitute factual information analogous to that which the sponsor intended to be made available. Further, there is no indication that the report contains information in the nature of advice or that would be reflective of the thought processes of officials of the Health 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:nb
Enc.

cc: Kearney Jones

Stephen Krill

STATE OF NEW YORK
COMMITTEE ON PUBLIC ACCESS TO RECORDS FOIL-AO-951

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

November 13, 1978

Neal D. Madden, Esq.
Harter, Secrest & Emery
700 Midtown Tower
Rochester, New York 14604

Dear Mr. Madden:

I am in receipt of your letter of November 9. Your inquiry concerns the ability of the New York State Department of Health to withhold the contents of an application for the establishment of a corporation, a nursing home which to date has been conducted as a sole proprietorship.

Your letter states further that your client has "claimed an exemption from disclosure" of personal financial data submitted on the application to the Health Department. In this regard, I doubt that an individual can "claim" any of the exceptions to rights of access under the Freedom of Information Law. The Law is permissive; although §87(2) of the Law permits agencies to withhold specified categories of deniable information, there is no compulsion or legal requirement to do so. Therefore, only government can cite grounds for denial in order to withhold records; the subject of records cannot in my opinion "claim an exemption."

Having reviewed the application, it would appear that the numerical figures required to be submitted could be denied on the ground that disclosure would constitute an unwarranted invasion of personal privacy under §87(2)(b). However, I would like to advise you of a recent decision by the Court of Appeals which based its finding upon the conjunctive aspects of one of the examples of unwarranted invasions of personal privacy listed in §89(2)(b) of the Freedom of Information Law. In Gannett v. County of Monroe (_____ NY 2d _____), the Court required the agency to demonstrate that disclosure would result in personal or economic hardship and that the records were not relevant to the ordinary work of the agency. While I agree with the outcome, I believe that the Court of Appeals

was unnecessarily constrained to the specific language of §89(2)(b)(iv). In my view, the examples listed in §89(2)(b) are merely illustrations of unwarranted invasions of personal privacy and represent but five among conceivable dozens of such invasions. Consequently, I believe that the disclosure of personal financial data could likely be denied by the Health Department, even if the data is "relevant" to its work.

You have also indicated that you would "claim" the exception to rights of access appearing in §87(2)(c), for disclosure would impair present or imminent collective bargaining negotiations. Here, the applicability of the exception in question would depend upon timing and the factual circumstances surrounding a request. Although §87(2)(c) might in some instances be appropriately raised with respect to the information in question, I doubt that it could be cited in all instances in which the information is 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:nb

STATE OF NEW YORK
COMMITTEE ON PUBLIC ACCESS TO RECORDS

FOIL-AO-952

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

November 13, 1978

Mr. William M. Kavanaugh
City of Newburgh
Office of Corporation Counsel
Newburgh, New York 12550

Dear Mr. Kavanaugh:

Thank you for your interest in complying with the Freedom of Information Law. Your question concerns fees for copies of accident reports in possession of the Newburgh Police Department.

Your letter indicates that it has been the policy of the City for years to charge $3.50 for accident reports. In this regard, I believe that the policy is contrary to law. While §202 of the Vehicle and Traffic Law enables the State Department of Motor Vehicles to assess fees for searching and copying accident reports in their possession that far exceed the fees permitted to be assessed under the Freedom of Information Law, the provision only applies to records of that Department. Consequently, units of local government in possession of accident reports may charge a maximum of twenty-five cents per photocopy, "unless a different fee is otherwise prescribed by law."

The question under the circumstances is whether the City can enact a local ordinance that would legally enable the Police Department to charge $3.50 for accident reports. I have recently discussed the matter of fees with the Committee. While the Committee believes that there is a distinction between a statute and "law", it contends that the word "law" appearing in §87(1)(b)(iii) represents an unintentional oversight on the part of the Legislature. The Committee also contends that it would be unreasonable to construe §87(1)(b)(iii) in such a manner that its obvious intent to impose a ceiling upon fees for photocopies would be subverted.

In its upcoming report to the Governor and the Legislature, I believe that the Committee will cite the difference

between a law and a statute, and will reiterate the intent of the fee provision expressed earlier. Further, the Committee will in my view recommend that problems of interpretation be removed by replacing the word "law" with"statute".

In sum, while it may be legal to pass an ordinance or a local law raising the twenty-five cent limit, the Committee believes that such an enactment would be contrary to the intent of the Law. Moreover, it is possible that a court in viewing the intent of the Law might conclude that the twenty-five cent fee was intended to be a maximum, except in cases where the State Legislature provides otherwise.

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:jm

STATE OF NEW YORK

COMMITTEE ON PUBLIC ACCESS TO RECORDS FOIL-AO-953

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

November 14, 1978

Mr. Richard J. Remsnyder
Reporter
Kingston Daily Freeman
79-97 Hurley Avenue
Kingston, New York 12401

Dear Mr. Remsnyder:

I am in receipt of your letter of November 9. The first question concerns rights of access to budget figures transmitted by department heads to the Mayor of the City of Kingston. It is noted that you letter indicates that the records in question will soon be made available, but that you want an opinion to avoid controversies that may arise in the future. Your second question concerns the status of meetings held by the Mayor with department heads.

With respect to access to budget information, the Freedom of Information Law as amended, effective January 1, 1978, is based upon a presumption of access. Unlike the original Freedom of Information Law which granted access to specified categories of records to the exclusion of all others, the new Law provides that all records in possession of government in New York are accessible, except to the extent that records or portions thereof fall within one or more enumerated categories of deniable information appearing in §87(2)(a) through (h).

In my opinion, the only ground for denial that may be offered with respect to the records sought is §87(2)(g). The cited provision states that an agency may withhold records or portions thereof that:

> "are inter-agency or intra-agency materials 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..."

The quoted provision contains what is in effect a double negative. Although an agency may deny access to inter-agency or intra-agency materials, statistical or factual tabulations or data, instructions to staff that affect the public or final agency policy or determinations found within such materials must be made available. Therefore, to the extent that the records sought consist of statistical or factual tabulations or data, or are reflective of agency policy or determinations, they are in my opinion accessible. Prior to the adoption of a budget, none of the records could likely be characterized as final determinations. Portions of the records, however might contain agency policy adopted in the past, and substantial portions of the records likely contain "statistical or factual tabulations or data."

Two decisions rendered to date have dealt with budget information that may be somewhat analogous to the information you are seeking. In Dunlea v. Goldmark, [54 AD 2d 446, affirmed without opinion, 43 NY 2d 754 (1977)], the Appellate Division, Third Department, held that budget worksheets containing advice in the form of numbers were accessible. The Court noted that although the figures contained in the worksheets may not have been reflective of "objective reality," they were nonetheless accessible. The worksheets were sought after the adoption of the executive budget.

The second determination that dealt with similar subject matter was rendered this year by the Appellate Division, Second Department. In Delaney v. DelBello (62 AD 2d 281), it was held that budget estimates submitted by agency heads to a County Executive were deniable. In Delaney, the court found that only "supporting" statistical or factual tabulations relative to a budget are accessible. In order to discern whether such tabulations are "supporting," the budget obviously must pass to make such a determination. Consequently, Delaney was distinguished from Dunlea on the basis that the information was sought in Delaney prior to the adoption of the budget, while it was sought after the adoption of the budget in Dunlea. Both decisions were handed down under the Freedom of Information Law as originally enacted.

I disagree with the holding in Delaney for several reasons. First, the amended Freedom of Information Law, as noted earlier, is based upon a presumption of access. Further, the new Law defines "record" to include any information in possession of any agency "in any physical form whatsoever" [§86(4)]. Therefore, the nature of the contents of records determines the extent to which records or portions thereof may be withheld. A distinction in terms of time cannot in my view justifiably be made under the new Law. For example, if a factual tabulation appears in a record, it is accessible, whether or not it relates to a proposed or an adopted budget. Its nature alone determines rights of access under §87(2)(g). Therefore, I believe that the distinction made in Delaney based upon the time of submission of the records sought would be irrelevant under the amended Freedom of Information Law.

Second, Delaney relied heavily upon 9 NYCRR 145.1(2). Reliance upon that section of the New York Code of Rules and Regulations was in my view misplaced. The cited provision constituted a portion of the regulations adopted under the original Law by the State Division of Budget, which exempted "opinions, policy options and recommendations" from the coverage of the Freedom of Information Law. It may have been relevant to the Dunlea case, but it had no connection whatsoever to the controversy in Delaney. The Freedom of Information Law requires this Committee to promulgate regulations regarding the procedural aspects of the Law, and all agencies in the state must in turn adopt regulations no more restrictive than those promulgated by the Committee. The regulations adopted by the Division of the Budget, however, pertained not only to procedures, but to rights of access as well. In this regard, it is my contention that an agency cannot adopt regulations more restrictive in terms of rights of access than a statute [see Zuckerkman v. Board of Parole 53 AD 2d 405]. If an agency could adopt regulations more restrictive than the statute, the statute would be of no effect. In short, 9 NYCRR 145.1(2) should in my opinion have had no relevance to the Delaney determination.

Third, the phrase "statistical or factual tabulations or data" is subject to conflicting interpretations. The phrases "factual tabulations" or "factual data" in my view would not result in substantial questions regarding their interpretation. But what constitutes "statistical tabulations" or "statistical data"? In my opinion, there must be a difference between "factual" tabulations or data and "statistical" tabulations or data, or the Legislature would not have included the word "statistical" within the Law. If the phrase "statistical tabulations or data" does not include items such as proposed budget estimates, the word "statistical" appearing in §87(2)(g)(i) would have no apparent meaning.

Fourth, the legislative declaration contained in §84 of the Freedom of Information Law states that the people must have the right "to review the documents and statistics leading to determinations..." The statement of legislative intent makes clear that statistical or factual findings that precede the making of determinations are intended to be available. The Delaney decision appears to have passed over a relevant portion of the Freedom of Information Law, its statement of intent. Although the phrase "statistical or factual tabulations" may be subject to conflicting interpretations, the courts have long held that in cases in which the specific language of a statute is unclear but the statute's legislative intent is clear, the statement of intent should be used as a guide to appropriate interpretation. Further, the rules of construction have long held that remedial legislation, such as the Freedom of Information Law, should be construed liberally.

In sum, I believe that the phrase "statistical or factual tabulations or data" should be construed broadly to include within its scope statistical or factual data submitted by department heads to the Mayor prior to the adoption of a budget. Therefore, to the extent that the records in question consist of statistical or factual data or contain statements of policy, they are in my opinion available.

Finally, the Open Meetings Law is applicable to public bodies that consist of two or more members and act collectively for or on behalf of government. Therefore, a meeting held by the Mayor of Kingston and department heads would not be a gathering of a public body, but rather would be a gathering of staff with an executive that falls outside the scope of the Law. If a group of individuals had been designated to act as a body, such as a budget committee created under §354 of the County Law, my response would be different. Here, it appears that the Mayor is an executive who acts alone in determining the nature of the budget.

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:jm

cc: Mayor Francis F. Koenig
Louis F. DeCicco

STATE OF NEW YORK
COMMITTEE ON PUBLIC ACCESS TO RECORDS

FOIL-AO-954

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

November 16, 1978

Jay Cox O'Brien
Assistant Director
Law Revision Commission
488 Broadway
Albany, New York 12207

Dear Mr. O'Brien:

Thank you for your interest in complying with the Freedom of Information Law and transmitting a copy of the Commission's regulations.

Having reviewed the regulations, I believe that they comply with those promulgated by the Committee in all respects.

Once again, I thank you for your consideration.

Sincerely,

Robert J. Freeman
Executive Director

RJF:nb

STATE OF NEW YORK
COMMITTEE ON PUBLIC ACCESS TO RECORDS FOIL-AO-955

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

November 17, 1978

Chancellor Frank J. Macchiarola
Board of Education
110 Livingston Street
Brooklyn, New York 11201

Dear Chancellor Macchiarola:

At the request of Myrna Luster, I have been asked to intercede and give appropriate advice regarding requests made by Ms. Luster under the Freedom of Information Law.

Based upon information provided by Ms. Luster, four appeals following denials of access by the New York City Board of Education have been received by your office. To date, none of the appeals have been determined. In addition, previous correspondence addressed to you (of which I received a copy) indicated that the grounds for initial denials of access were not specified.

In this regard, please be advised that the regulations promulgated by the Committee, which have the force and effect of law, require that a denial of access be given in writing and that reasons for the denial be provided [see enclosed regulations, §1401.7]. Further, the regulations require that a person denied access be informed of his or her right to appeal and be given the name of the person or body to whom an appeal should be directed. Both the Law [see attached, Freedom of Information Law, §89(4)] and the regulations mandate that determinations on appeal be rendered within seven business days of their receipt. In addition, copies of appeals and the determinations that ensue must be transmitted to this office.

In view of the foregoing, it is suggested that your office review its procedures concerning the implementation of the Freedom of Information Law and insure that effect be

given to the regulations promulgated by the Committee as well as the substantive aspects of the Law.

I hope that I have been of some assistance. If you or your staff would like to discuss the matter, please feel free to contact me.

Sincerely,

Robert J. Freeman

Robert J. Freeman
Executive Director

RJF:nb
Encs.

cc: Myrna Luster

STATE OF NEW YORK

COMMITTEE ON PUBLIC ACCESS TO RECORDS

FOIL-AO-956

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

November 21, 1978

Ms. Jody Adams
[redacted]

Dear Ms. Adams:

Thank you for your letter of November 12 and for your interest in the Freedom of Information Law. Several questions have been raised, and I will attempt to answer each of them.

The first area of inquiry concerns the procedural implementation of the Freedom of Information Law by the Town of Southold. Section 87(1)(b) of the Freedom of Information Law requires that each agency, which includes a town, must adopt rules and regulations for the implementation of the Law which are consistent with and no more restrictive than the regulations promulgated by the Committee.

Your letter indicates that there is currently a single records access officer, even though records are kept in several locations. In this regard, the regulations promulgated by the Committee provide that the governing body of a town is responsible for designating one or more records access officers. The records access officer is responsible for coordinating the agency's response for requests for records. While there is no requirement that there be a records access officer at each location where records are kept, the town clerk should nonetheless be responsible for insuring that the time limitations for response to requests contained in the Law and the regulations be followed. Further, §1401.7 of the Committee's regulations requires that a person designated to determine appeals must be identified by name, title, business address and business telephone number. Consequently, there should be a uniform procedure for appealing denials of access; a specific person or body should be designated to hear all appeals. Moreover, §1401.9 of the regulations requires that each agency must publicize by posting or by publication in a local newspaper the name and business address of the person or body to whom an appeal must be directed.

Although the Committee does not have the legal authority to enforce the Law or compel compliance with its provisions, the Committee is empowered to advise any person having questions with respect to the Freedom of Information Law. Therefore, in an effort to provide advice to you and to the Town, copies of the regulations and model regulations developed by the Committee to assist agencies in complying with the Committee's regulations will be sent to the Town of Southold. Perhaps a review of the regulations and model regulations will be helpful to town officials.

Third, your letter indicates that the Police Department charges $3.50 per page for copies of items such as accident reports. The Freedom of Information Law, §87(1)(b)(iii), provides that no more than twenty-five cents per photocopy may be assessed, except when a different fee is otherwise prescribed by Law. Stated differently, unless the Town had passed a local law or ordinance prior to the enactment of the original Freedom of Information Law in 1974, no more than twenty-five cents per photocopy may be charged. It is noted that §202 of the Vehicle and Traffic Law enables the State Department of Motor Vehicles to charge a fee of $3.50 for accident reports. However, the ability to assess such a fee does not extend to municipalities; it applies only to records in possession of the State Department of Motor Vehicles.

Fourth, questions have been raised regarding a criminal investigation by the Police Department. Here, I direct your attention to the Freedom of Information Law. In brief, the Law provides that all records in possession of an agency are accessible, except to the extent that records or portions thereof fall within one or more categories of deniable information. One of the categories states that an agency may deny access to records or portions thereof that:

> "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" [§87(2)(e)].

It is emphasized that the grounds for denial quoted above are based largely upon the effects of disclosure. While it would be inappropriate to conjecture with respect to your rights of access without greater knowledge of the circumstances, the ability to deny access to records compiled for law enforcement purposes is limited to those circumstances listed in the Law.

Fifth, the statute of limitations for the initiation of an Article 78 proceeding is four months. In the case of the Freedom of Information Law, a person may bring an Article 78 proceeding within four months of the date of a determination to deny access rendered on appeal by the head of an agency. As far as the complexity of the Article 78 proceeding is concerned, it is suggested that you discuss the matter with an attorney, since I am not a practicing "courtroom" attorney.

Sixth, you have asked whether the time limitations in the Law are applicable in cases in which boards may have only a secretary or parttime staff. The time limitations contained in §89(3) of the Freedom of Information Law and §1401.5 of the Committee's regulations must be followed. Please note that the Law does not require that a request be answered immediately; a records access officer has five business days from the receipt of a request to determine whether or not records are accessible.

Finally, you have indicated that town officials may avoid putting things in writing. In this regard, the Freedom of Information Law is applicable to existing records and there is no obligation on the part of government to create a record in response to a request. It is suggested, however, that you educate and familiarize yourself concerning the Freedom of Information Law. Perhaps increased knowledge on the subject will result in future successes. In addition, if questions arise, please feel free to contact me.

Enclosed for your consideration are copies of the Freedom of Information Law, the regulations, the model regulations, the pamphlet entitled "The New Freedom of Information Law and How to Use It", and a pocket guide to the Law.

I hope that I have been of some assistance.

Sincerely,

Robert J. Freeman

Robert J. Freeman
Executive Director

RJF:jm

Enclosures

cc: Town Board

STATE OF NEW YORK

COMMITTEE ON PUBLIC ACCESS TO RECORDS FOIL-AO-957

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

November 28, 1978

Mr. John J. Zupetz
[redacted]

Dear Mr. Zupetz:

I am in receipt of your letter of November 16, which arrived at this office on November 27. Your inquiry concerns unsuccessful attempts to obtain copies of the Treasurer's Report submitted to the Board of Fire Commissioners of the Silver Lake Fire Company.

A question that has consistently arisen regarding volunteer fire companies is their status under the Freedom of Information Law. Although the definition of "agency" appearing in §87(1) of the Freedom of Information Law (see attached) includes "governmental" entities that perform governmental functions, and volunteer fire companies are generally not-for-profit corporations, the Committee has consistently advised that volunteer fire companies are agencies subject in part to the Freedom of Information Law. While a not-for-profit corporation would not in most instances be considered a governmental entity, a judicial decision rendered by a federal court held that a volunteer fireman is "in the public service" and therefore is a public servant even though no salary is paid [see Everett v. Riverside Hose Company, 261 F. Supp. 2nd 463 (1966)]. The determination is Everett is based upon the notion that a volunteer fire company performs what traditionally has been deemed a governmental function. Consequently, the decision inferred that a volunteer fire company is a governmental entity notwithstanding its status as a rot-for-profit corporation.

In view of the foregoing and a recognition of the nature of the records in possession of volunteer fire companies, it has been advised that records in possession of such companies that concern the performance of their official duties, such as the Treasurer's Report or a break-

down of expenditures, are subject to rights of access granted by the Freedom of Information Law. However, records that are unrelated to the performance of official duties, such as those that deal with social activities, would be outside the scope of the Freedom of Information Law, for they pertain to non-governmental functions.

Since the records in which you are interested have a direct bearing upon the official duties of the company and affect the lives of persons residing in the Fire District, they relate to the governmental functions performed by the Company. Moreover, they are in my opinion clearly accessible under §87(2)(g) of the Freedom of Information Law.

I have enclosed a copy of an earlier opinion dealing with the same subject matter and an explanatory pamphlet regarding the Freedom of Information Law. I believe that both will be helpful to you.

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

Enclosures

cc: Board of Fire Commissioners
Anthony Austria, Jr.

STATE OF NEW YORK

COMMITTEE ON PUBLIC ACCESS TO RECORDS

FOIL-AO-958

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

November 29, 1978

Mr. Joseph Dubovy
[redacted]

Dear Mr. Dubovy:

I am in receipt of your letter concerning a request for information directed to the Blue Mountain Middle School. Please be advised that although your letter is dated November 8, it was only recently delivered to this office.

Your inquiry indicates that you have asked for a list of suspensions of students in the Blue Mountain School in the past year, including the duration of time of each suspension and the grounds for each suspension. Mr. Eible, the Superintendent of Schools, has according to your letter informed you that the information is not available and "could not be generated."

In my opinion, the Superintendent's response may be both correct and incorrect in part. The Freedom of Information Law specifically states that an agency, such as a school district, need not create a record in response to a request [see attached Freedom of Information Law, §89(3)]. Therefore, if no list of suspensions, the duration of suspensions or the grounds for suspensions exist, the School District has no obligation to prepare such a list on your behalf. Nevertheless, individual records containing the substance of the information sought might be accessible.

You have stated in your letter that the names of students are not sought. In this regard, the Family Educational Rights and Privacy Act (20 USC 1232g) (which is commonly known as the "Buckley Amendment"), prohibits the School District from disclosing education records that identify a particular student or students. However, if portions of records can be deleted to protect against the disclosure of the identities of students named or

otherwise cited in the records, the information that you are seeking would be subject to rights of access. Similarly, even if the Buckley Amendment were not in existence, the Freedom of Information Law states that an agency may withhold records or portions of records which if disclosed would result in an unwarranted invasion of personal privacy [see §87(2)(b)].

Consequently, if there are records in existence which are subject to the deletion of identifying details and which include reference to the duration of suspensions and the grounds for suspension, such records should in my view be made available. If, however, records analogous to those described do not exist, or if the records do exist and there is no feasible means by which the identities of students concerned could be withheld or excised, a denial by the School District would in my opinion be proper.

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:jm

Enclosure

cc: Mr. Eible, Superintendent of Schools

STATE OF NEW YORK
COMMITTEE ON PUBLIC ACCESS TO RECORDS

FOIL-AO-959

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

November 29, 1978

Ms. Phyllis Teitelbaum
[redacted]

Dear Ms. Teitelbaum:

I am in receipt of your letter and the correspondence with Harold Siegel, Secretary to the New York City Board of Education, regarding a refusal to stamp or otherwise acknowledge receipt of requests made under the Freedom of Information Law.

Although I do not believe that your request of the Board for acknowledgment of receipt of your communications is in any way unwarranted or inappropriate, there is nothing in either the Freedom of Information Law or the regulations promulgated by the Committee that requires that such an acknowledgment be given. To be sure that you can ascertain that a request has been received, it is suggested that you send your letter by registered mail with return receipt requested. In the alternative, perhaps you could devise an affidavit or certification in which you state that a particular communication was hand delivered and accepted by the Board of Education on a particular date, or you could deliver your request while in the company of another individual who could so certify.

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:jm

cc: Harold Siegel

STATE OF NEW YORK

COMMITTEE ON PUBLIC ACCESS TO RECORDS

FOIL-AO-960

DEPARTMENT OF STATE, 162 WASHINGTON AVENUE, ALBANY, NEW YORK 12231
(518) 474-2513, 2791

November 30, 1978

Ms. Angelina Sinicropi
[redacted]

Dear Ms. Sinicropi:

Your letter addressed to the Committee on Public Access to Records at the office of the Lieutenant Governor has been transmitted to the administrative office of the Committee, which is housed in the Department of State. Your inquiry concerns a denial of access by Nassau County with respect to records relative to a grievance proceeding of a specific employee of the County.

It is noted at the outset that the Committee does not have the power to compel compliance with the Freedom of Information Law; it has authority only to advise.

Your letter indicates that the response to an appeal was rendered beyond the statutory time limit required by §89(4)(a) of the Law. Moreover, as you intimated, the Committee has received neither a copy of your appeal nor the determination that ensued.

With regard to your contentions, I am in basic agreement. Although the records in which you are interested relate to a particular public employee, the Committee has advised and the courts have upheld the notion that records that bear upon the performance of official duties of public employees are accessible, for disclosure would constitute a permissible as opposed to an unwarranted invasion of personal privacy [see e.g., Montes v. State, 406 NYS 2d 664 (Court of Claims, 1978)]. Conversely, if records have no relevance to the manner in which a public employee performs his or her official duties, disclosure would constitute an unwarranted invasion of personal privacy and therefore such records may be withheld [see e.g., Matter of Wool, Sup. Ct., Nassau Cty., NYLJ, Nov. 22, 1977]. In this case,

a disciplinary proceeding is relevant to the performance of duties. As such, the ground for denial offered by the County is in my view inappropriate.

Nevertheless, it is possible that there may be portions of the records sought that could properly be denied. For example, while I believe that charges, answers, and determinations are available in their entirety, for they constitute the information directed to be made available by §87(2)(g)(i) and (iii), portions of the transcript might be withheld on the ground that disclosure would result in an unwarranted invasion of privacy of those who may have testified or appeared as witnesses.

It is also noted that §75 of the Civil Service Law enables the subject of a proceeding to opt for an open or a closed hearing. Therefore, if the subject of the proceeding opted for a public hearing, all of the records in which you are interested would in my opinion be 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:jm

cc: Francis T. Purcell
Edward McCabe

STATE OF NEW YORK
COMMITTEE ON PUBLIC ACCESS TO RECORDS

FOIL-AO-961

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

December 5, 1978

Mr. Dan F. Ward
Thomas P. Ward, Inc.
P.O. Box 328, 22 Woodruff Street
Saranac Lake, New York 12983

Dear Mr. Ward:

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 been informed that lists of persons interested in renting property during the 1980 Olympic Games are made available by the Lake Placid Chamber of Commerce only if you join the Chamber of Commerce.

In my opinion, the demand made by the Chamber of Commerce does not violate any provision of law. First, the Freedom of Information Law is applicable only to governmental entities. Although the Chamber of Commerce might receive funding from the state and federal governments, it is not a governmental entity and therefore is not subject to rights of access granted by the Freedom of Information Law. In essence, it is independent and has the ability to disclose or maintain the privacy of its records as it sees fit.

Moreover, even if the Chamber of Commerce had been considered a governmental entity subject to the Freedom of Information Law, such a list would in my view be deniable. Specifically, the Freedom of Information Law provides that disclosure of lists of names and addresses that would be used for commercial or fund-raising purposes would constitute an unwarranted invasion of personal privacy. Consequently, such lists may generally be withheld from public inspection.

Enclosed for your consideration is an explanatory pamphlet on the Freedom of Information Law 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
Executive Director

RJF:nb
Enc.

STATE OF NEW YORK

COMMITTEE ON PUBLIC ACCESS TO RECORDS FOIL-AO-962

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

December 5, 1978

Mr. Jack E. Douglas
President
Millsite Lake Property
Owners Association
P.O. Box 666
Redwood, NY 13679

Dear Mr. Douglas:

I am in receipt of your letter of November 22, which concerns information in possession of the Department of Environmental Conservation.

It is emphasized that this Committee does not possess records generally, nor does it have the authority to compel compliance with the Freedom of Information Law. As such, a request for records in possession of the Department of Environmental Conservation must be directed to its records access officer. I have contacted the records access officer on your behalf, Mr. Richard Schneider, who is located at 50 Wolf Road, Albany. He informed me that he has not recently received a request from you analogous to your correspondence to me.

In terms of substance, as you are aware, each agency must create a subject matter list which makes reference by category to all records in its possession, whether or not the records are available. In this instance, it is suggested that you direct your request for the list (as well as the records) to Mr. Schneider. I am sure that he will be happy to provide a copy. It is noted, however, that §87(2)(b)(iii) of the Freedom of Information Law permits agencies to charge up to twenty-five cents per photocopy not in excess of nine by fourteen inches. Consequently, the Department may assess fees in accordance with its regulations regarding fees for copies of records.

With respect to the specific records in which you are interested, it would appear that most could be categorized as inter-agency or intra-agency materials, materials generated within or between agencies. In this regard, the Freedom of Information Law provides that all records are available except to the extent that records or portions thereof fall within one or more enumerated categories of deniable information appearing in §87(2) (a) through (h). Relevant in this instance is §87(2)(g), which provides that an agency may withhold records or portions thereof that:

> "are inter-agency or intra-agency materials 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..."

It is important to note that the quoted provision contained what in effect is a double negative. While an agency may deny access to inter-agency and intra-agency materials, statistical or factual tabulations or data, instructions to staff that affect the public, or final agency policy or determinations found within such materials are available. For example, a maintenance cost schedule or an audit would likely consist of "statistical or factual tabulations or data" and therefore would be available. Similarly, records reflective of cost overruns would be available based upon the same rationale. However, memoranda in the nature of advice which may be accepted or rejected would be deniable, for such materials would not constitute statistical or factual data, instructions to staff or the policy of the agency.

Once again, it is suggested that you direct your request to Mr. Schneider. I am sure that he will be happy to help 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:jm

COMMITTEE ON PUBLIC ACCESS TO RECORDS FOIL-AO- 963

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

December 7, 1978

Penelope D. Clute, Esq.
Clute, Clute & Thompson
44 Brinkerhoff Street
Plattsburgh, New York 12901

Dear Ms. Clute:

I am in receipt of your request for an opinion regarding a denial of access to records by the Division of Parole. Specifically, your letter indicates that you requested records concerning your client that were used by the Parole Board to make determinations. The denial was grounded upon the notion that the records sought were not prepared by the Division, but rather originated in other departments.

I agree with your contention that the fact that records in possession of an agency, which may not have been prepared by that agency, is irrelevant to rights of access. Consequently, the only question that may be raised when a request is made involves the extent, if any, to which an agency may withhold records based upon the provisions for denial of access appearing in §87(2)(a) through (h) of the Freedom of Information Law. As you wrote in your letter to Mr. Graber, Counsel to the Division of Parole, the Freedom of Information Law defines "record" to include "any information kept, held, filed, produced, or reproduced by, with or for an agency...in any physical form whatsoever..." [§86(4)]. In view of the definition, virtually any information in possession of an agency, regardless of its origin, is subject to rights of access. Therefore, although the records requested may not have been created by the Division of Parole, they are nonetheless subject to rights of access.

It is noted in passing that one of the categories of records in which you are interested cannot in my opinion be made available by the Division. Access to presentence reports is governed by §390.50 of the Criminal Procedure Law.

It is suggested that you review the cited provision to determine the appropriate entity to which a request should be directed.

As we discussed, I contacted the Division's Office of Counsel on your behalf with respect to your correspondence. Counsel contends that it is bound by the existing regulations of the Division (9 NYCRR §8000.5) which state that "access by the Division of Parole shall not be granted to reports, documents and materials of other agencies," and are generally more restrictive than the Freedom of Information Law. In my opinion, the current regulations do not comply with law. It has been established in case law that an agency cannot promulgate regulations that effectively supersede provisions of a statute. Moreover, in a suit initiated under the Freedom of Information Law, it was determined that regulations that restrict rights of access beyond the scope of the restrictions contained in the Freedom of Information Law were void to that extent [Zuckerman v. NYS Board of Parole, 53 AD 2d 405].

It is clear that regulations relative to the Freedom of Information Law are intended to apply only to the procedural implementation of the statute. Section 89(1)(b)(iii) of the Freedom of Information Law requires this Committee to promulgate rules and regulations governing the procedural aspects of the Law. In turn, §87(1)(b) requires all agencies, including the Division of Parole, to promulgate regulations "pursuant to such general rules and regulations as may be promulgated by the committee on public access to records in conformity with the provisions of this article..." Consequently, agencies must adopt regulations that conform to those promulgated by the Committee, and which are consistent with the provisions of the Freedom of Information Law. In view of the foregoing, I have suggested to a representative of the Division's Office of Counsel that §8000.5 insofar as it pertains to access to records should be altered to conform with the procedural regulations promulgated by the Committee. The Division has in its possession the Committee's regulations as well as model regulations which may serve as a guide to compliance with the procedural aspects of the Law.

In sum, I believe that the existing regulations of the Division pertain not only to the procedure but also to substantive rights of access and are more restrictive than a statute, the Freedom of Information Law. Therefore, the Division's regulations should in my opinion be altered to be consistent with those promulgated by the Committee and the Freedom of Information Law itself.

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:nb

CC: Herman Graber

William Altschuller

STATE OF NEW YORK
COMMITTEE ON PUBLIC ACCESS TO RECORDS

FOIL-AO-964

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

December 11, 1978

Mr. Leonard Farbman
Plumbing Industry Affairs Corp.
55 Willoughby Street
Brooklyn, New York 11201

Dear Mr. Farbman:

I have reviewed your letter of November 30, as well as the correspondence relative to my response of May 3 to Donald Schatz of the New York City Housing Authority. Once again, your letter indicates that you are interested in learning the identities of persons whose names appear on a weekly payroll sheet. The people identified on the sheet are employees of private contractors engaged in work for the Housing Authority.

While I understand you concerns, I cannot in good faith advise that a payroll record identifying employees of private contractors should be made available. As noted in the opinion of May 3, the Freedom of Information Law enables agencies to withhold information the disclosure of which would result in "an unwarranted invasion of personal privacy" [see Section 87(2)(b) and 89(2)(b)]. Consequently, the Housing Authority in my opinion has the ability to delete identifying details from records when in its judgment disclosure would result in an unwarranted invasion of personal privacy. Moreover, I believe that the position taken by the Housing Authority is consistent with the intent of the Freedom of Information Law, which seeks to ensure that government be accountable and that the personal details of individuals' lives remain beyond the scope of rights of access. As such, I agree with the contention of the Housing Authority that the names of the employees in question may justifiably be deleted, while the statistics reflective of the expenditures of public monies be made available.

If you would like to discuss the matter further, please feel free to contact me.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Donald Schatz
Steve Abramowitz

STATE OF NEW YORK
COMMITTEE ON PUBLIC ACCESS TO RECORDS

FOIL-AO-965

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

December 12, 1978

Mr. Robert P. Augello
Law Clerk
Law Offices of Jerome K. Frost
36 First Street
Troy, New York 12180

Dear Mr. Augello:

I am in receipt of your letter regarding a denial of access to police accident reports by the Police Chief of the City of Troy. Your letter indicates that the request pertains to accident reports compiled from 1972 to 1974 and that the purpose of the request involves legal research.

In my opinion, the accident reports are available. First, the Freedom of Information Law is based upon a presumption of access. All records in possession of an agency are accessible, except to the extent that records or portions thereof fall within one or more enumerated categories of deniable information [see Freedom of Information Law, §87 (2)(a) through (h)]. Under the circumstances, although an accident report might be considered intra-agency material [see §87(2)(g)], its contents consist of "factual data," which is available. Second, §89(5) of the Law states that its provisions shall not be construed to limit or abridge "any otherwise available right of access at law or in equity of any party to records." In this regard, §66-a of the Public Officers Law has long granted access to accident reports. Since §89(5) of the Freedom of Information Law preserves rights of access granted pursuant to §66-a of the Public Officers Law, the reports in question should in my view have been made available to you.

Further, it appears that the scope of the request is not so broad that a response cannot be given. Specifically, §89(3) of the Law requires the public to "reasonably describe" the records sought. In this instance, it would appear that the records in question have been "reasonably described."

I have enclosed a copy of an early opinion which provides additional information regarding access to accident reports, including citations to judicial determinations, 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
Executive Director

RJF:nb
Enc.

cc: Police Chief, City of Troy

COMMITTEE ON PUBLIC ACCESS TO RECORDS OML-AO- 279
FOIL-AO- 966

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

December 12, 1978

Albert M. Martocchia
Supervisor
Office of Supervisor
Town of Southold
Southold, New York 11971

Dear Supervisor Martocchia:

Thank you for transmitting the determination of the Board in response to an appeal made under the Freedom of Information Law.

While I concur with the substance of the determination, there is a point to which I would like to direct your attention. First, as inferred in the determination, there is no requirement that an agency create a record in response to a request [see Freedom of Information Law, §89(3)]. Second, it is true that minutes of executive session need only make reference to action taken.

However, your determination states that the gathering related to the second request "was not in fact a Formal Town Board Meeting, nor was the same a meeting of the Town Board at which action was taken by formal vote..." In this regard, enclosed are copies of decisions rendered by the Appellate Division and the Court of Appeals in Orange County Publications v. Council of the City of Newburgh. In brief, the Court of Appeals affirmed the lower court's finding that any gathering of a quorum of a public body, on notice to the members, for the purpose of discussing public business falls within the definition of "meeting" in the Open Meetings Law [see §97(2)]. Further, it is clear that there need not be an intent to take action nor a characterization of a gathering as "formal" to fall within the scope of the Law.

Consequently, the session described in your letter appears to have been a "meeting." If so, it should have been convened as an open meeting and preceded by notice.

After convening an open meeting, a public body may enter into executive session in accordance with §100 of the Law (see attached).

I hope that I have been of some assistance. If you would like to discuss the matter, please feel free to contact me.

Sincerely,

Robert J. Freeman

Robert J. Freeman
Executive Director

RJF:nb
Encs.

STATE OF NEW YORK
COMMITTEE ON PUBLIC ACCESS TO RECORDS FOIL-AO- 967

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

December 13, 1978

Mrs. William White
[redacted]

Dear Mrs. White:

I am in receipt of your letter regarding your unsuccessful attempts to gain access to a record in possession of the Supervisor of the Town of Wilson. Specifically, you are interested in a letter sent by the Regional Director of the Department of Housing and Urban Development to the Supervisor.

In my opinion, the letter is accessible. The Freedom of Information Law is based upon a presumption of access. It states that all records in possession of an agency are available, except to the extent that records or portions thereof fall within one or more enumerated categories of deniable information [see attached, Freedom of Information Law, §87(2)(a) through (h)]. In my view, the determination made by the Department of Housing and Urban Development and sent to the Town Supervisor is clearly available, for it does not fall within any of the grounds for denial listed in the Freedom of Information Law.

With regard to the steps that may be taken to obtain the letter, the regulations promulgated by the Committee, which have the force and effect of law (see attached), state that a denial of access to records must be stated in writing, give the reasons for denial, apprise the applicant of his or her right to appeal, and provide the name of the person to whom an appeal should be directed. The appeals officer then has seven business days from the receipt of the appeal to render a determination. In addition, §89(4)(a) of the Freedom of Information Law requires agencies to send copies of appeals as well as the determinations that ensue to the Committee.

If you are denied access on appeal, you may initiate a judicial proceeding to challenge the denial. In such a proceeding, the agency has the burden of proving that the records withheld fall within one or more of the categories of deniable information listed in the Law.

It is also noted that the Town Clerk is designated by §30 of the Town Law as the custodian of all Town records. Consequently, it would appear that the Clerk, not the Supervisor, should have legal custody of the record in which you are interested.

Enclosed for your consideration is a pamphlet entitled "The New Freedom of Information Law and How to Use It," which may be useful 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:nb
Encs.

cc: Whitney Boonum
Town Clerk

STATE OF NEW YORK

COMMITTEE ON PUBLIC ACCESS TO RECORDS FOIL-AO-968

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

December 13, 1978

Mr. Joseph J. Reich
[redacted]

Dear Mr. Reich:

I am in receipt of your letter of December 4, which was transmitted to the Committee by the Attorney General. Your inquiry concerns rights of access to the name of the person who registered a complaint with the ABC Board that resulted in a fine and suspending the operation of your bar for a week.

In my opinion, although the substance of a complaint is accessible, the name of the person who made the complaint may be withheld.

The Freedom of Information Law states that all records in possession of government in New York are accessible, except records or portions of records that fall within one or more of eight categories of deniable information listed in the Law [see attached, Freedom of Information Law, §87(2)(a) through (h)]. Relevant to your inquiry, §87(2)(b) states that portions of records may be withheld when disclosure would result in an unwarranted invasion of personal privacy. Further, §89(2)(b) of the Law lists five examples of unwarranted invasions of personal privacy. Several of the examples make reference to relevance to the ordinary work of the agency. In the case of complaints, the Committee has advised and the courts have tended to uphold the notion that the substance of a complaint is relevant to the agency in receipt of a complaint, and that the identity of the complainant is largely irrelevant [see Church of Scientology v. State, 403 NYS 2d 224, ___ Ad 2d ___ (1978)]. On that basis, it has been advised that the name of a complainant may be deleted, but that the substance of the complaint be made available.

In sum, I believe that the ABC Board must furnish records of complaints to you, but that the name of the complainant may be deleted from 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
Executive Director

RJF:jm

Enclosure

STATE OF NEW YORK

COMMITTEE ON PUBLIC ACCESS TO RECORDS FOIL-AO-969

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

December 13, 1978

Mr. Virgil Pontone
[redacted]

Dear Mr. Pontone:

I am in receipt of your letter of December 1. Your inquiry concerns the right to inspect and copy a list of election inspectors in your assembly district.

In my opinion, records indicating the identities of election inspectors are accessible. It is noted that the Freedom of Information Law generally does not require an agency to create a record in response to a request. Consequently, if there is no list of inspectors in existence, there would be no obligation to create such a list on your behalf. Nevertheless, §87(3)(b) of the Freedom of Information Law requires each agency to maintain a payroll record consisting of the name, public office address, title and salary of each officer or employee of the agency. It is possible that election inspectors may be included in the payroll records, which is available.

Secondly, the Freedom of Information Law grants access to vouchers, checks, and other similar records of expenditure that indicate payment. Therefore, if there is no list of election inspectors or if the payroll record does not include reference to them, records of expenditures identifiable to election inspectors would be available.

Assuming that such a list does exist, it would constitute a factual tabulation that would be accessible.

Finally, if you wish to request photocopies of the records in question, photocopies must be made available to you. However, the agency may charge up to twenty-five cents per page.

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:jm

STATE OF NEW YORK
COMMITTEE ON PUBLIC ACCESS TO RECORDS

FOIL-AO- 970

DEPARTMENT OF STATE, 162 WASHINGTON AVENUE, ALBANY, NEW YORK 12231
(5 8) 474-2518, 2791

December 14, 1978

Ms. Jody Adams
[redacted]

Dear Ms. Adams:

I am in receipt of your letter of November 30, which raises a series of questions regarding the interpretation of the Freedom of Information Law and the activities of the Committee.

First, there is nothing in the Law that precludes individuals from renewing a request that may once have been denied. However, it is noted that §89(4)(a) of the Law requires an applicant to appeal a denial within 30 days of the denial. Moreover, a judicial challenge to a denial must be made within four months of receipt of a denial on appeal.

Second, I am aware that the Suffolk County Legislature has considered the enactment of a local law that would enable county agencies to assess fees for searching records. Although passage of a local law regarding search fees would in my opinion conflict with the clear intent of the Freedom of Information Law, it is possible that such a local law would be valid. In this regard, the Committee in its upcoming report to the Legislature will recommend an amendment to the Freedom of Information Law that would effectively preclude local government from assessing any fees for search, or fees for reproduction in excess of twenty-five cents per photocopy. Further, I have been informed by the Office of the Suffolk County Attorney that the proposal regarding search fees has been tabled indefinitely.

The provisions regarding fees for copying documents became effective initially in 1974 in the regulations promulgated by the Committee. The Freedom of Information Law itself did not include specific provisions for the assessment of fees for photocopying until its amendment. The

amended Law became effective January 1, 1978.

You have raised a question concerning the circumstances in which the Committee acts as a mediator. In essence, I will provide oral advice on receipt of a telephone call to any person who has questions. Similarly, a written advisory opinion will be prepared upon the receipt of any written inquiry. In terms of mediation, as you are aware, if a specific entity of government is involved in a dispute with a member of the public, a copy of my response to the public is also sent to government. Further, in many instances, I will contact representatives of government in order to obtain information regarding a dispute and advise accordingly.

Next, as noted in my earlier letter to you, the Committee does not have the power to enforce the Law. The capacity to enforce compliance with the Law rests on the shoulders of the public. However, the Committee realizes that a judicial challenge to a denial of access may involve a substantial amount of money. Consequently, its upcoming report will recommend that the Law be amended in order that a court may in its discretion award reasonable attorney fees to a person who substantially prevails in a judicial challenge to a denial of access.

Lastly, you have inquired with respect to the degree of activity of the members of the Committee and the size of its staff. The staff consists of myself and two secretarial assistants. The Committee members meet periodically and provide me with policy direction. As such, the Committee rarely becomes involved in a specific controversy, and I deal with controversies on the behalf of the Committee.

The members of the Committee and the expiration of their terms are as follows:

T. Elmer Bogardus	9/1/78
Gilbert Smith	9/1/81
Douglas Turner	9/1/79
Walter W. Grunfeld*	*determined by
Irving Seidman*	Legislature
Mario M. Cuomo	ex officio
Mary Anne Krupsak	ex officio
James O'Shea	ex officio
Howard F. Miller	ex officio

Elie Abel recently resigned from the Committee to accept a position out of state.

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:nb

STATE OF NEW YORK
COMMITTEE ON PUBLIC ACCESS TO RECORDS

FOIL-AO-971

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

December 18, 1978

Joseph A. Rihn
Assistant County Attorney
Office of the County Attorney
of Dutchess County
County Office Building
Poughkeepsie, New York 12601

Dear Mr. Rihn:

I have received your letter of December 13 in which an advisory opinion is sought regarding a request under the Freedom of Information Law.

The correspondence attached to your letter indicates that three requests were initially directed to the Dutchess County Office of the Aging. No records exist with respect to the first request, and records relative to the third were made available. However, the second request has been denied. It deals with:

> "[A]ny and all agency records which would indicate how and/or when the agency became aware that Jane Gould was interested in and/or available for employment with your agency."

In my opinion, the request was justifiably denied. The Freedom of Information Law is based upon a presumption of access and states that all records are available except those falling within one or more enumerated categories of deniable information [see §87(2)]. Under the circumstances, it would appear that the records in question could be withheld under §87(2)(b), which states that an agency may withhold records or portions thereof which if disclosed would constitute an unwarranted invasion of personal privacy.

Moreover, §89(2)(b), which lists five examples of unwarranted invasions of personal privacy, tends to bolster a denial based on the privacy provisions. It is noted that

the examples are in my view merely illustrative and represent but five among conceivable dozens of unwarranted invasions of personal privacy. One of the examples of unwarranted invasions of privacy includes the

> "disclosure of employment, medical or credit histories or personal references of applicants for employment..." [§89(2)(b)(i)].

I believe that the intent of the quoted provision is to protect against disclosure of materials involving an individual's employment history or the process of obtaining employment. Further, the fourth example of an unwarranted invasion listed in §89(2) includes the

> "disclosure of information of a personal nature when disclosure would result in economic or personal hardship to the subject party and such information is not relevant to the work of an agency requesting or maintaining it..."

Based upon the correspondence attached to your letter, the records in question would be of a personal nature and disclosure might result in economic or personal hardship to the subject of the record. Although the records may be relevant to the work of the agency maintaining them, it is difficult to imagine a situation in which records maintained by an agency are not relevant to the performance of its duties. Stated differently, it is again emphasized that the examples of unwarranted invasions of personal privacy are illustrations, and the ability to deny should not in my opinion be constrained to the specific wording of any single example. In this regard, in its report to the Governor and the Legislature on the Freedom of Information Law, the Committee has suggested that examples of unwarranted invasions of personal privacy in the Law be deleted, for they have raised more questions than answers.

In sum, in view of the personal nature of the records in question, I believe that the denial of access would be proper.

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:nb
Enc.

STATE OF NEW YORK

COMMITTEE ON PUBLIC ACCESS TO RECORDS FOIL-AO-972

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

December 18, 1978

Mr. Carl C. Kimberly
Village Clerk - Treasurer
Village of McGraw
McGraw, New York 13101

Dear Mr. Kimberly:

Thank you for your letter and your interest in complying with the Freedom of Information Law. If you see fit to communicate the contents of my response to your questions, please feel free to do so.

The first question concerns tape recordings owned by a village clerk used as an aid in the preparation of minutes. If both the tape recorder and the tape recordings are owned by the village clerk, they would not in my opinion be subject to the Freedom of Information Law. Consequently, the tapes need not be preserved for public listening.

It is noted, however, that similar questions have recently arisen with respect to tape recordings made with a tape recorder owned by a municipality. In such a circumstance, my response would be different, for §86(4) of the Freedom of Information Law defines "record" to mean:

> "...any information kept, held, filed, produced or reproduced by, with or for an agency or the state legislature, in any physical form whatsoever..."

In view of the definition, tape recordings or notes are in my opinion records subject to rights of access granted by the Freedom of Information Law. This contention is bolstered by a recent decision that dealt with a similar subject. Notes compiled by the Secretary to the Board of Regents at meetings of the Board (see attached, Warder v. Board of Regents, Sup. Ct., Albany Cty., Sept. 22, 1978) were found to be "records" within the scope of the Freedom of Information Law, despite respondents' contention that

the notes were "personal" property. Further, having made an in camera inspection, the court determined that the notes were accessible.

Second, and perhaps more important with respect to the specific question raised, §65-b of the Public Officers Law has long provided that a public officer of a public corporation may destroy records only after having advised the Commissioner of Education of the nature of records sought to be destroyed and after having received the consent of the Commissioner to do so.

Your remaining question concerns notes taken by a clerk during a meeting that are used in the preparation of minutes. In this regard, the answer is similar to that stated above. Specifically, although the notes may have little value to anyone but the clerk, they are within the scope of the definition of "record" appearing in the Freedom of Information Law. Further, although the retention period for the notes may be zero, I believe that full compliance with the Public Officers Law would require the clerk to obtain consent to destroy notes from the Commissioner of Education prior to their destruction. In some cases, schedules for the disposal of particular records may be developed and approved by the Commissioner, so that records may be destroyed on an ongoing basis. Therefore, if, for example, a municipality has received the consent of the Commissioner to destroy records such as notes as soon as the notes lose their utility, they might be destroyed immediately and without the consent of the Commissioner in each instance in which the notes are compiled.

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:jm

Enclosure

STATE OF NEW YORK
COMMITTEE ON PUBLIC ACCESS TO RECORDS

FOIL-AO-973

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

December 18, 1978

Paul S. Murphy
City Clerk/Commissioner
of Accounts
City Clerk's Office
Room 8
City Hall
Watervliet, New York 12189

Dear Mr. Murphy:

Thank you for your interest in complying with the Freedom of Information Law. Your inquiry concerns the ability of an agency to require that requests be made in writing, or whether requests for records must be accepted when given orally without a written request.

In my opinion, an agency may require that a request be made in writing. Specifically, §89(3) of the Freedom of Information Law (see attached) states that a response to a request must be given "within five business days of the receipt of a written request for a record reasonably described..." Further, §1401.5(a) of the regulations promulgated by the Committee (see attached), which have the force and effect of law, state that "[A]n agency may require that a request be made in writing or make records available upon oral request."

In sum, although an oral request may be accepted, an agency has the ability to require that a request be made in writing.

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:nb
Encs.

STATE OF NEW YORK
COMMITTEE ON PUBLIC ACCESS TO RECORDS FOIL-AO-974

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

December 18, 1978

Ms. Florence Dreizen
Deputy Industrial Commissioner
for Legal Affairs
Department of Labor
Two World Trade Center
Room 7330
New York, New York 10047

Dear Ms. Dreizen:

I have received a copy of your response to an appeal made by Ms. Carol J. Raybin, which affirms the initial denial. In my opinion, the records sought should have been made available.

The request concerns a list in possession of the Department of per diem substitute teachers. Your denial of access to the list is based upon §537 of the Labor Law. In my view, §537 pertains to records of the Department acquired from employers and employees that deal with unemployment insurance benefits. As such, it would appear that the confidentiality provisions of §537 are applicable to particular records, and not to Department records generally. In this instance, I do not believe that §537 can justifiably be cited to withhold the records sought by Ms. Raybin.

A list of per diem substitute teachers would constitute a factual tabulation and therefore should be available under the Freedom of Information Law, §87(2)(g)(i). Although specific individuals may be identified in the list, disclosure would in my opinion result in a permissible, as opposed to an unwarranted invasion of personal privacy. As you are aware, records reflective of the employment of individuals and their salaries have long been available. While per diem substitute teachers are not full-time employees, I do not believe that their status bears upon rights of access to a list that merely identifies them.

If you would like to discuss the matter, I am at your service.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Carol J. Raybin

STATE OF NEW YORK
COMMITTEE ON PUBLIC ACCESS TO RECORDS

FOIL-AO-975

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

December 19, 1978

Mr. R. Gagné
[redacted]

Dear Mr. Gagné:

I have received your package of letters which for some reason only recently arrived at this office.

Several of your questions deal with rights of access to accident reports and the fees that may be assessed for accident reports. Rather than writing a lengthy opinion on the subject, I have enclosed copies of several advisory opinions that should be helpful to you. It is noted that although opinion number 361 does not provide a clear response regarding the status of accident reports in possession of the New York City Transit Authority, the Yungworth case that you cited in my view clearly indicates that §66(a) of the Public Officers Law is applicable to the Authority and grants access to accident reports in possession of the Authority.

Your remaining question concerns the status of an individual who is engaged in litigation with an agency but who continues to make requests under the Freedom of Information Law. As you suggested, the pendency of litigation in my view has no bearing upon rights of access to other records in possession of the agency or the ability to make requests. Very simply, the only question that arises when a request for records under the Freedom of Information Law is made concerns the extent to which records may be withheld under §87(2) of the Law, if any.

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:jm

STATE OF NEW YORK
COMMITTEE ON PUBLIC ACCESS TO RECORDS

FOIL-AO-976

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

December 19, 1978

Lawrence T. Kurlander
District Attorney
Office of the Monroe County
District Attorney
Suite 201
Hall of Justice
Civic Center Plaza
Rochester, New York 14614

Dear Mr. Kurlander:

I have received your letter of December 8 regarding access to records in possession of the Police Department of the City of Rochester. According to the materials appended to your letter, your inquiry was precipitated by a request for information by Kno-Now, Inc.

Before addressing the substantive issues, I would like to note that I have performed a minor investigation regarding Kno-Now. Specifically, the Department of State licenses private investigators, and I have contacted the Licensing Bureau to determine whether Kno-Now or its officers have obtained a license to engage in private investigation. Based upon a computer check done by the Licensing Bureau, Kno-Now is not licensed to engage in private investigations. However, Mr. William E. List is licensed in conjunction with the List Security and Investigative Agency, Inc., which operates at the same address as Kno-Now. I have also been informed that §74(3) of the General Business Law precludes an individual from maintaining more than one license. Specifically, the cited provision states that "[W]hile holding a license under this article a licensee shall not simultaneously hold an employment agency license or have financial interest or participate in the control and management of any employment agency or any other person, firm or corporation engaged in private detective business..." Consequently, it would appear that Mr. List, as a representative of Kno-Now, Inc., cannot engage in "private detective business" on behalf of Kno-Now if he concurrently engages in the same profession on behalf of the List Security and Investigative Agency.

With respect to rights of access, three questions have been raised. First, "[C]an an information concerning complaints or arrests on bad check charges ever be supplied to a business by a police agency to be used for the commercial benefit of that business?" Secondary questions regarding NYCIS and NCIC reports, and the persons to whom the records might appropriately be disclosed, were also raised. It is important to emphasize at this juncture that several courts have held that if information is accessible under the Freedom of Information Law, it must be made equally available to any person without regard to status or interest [see e.g., Burke v. Yudelson, 368 NYS 2d 779, affirmed 51 AD 2d 673, 378 NYS 2d 165]. Therefore, as a general presumption, the only question that should be asked by an agency when a request is made is the extent to which records may be denied under §87(2) of the Freedom of Information Law, if any; the reason for making a request is largely irrelevant.

With regard to complaints, the Committee has advised that the substance of complaints must generally be made available, but that the identities of complainants may be deleted on the ground that disclosure would result in an "unwarranted invasion of personal privacy" [see §§87(2)(b) and 89(2)(b); see also, Church of Scientology v. State, 403 NYS 2d 224, 61 AD 2d 942 (1978)]. As such, in my opinion, complaints are available except to the extent that they identify the complainants.

Records of arrest compiled by an arresting agency, or booking records, are also accessible. You might recall that the original Freedom of Information Law specifically granted access to "police blotters and booking records" and that such records had been available by means of case law long before the enactment of the Freedom of Information Law.

I would like to point out, however, that records may be sealed if an arrest does not result in a conviction. In this vein, it is suggested that the provisions of §160.50 of the Criminal Procedure Law be reviewed to determine which records among those that might potentially be made available may be considered confidential.

Rights of access to NYCIS and NCIC reports are at best unclear. The Division of Criminal Justice Services, which maintains criminal history information, has long contended that its reports may be withheld on the ground that disclosure of a "history" results in an unwarranted invasion of personal privacy. Currently, the Division provides access to criminal history information to law enforcement agencies within the state and other agencies with a need to know criminal histories

for the purpose of licensing. While I do not agree entirely with the stance taken by the Division of Criminal Justice Services (i.e., should distinctions be made between records of arrest and conviction?), following its policy of denying access to criminal history reports would not likely be unreasonable.

As an aside, I have enclosed a copy of the Committee's recent report on the Freedom of Information Law which discusses problems that have arisen regarding access to criminal history information. In short, the Committee recommended that the Governor and the Legislature review the existing law on the subject and draw legislation based upon the protection of privacy regarding the disclosure of such information.

Finally, I believe that four remaining points should be made. First, the Freedom of Information Law does not require an agency to create a record in response to a request [see §89(3)]. Consequently, if for example a list of arrests is sought by an applicant and no such list exists, there would be no obligation to create a list on behalf of an applicant.

Second, §89(2)(b) of the Freedom of Information Law provides five examples of unwarranted invasions of personal privacy. The examples are in my view merely illustrative and represent but five among conceivable dozens of unwarranted invasions of personal privacy. One of the examples provides that an unwarranted invasion of personal privacy includes the "sale or release of names and addresses if such lists would be used for commercial or fund-raising purposes." While there is no case law of which I am aware that would relate to a request for a list of persons arrested or convicted within a particular area of criminal activity, it is possible that a court might consider disclosure of a list of that nature to constitute an unwarranted invasion of personal privacy in conjunction with the quoted provision, if it is sought by commercial enterprise, such as Kno-Now. Nevertheless, I cannot with certainty advise you that a denial of access to a list on that basis would be judicially upheld.

Third, records of convictions are available under §255 of the Judiciary Law, which requires a court clerk to search and provide copies of records in his or her custody.

And fourth, it is clear that virtually all of the information sought by Kno-Now is available from various sources. As I mentioned earlier, police blotters and booking

records, which indicate that an arrest has been made, are available from the arresting agency, unless sealed under §160.50 of the Criminal Procedure Law. Similarly, records of convictions must be made available by court clerks. Consequently, an industrious person or entity could likely locate the same information that may be in possession of a police department from other sources. The key questions, therefore, involve the intent of the Freedom of Information Law and the protection of personal privacy. From my perspective, the Freedom of Information Law is intended to ensure that government be accountable, not to enhance the ability of commercial enterprise to increase profits. In terms of privacy, I believe that government custodians of records must make subjective judgments regarding what may constitute a permissible, as opposed to an unwarranted invasion of personal privacy concerning the disclosure of records. Under the circumstances, I tend to agree with the policy adopted by the Division of Criminal Justice Services which permits disclosure of criminal history information only to other entities of government.

I regret that I cannot provide a more specific response or be of greater assistance. If you would like to discuss the issues further, please feel free to contact me.

Sincerely,

Robert J. Freeman
Executive Director

RJF:nb
Enc.

STATE OF NEW YORK

COMMITTEE ON PUBLIC ACCESS TO RECORDS FOIL-AO-977

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

December 19, 1978

Mr. Rocco S. Mascaro
Special Assistant
County Attorney
Oneida County
Department of Law
County Office Building
800 Park Avenue
Utica, New York 13501

Dear Mr. Mascaro:

I have received your letter of December 12 regarding an inquiry of the Deputy Commissioner of Public Works of Oneida County.

According to the memorandum attached to your letter, the Board of Water Supply for the City of Utica currently does the billing, collection and accounting of sewer service charges for the Oneida County Sewer District. These duties are performed by means of a computer. The Sewer District has recently sought the computer tapes from the Board of Water Supply to perform "the remainder of the tasks necessary to collect the sewer service charges." The questions concern whether the computer tapes must be given to the Sewer District and what cost may be assessed by the City.

First, it is noted that the Freedom of Information Law is applicable to all records in possession of government. Section 86(4) of the Law defines 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."

The definition states that all information "in any physical form whatsoever" is subject to the Law and makes specific reference to computer tapes and discs. As such, it is clear that computer tapes are subject to rights of access granted by the Freedom of Information Law.

Second, based upon the information provided, it appears that all of the information contained on the computer tape consists of statistical or factual data, which is accessible under §87(2)(g)(i) of the Law. Although the identities of particular users may be identified in the tapes, disclosure would not in my view constitute an unwarranted invasion of personal privacy. As you are aware, the information that identifies individuals on an assessment roll, as well as the information used in arriving at real property assessments, is considered public by the courts under the Freedom of Information Law and under judicial determinations rendered long before the enactment of the Freedom of Information Law. Since the information contained in the computer tape would be somewhat analogous to that contained in an assessment roll, I believe that the disclosure would result in a permissible as opposed to an unwarranted invasion of personal privacy. Moreover, the Freedom of Information Law is based upon a right to know. Under the circumstances, it would appear that the County is seeking the tape due to a need to know. Stated differently, the County requires the information to perform its official duties.

Third, with respect to fees, §87(1)(b)(iii) of the Law provides that an agency may charge no more than twenty-five cents per photocopy up to nine by fourteen inches "or the actual cost of reproducing any other record...". Consequently, the computer tape should be made available on an actual basis. In my opinion, no additional fees may be assessed for the tapes.

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:jm

cc: Board of Water Supply

STATE OF NEW YORK
COMMITTEE ON PUBLIC ACCESS TO RECORDS

OML-AO-282
FOIL-AO-978

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

December 19, 1978

Ms. Barbara C. Singer
[redacted]

Dear Ms. Singer:

I have received your letter of December 13 concerning the notice requirements of the Open Meetings Law and rights of access to an agenda under the Freedom of Information Law.

With respect to meetings scheduled at least a week in advance, §99(1) of the Open Meetings Law provides that notice must be given to the public and the news media not less than seventy-two hours prior to the meetings. Section 99(2) states that if a meeting is scheduled less than a week in advance, notice must be given to the public and the news media "to the extent practicable" at a reasonable time prior to the meeting.

In my opinion, the provisions cited in the preceding paragraph distinguish between the public and the news media. In essence, separate notices must in my view be provided. With regard to the news media, since "media" is plural, it has consistently been advised that notice must be given to at least two members of the news media who would likely make contact with those interested in attending. Notice to the public can be accomplished by posting a notice conspicuously in one or more designated locations prior to all meetings.

Your letter indicates your belief that notice must be provided in writing to the news media. It is noted that §99 does not specify the means by which notice should be provided. Consequently, notice to the news media might be accomplished by means of a telephone call, as in the case of a meeting called on short notice, for instance.

The second question concerns rights of access to agendas. The Freedom of Information Law is based upon a presumption of access. In brief, the Law defines "record"

to include any information "in any physical form whatsoever" in possession of an agency [see §86(4)], and that all records in possession of an agency are accessible, except to the extent that records or portions thereof fall within one or more enumerated categories of deniable information listed in §87(2) of the Law. In my opinion, none of the grounds for denial appearing in the Law could appropriately be asserted with respect to agendas. Further, the Committee has long advised that agendas are available as soon as they exist. The fact that matters that may be discussed at a meeting might differ from the items for discussion appearing on an agenda is irrelevant, for any new items would presumably be raised at an open meeting.

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:nb

cc: Mr. John Fabozzi
Mrs. Anthony London
Mr. Kenneth Luft
Mr. Joseph Orapello
Mr. John V'Doviak
Mr. Fredrick Woller

STATE OF NEW YORK

COMMITTEE ON PUBLIC ACCESS TO RECORDS FOIL-AO-979

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

December 19, 1978

Ms. Sarah Birn
New York Civil Liberties
Union
State Legislative Office
90 State Street
Albany, New York 12207

Dear Ms. Birn:

I have received your letter of December 8 regarding a proposed amendment to the regulations promulgated by the Commissioner of Education. Specifically, a question has been raised with respect to the propriety of §247.4(d)(1)(i) of the proposal.

Section 247.4 pertains to the confidentiality of vocational rehabilitation records related to clients and applicants. The language that you cited concerns the release of information to clients and states that:

> "[U]pon written request of the client or applicant, the agency shall release information to the client or applicant, or it appropriate to the client's or applicant's parent, guardian or other representative. This shall be subject to the following limitations:
>
> (i) only such information as the agency deems relevant to the needs of the client or applicant shall be released;
>
> (ii) in the case of medical or psychological information the knowledge of which may be harmful if disclosed to the client or applicant, such information shall be released to the parent, guardian or other representative or to a physician or licensed psychiatrist for review with the client or applicant..."

It is noted that the statutory authority for the regulations is based upon §1004 and §1007 of the Education Law. Section 1004 merely gives the Education Department the power to adopt and promulgate regulations necessary to carry out the provisions of Article 21 of the Education Law. Section 1007 states that it is unlawful to disclose vocational rehabilitation records, except for purposes directly connected with the administration of the vocational rehabilitation program. The last sentence of §1007 states that "[S]uch records, papers, files and communications shall be regarded as confidential information and privileged within the meaning of section forty-five hundred four of the civil practice laws and rules." The quoted provision raises several questions and in my opinion leads to a specific conclusion regarding the intent of §1007.

The reference to the physician-patient privilege in my view indicates that §1007 is intended to apply only to records that fall within the privilege. Assuming that the Education Department as a matter of course releases policies, procedures and similar materials upon which it relies in carrying out its duties, it would be all but certain that §1007 is applicable only to records falling within the privilege. If my analysis is accurate, records outside the privilege would be subject to rights of access granted by the Freedom of Information Law.

In this regard, while (ii) of the proposed §247.4 (d)(1) limits access to the client or applicant to medical or psychological information the disclosure of which might be harmful, (i) of the quoted provision grants access to "only such information as the agency deems relevant to the needs of client or applicant...". In my view, the language of (i) would place a restriction upon rights granted by the physician-patient privilege as well as those granted by the Freedom of Information Law. Moreover, it appears that (i) is applicable to some but not all medical or psychological information as well as any other information regarding a client or applicant. Again, the limitation regarding disclosure to situations in which the agency believes that the records may be relevant to the needs of the client or applicant would likely conflict with the Freedom of Information Law and the physician-patient privilege.

It is well established in case law that an agency cannot promulgate regulations beyond or in conflict with statutory authority. In this instance, (i) of the proposal appears to be more restrictive than the privilege and the Freedom of Information Law.

In view of the foregoing, the language of (i) should in my opinion be deleted. Further, perhaps the Legislature should review §1007 of the Education Law with the aim of clarification.

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:jm

cc: Basil Y. Scott
James Whitney, Esq.

STATE OF NEW YORK
COMMITTEE ON PUBLIC ACCESS TO RECORDS FOIL-AO-980

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

December 20, 1978

Harriet Katz
Associate Attorney
Department of Health
Office of Health Systems
Management
Tower Building
Empire State Plaza
Albany, New York 12237

Dear Ms. Katz:

Thank you for your interest in complying with the Freedom of Information Law. Your inquiry concerns rights of access to records reflective of financial holdings of operators of nursing homes. Your letter further indicates that a creditor of a former operator has requested information regarding the operator's property, "presumably" for the purpose of attachment.

As you are aware, the Freedom of Information Law is based upon a presumption of access. All records in possession of an agency are available, except to the extent that records or portions thereof fall within one or more enumerated categories of deniable information listed in §87(2)(a) through (h) of the Law. In addition, it is noted that the Committee has consistently advised and the courts have upheld the notion that if a record is accessible, it should be made equally available to any person, without regard to status or interest (see e.g., Burke v. Yudelson, 368 NYS 2d 779, affirmed 51 AD 2d 673, 378 NYS 2d 165). Therefore, the purpose for making a request is largely irrelevant.

In my opinion, one ground for denial may justifiably be cited to withhold certain information regarding the financial holdings in question. Specifically, §87(2)(b) of the Law provides that an agency may withhold information the disclosure of which would result in "an unwarranted invasion of personal privacy." In addition, §89(2)(b) lists five

examples of unwarranted invasions of personal privacy. In view of the introductory language to the examples, it is clear that they merely illustrate five among conceivable dozens of unwarranted invasions of personal privacy. Consequently, I do not believe that an agency is constrained to the specific language of the illustrations in order to deny access under the privacy provisions of the Law.

Further, the intent of the Law in my view is to protect against disclosure of the personal details of an individual's life. Consequently, records containing reference to the financial holdings of an individual may in most cases be denied on the ground of personal privacy. However, it is suggested that references to holdings of real property are accessible, for virtually the same information would be contained in an assessment roll of the county in which the holdings are located. In this regard, case law rendered long before the enactment of the Freedom of Information Law held that assessment information is available to the public. Implicit in the case law is the notion that the disclosure of some government records which identify individuals results in a permissible, as opposed to an unwarranted invasion of personal privacy. Since records indicating the ownership of real property would be accessible from other sources, I believe that records or portions thereof in your possession concerning the ownership of real property should similarly be made available.

In sum, records containing financial information related to an individual may in my view be withheld under §87 (2)(b) of the Freedom of Information Law, except to the extent that such records refer to the ownership of real property.

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:nb

STATE OF NEW YORK

COMMITTEE ON PUBLIC ACCESS TO RECORDS FOIL-AO-981

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

December 20, 1978

Ms. Dolores Chechek
Wappingers Board of Education
Miller Hill Road
Hopewell Junction, New York 12533

Dear Ms. Chechek:

I have received your letter of December 13 and reviewed the materials attached to it.

You have indicated in your letter that you wish to "go to the files and copy the information" sought. In this regard, I have taken the liberty to contact Dr. Sturgis, Superintendent of the Wappingers Central School District, with respect to your request. Dr. Sturgis informed me that he has told you that you may inspect the files "five days a week, eight hours a day". Consequently, it appears that you have an open invitation to research and obtain copies of the records in which you are interested, including those that may be used in the compilation of studies not yet in existence.

The following paragraphs will contain comments relative to each of the applications for records that you submitted with your letter.

The first application concerns "[A] list of all district employees. Names, addresses, salaries, overtime, benefits and date of employment of each". As you are aware, the Freedom of Information Law does not require an agency to create a record in response to a request. In this instance, although each agency must maintain a payroll record consisting of the names, public office address, title and salaries of all officers or employees of the District, it appears that the District payroll record does not and need not include reference to overtime, benefits and the dates of employment of employees of the District. The memorandum written by Lawrence Gilmour, Assistant Superintendent, indicates

the basis for the fee that you have been assessed for the compilation of information sought in the request. Specifically, it appears that programming and computer time were of necessity employed to respond. From my perspective, the fee assessed is not unreasonable, for §87(1)(b)(iii) of the Freedom of Information Law permits an agency to charge the actual cost of reproduction with respect to records not subject to conventional photocopying. Further, I believe that in this instance the School District was not required to compile the information that you sought, but did so at your request.

The second application deals with "the numbers of W.C.S.D. students in A.C. & N.C. classes for the past five years". Dr. Sturgis informed me that the statistics in which you are interested do not yet exist but are currently being prepared and will soon be made available. Again, based upon my knowledge of the situation, I believe that the response contained in the memorandum by Lawrence Gilmour addressed to you was appropriate. As mentioned earlier, an agency has no obligation to create records. A statistical breakdown, however, apparently will be prepared and made available to you within approximately one month.

Your third request deals with "[A]ll litigation the district has been involved in for the past five years and the decisions reached and the monies involved in each case". In response to this request, Mr. Gilmour informed you that a report on the subject is in the process of being prepared. In my opinion, since records exist, I believe that materials reflective of litigation, decisions, and the monies expended in each case should be made available individually prior to the compilation of the report. Although a report on the subject is being prepared, existing records falling within your request should be made available within the statutory limitations contained in §89(3) of the Freedom of Information Law and §1401.5 of the regulations promulgated by the Committee.

Your final request deals with "[T]he costs to the district of all conferences and workshops both in and outside of the district and the evaluation of each, for the past five years". In his response, Mr. Gilmour suggested that you be more specific with regard to the information sought. The memorandum in response that you sent to Mr. Gilmour appears to clarify your request. In my view, records concerning the expenditures of school district monies on conferences and workshops constitute factual tabulations and therefore are available under §87(2)(g)(i). Once again, however, I do not

believe that totals, for example, must be tabulated. Nevertheless, records indicating expenditures for workshops, seminars and the like are in my opinion individually 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:jm

cc: Lawrence Gilmour
Dr. Theodore J. Sturgis

STATE OF NEW YORK
COMMITTEE ON PUBLIC ACCESS TO RECORDS

FOIL-AO-982

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

December 21, 1978

Ms. Margaret Slayter
Vocational Counselor -
Coordinator
Roosevelt Junior Senior
High School
Wagner Avenue
Roosevelt, New York 11575

Dear Ms. Slayter:

I have received your letter regarding the Freedom of Information Law and the manner in which it affects school records.

As you are aware, the amended Freedom of Information Law is based upon a presumption of access. Section 87(2) of the Law provides that all records in possession of an agency are accessible, except to the extent that records or portions thereof fall within one or more enumerated categories of deniable information listed in the ensuing paragraphs (a) through (h). Moreover, the Committee has advised and the courts have upheld the notion that if records are accessible under the Law, they must be made equally available to any person, without regard to status or interest.

Although §2116 of the Education Law, which pertains to school district records, restricts access to "qualified voters of the district", the courts have held that the restriction contained in the cited provision is of no effect due to the provisions of the Freedom of Information Law.

Your inquiry does not specify whether you are interested in access to student records. Nevertheless, you should be aware that access to education records identifiable to students are not subject to the Freedom of Information Law, but rather to the federal Family Educational Rights and Privacy Act, which is commonly known as the "Buckley Amendment". In brief, the Buckly Amendment pro-

vides that education records identifiable to students are confidential to all but the parents of the students, and that students acquire the rights of parents when they reach the age of eighteen. The parents may waive the confidentiality provisions in order that third parties may inspect student records.

Enclosed are copies of an explantory pamphlet on the Freedom of Information Law and an index to advisory opinions rendered by this office. If there are any opinions of particular interest, please identify them by number or key phrase and I will be happy to send them to you. In addition, enclosed are the regulations promulgated by the U.S. Department of Health, Education and Welfare under the Buckley Amendment. Every educational agency or institution, including school districts, must comply with those 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

Robert J. Freeman
Executive Director

RJF:jm

Enclosures

STATE OF NEW YORK
COMMITTEE ON PUBLIC ACCESS TO RECORDS FOIL-AO-983

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

December 21, 1978

John G. Sisti, Esq.
Stewart T. Schantz, P.C.
5-7 Milton Avenue
Highland, New York 12528

Dear Mr. Sisti:

Thank you for sending a copy of the resolution adopted by the Board of Fire Commissioners of the Plattekill Fire District. I have reviewed the resolution and have but one comment to offer.

Page 4 of the resolution pertains to the time limits for response to a request. My comment specifically pertains to a situation in which the records access officer is unable to provide or deny access to the records sought within five business days of receipt of a request, in which case, he or she "shall furnish a written acknowledgment of receipt of the request, and a statement of the approximate date when the request will be granted or denied..." The quoted provision is similar to the language of the Committee's original regulations promulgated in 1974. However, the amended regulations provide that if no response can be given within five business days, a written acknowledgment may be given which states the approximate date when the request will be granted or denied and that "[I]f access to records is neither granted nor denied within ten business days after the date of acknowledgment of receipt of a request, the request may be construed as a denial of access that may be appealed" [see attached regulations, §1401.5(d)]. The rationale behind the ten day limitation for response following an acknowledgment is based upon problems that arose when agencies delayed response by means of an acknowledgment for unreasonable periods of time.

While I do not believe that the lack of the language cited in the preceding paragraph is serious, I merely want to apprise you of its existence and intent.

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:nb

Enc.

STATE OF NEW YORK
COMMITTEE ON PUBLIC ACCESS TO RECORDS

FOIL-AO-984

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

December 26, 1978

Mr. Joseph P. Delpriore, Jr.
[redacted]

Dear Mr. Delpriore:

I have received your letter of December 19 and the correspondence attached to it. Your inquiry concerns rights of access to records pertaining to you in possession of the Absentee Control Unit of the City of Buffalo.

The records that you are seeking include a letter from the Buffalo Sewer Authority to the Absentee Control Unit in which the Unit was requested to "conduct a surveillance" in the spring of 1977, the ensuing report prepared by the Unit and transmitted to the Authority, and "any other information requested and/or files" pertaining to you.

The Freedom of Information Law (see attached) provides access to all records in possession of agency, except those records or portions thereof that fall within one or more enumerated categories of deniable information listed in §87(2) of the Law. Central to your request is §87(2)(g) of the Freedom of Information Law, which states that an agency may deny access to records or portions thereof that:

> "are inter-agency or intra-agency materials 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..."

The quoted provision contains what in effect is a double negative. Although an agency may withhold communications between agencies or within an agency, statistical or factual data, instructions to staff that affect the public, or final agency policy or determinations found within such materials must be made available.

In terms of the records sought, it would appear that the letter from the Authority requesting that a control unit "conduct a surveillance" would be deniable, for it is an inter-agency document that does not contain any of the information that must be made available under §87(2)(g). To the extent that the second document, the report by the Control Unit to the Authority, contains statistical or factual findings, it is in my opinion available.

With respect to the third request for any other records that specifically pertain to you, it is noted that the Freedom of Information Law states that an applicant "reasonably describe" the records sought [see §89(3)]. If the Absentee Control Unit is a small office, it may be able to locate other records identifiable to you with relative ease. However, if its files are voluminous it may be necessary to describe the records in which you are interested with greater particularity.

Finally, in some instances collective bargaining agreements provide public employees with rights of access greater than those provided by the Freedom of Information Law. Consequently, it might be worthwhile to review your collective bargaining agreement to determine whether records that are deniable under the Freedom of Information Law might be available under the collective bargaining agreement.

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:jm
Encs.

cc: Joseph McNamara
Richard Planavsky

STATE OF NEW YORK
COMMITTEE ON PUBLIC ACCESS TO RECORDS FOIL-AO-985

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

December 27, 1978

Ms. Jody Adams
[redacted]

Dear Ms. Adams:

I have received your letter of December 19 and, in addition, Governor Carey has transmitted your letter of December 18 to this office for reply.

First, as requested, enclosed are copies of both the Freedom of Information Law and the Open Meetings Law.

Second, §66-a of the Public Officers Law has long granted access to accident reports to any person "having an interest therein," except that police authorities "may withhold from inspection any reports or records the disclosure of which would interfere with the investigation or prosecution by such authorities of a crime involved in or connected with the accident." Without greater knowledge of the basis for your request, it would be inappropriate to conjecture as to whether you are an "interested" person. However, it is noted that §66-a in conjunction with the Freedom of Information Law has been liberally construed.

Next, your letter to Governor Carey refers to "other state laws prohibiting giving out information." In this regard, I have enclosed a copy of the Committee's report to the Governor and the Legislature on the Freedom of Information Law, which discusses the protection of privacy in some detail and lists many statutes that prohibit disclosure of particular records.

With respect to court information, §255 of the Judiciary Law requires that a court clerk search and make available records in his or her possession. In some instances there are statutory prohibitions to disclosure,as

in the case of records of matrimonial proceedings or youthful offenders, for example.

As you requested, all materials sent to you, including a copy of this letter and my letter of November 21 will be sent to the public officials cited 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:nb
Encs.

cc: Mr. Fishbein
Ms. Irene Pendzik
Mr. Conrad Teller
Riverhead Town Board

STATE OF NEW YORK
COMMITTEE ON PUBLIC ACCESS TO RECORDS FOIL-AO-986

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

December 29, 1978

Ms. Carol L. Ritch
Mr. Rick Brand
Newsday
Union Avenue
Ronkonkoma, New York 11779

Dear Ms. Ritch and Mr. Brand:

I have received your letter of December 21 regarding rights of access to "statistical or factual tabulations or data contained in the preliminary draft of the 1978 audit of the Suffolk County Off-Track Betting Corporation." According to your letter, the request was denied by Walter Holmes, Public Information Officer for the Department of Audit and Control, who informed you that the information sought is "privileged."

I disagree with Mr. Holmes' contention. It is noted at the outset that the words "privileged" and "confidential" have specific meanings under New York law, none which would in my view be applicable in this instance.

First, records are privileged or confidential when a statute specifically prohibits disclosure. Second, records may be deemed privileged or confidential when in the opinion of a court disclosure would, on balance, be detrimental to the public interest (see Cirale v. 80 Pine St. Corp., 35 NY 2d 113). Third, records are privileged when they pertain to to a relationship which by law requires confidentiality, such as the relationships between an attorney and a client, or a physician and a patient. In my opinion, none of these three grounds for assertion that records are "privileged" could properly be offered under the circumstances.

Further, the Freedom of Information Law is based on a presumption of access. All records in possession of government are accessible, except to the extent that records or portions thereof fall within one or more categories of deniable information enumerated in §87(2)(a) through (h) of

the Law. Only one of the exceptions to rights of access is relevant to the records in which you are interested.

Specifically, §87(2)(g) states that an agency may withhold records or portions thereof that:

> "are inter-agency or intra-agency materials 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..."

The quoted provision contains what in effect is a double negative. Although inter-agency and intra-agency materials may be denied, statistical or factual data, instructions to staff that affect the public or final agency policy or determinations found within such materials are available.

The preliminary audit that you are seeking may be characterized as "intra-agency" material. It is not final and therefore does not constitute a final determination. Nevertheless, to the extent that it contains "statistical or factual tabulations or data," it is in my view accessible.

In sum, the non-final, narrative portions of the preliminary audit, such as recommendations that are subject to modification, may be withheld, while the remaining statistical or factual data, which presumably will remain unchanged notwithstanding possible alterations of directions or recommendations, 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:nb

cc: Walter Holmes
James Kalteux